No. _____

In the Supreme Court of the United States

KENNETH J. JACKSON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Kevin M. Cafferkey
Counsel of Record
55 Public Sq. – STE 2100
Cleveland, Ohio 44113
Office: (216) 363-6014
Fax: (216) 363-6015
kmcafferkey@hotmail.com

Christopher M. Kelley
55 Public Sq. – STE 2100
Cleveland, Ohio 44113
Office: (216) 363-6014
Fax: (216) 363-6015
ckelley@thomasgkelleylaw.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the sentencing amendments to 18 U.S.C. § 924(c) enacted by the First Step Act of 2018 (the "First Step Act", "FSA", or "Act"), Pub. L. No. 115-391, 132 Stat. 5194 apply to a defendant at a post-Act resentencing hearing following vacatur of an unlawful sentence that was imposed pre-Act?

2. Whether the court of appeals erred in holding that the sentencing amendments to 18 U.S.C. § 924(c) by the First Step Act did not apply to Petitioner, whose pre-Act sentence was vacated on appeal and then remanded for a *de novo* sentencing following the effective date of the Act?

PARTIES TO THE PROCEEDING

The parties appearing here and below are: (1) Kenneth J. Jackson, Jr, the Petitioner named in the caption; and (2) the United States, the Respondent named in the caption.

No corporations are involved in this proceeding.

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Kenneth J. Jackson, Jr, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals is contained within the Appendix and is reported at 995 F.3d 522.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on April 22, 2021. A timely petition for rehearing *en banc* was denied by the Court of Appeals on June 30, 2021. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c) imposes certain mandatory-minimum prison sentences to "any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) 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 …" *Id.* § 924(c) (1)(A).

Specifically, 18 U.S.C. § 924(c) imposes for subsequent violations of the subsection "a term of imprisonment of not less than 25 years; and if the firearm involved is a machine gun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life." *Id.* §§ 924(c)(1)(C)(i)-(ii).

The First Step Act of 2018 (the "First Step Act", "FSA", or "Act"), Pub. L. No. 115-391, 132 Stat. 5194 (2018) amended 18 U.S.C § 924(c)(1)(C) "by 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'". *Id.* § 403(a).

Additionally, Congress expressly provided that the Act would apply retroactively as follows:

> 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 for the offense has not been imposed as of such date of enactment

Id. § 403(b).

STATEMENT

18 U.S.C. § 924(c) imposes mandatory-minimum sentences upon an individual convicted of brandishing or using a firearm in connection with a crime of violence or drug trafficking crime (a "§924(c) conviction"). *Id.* §§ 924(c)(1)(A)-(B)(ii). With each subsequent §924(c) conviction, the mandatory-minimum sentence increases to 25 years or possible life imprisonment. *Id.* §§ 924(c)(1)(C)(i)-(ii).

Congress passed the First Step Act, in part, as a critical sentencing reform of the draconian mandatory-minimum sentences associated with 18 U.S.C. § 924(c), which Congress viewed as overly punitive and unjust. [1]

Prior to the enactment of the FSA, the mandatory-minimum penalties under 18 U.S.C. §§ 924(c)(1)(C)(i)-(ii) applied even when the subsequent §924(c) conviction occurred in the same case. *See* App. A, Opinion, p. 2. The FSA, however, greatly reformed this draconian measure and now requires that a prior §924(c) conviction become

[1] *See* 164 Cong. Rec. H10371 (2018) (statement of Rep. Goodlatte); 164 Cong. Rec. H10346, 10362 (2018) (statement of Rep. Nadler); 164 Cong. Rec. S7, 649 (statement of Sen. Grassley) (noting the "need to make sure that criminal sentences are tough enough to punish and deter, but not … unjustly harsh," and recognizing "unfairness in how … mandatory minimum sentences are sometimes applied"); 164 Cong. Rec. S7,762-63 (statement of Sen. Booker) ("[F]ailed policies … that created harsh sentencing, harsh mandatory minimum penalties" have "overwhelmingly" and "disproportionately" affected "people of color and low-income communities").

"final" before subjecting an individual to the mandatory-minimum penalties under 18 U.S.C. §§ 924(c)(1)(C)(i)-(ii). First Step Act § 403(a).

Furthermore, Congress, in a provision entitled "APPLICABILITY TO PENDING CASES.", expressly extended the FSA's ameliorative amendments to 18 U.S.C § 924(c) "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." First Step Act, § 403(b).

This petition seeks review of a split decision of the Sixth Circuit, reversing the lower court's finding that because petitioner's pre-Act sentence was unlawful and therefore vacated, the sentencing amendments of the First Step Act § 403(a) applied to petitioner's sentence imposed at the *de novo* resentencing hearing held after the Act's enactment date. The majority interpreted the text of the Act's retroactivity provision as precluding relief to anyone who had a sentence imposed on or before the effective date of the Act. App. A, Opinion, p. 2. The majority further held that the fact petitioner's pre-Act's unlawful sentence was vacated, and his corrected sentence was imposed at a *de novo* resentencing hearing held after the effect date of the Act was of no consequence. *Id.* at 4-5.

Judge Moore dissented, arguing that the majority misinterpreted the Act's retroactivity provision. App. A., Opinion, p. 7. The plain language, structure, and purpose of the Act, judge

Moore argued, show Congress only intended to preclude relief to those who had a valid sentence imposed at the time of the Act's effective date. App. A., Opinion, pp. 7-9. Further, and because petitioner's unlawful pre-Act sentence had been vacated, petitioner no longer had a valid sentence imposed at the time of the Act's effective date, and petitioner should have been sentenced under §403's sentencing amendments. *Id.*

The relevant procedural background of this matter was summarized by Judge Bush in the opinion of the court:

> In May of 2017, a jury convicted [petitioner Kenneth J. Jackson, Jr.] and the district court sentenced him on three counts of carjacking and, as relevant here, three counts of brandishing a firearm during a crime of violence under 18 U.S.C. § 924(c). *United States v. Jackson*, 918 F.3d 467, 476–77 (6th Cir. 2019). While Jackson's appeal was pending, Congress enacted the First Step Act. Three months later, we vacated one of his three § 924(c) convictions and remanded the case for resentencing. *Id*. at 494. At the resentencing hearing, the district court determined that the First Step Act's amendments to § 924(c) apply retroactively to someone who, like Jackson, had his sentence vacated after the Act became

> law. *United States v. Jackson*, No. 1:15 CR 453-001, 2019 WL 2524786, at *1 (N.D. Ohio, June 18, 2019). It sentenced him accordingly, reducing the 32-year mandatory minimum sentences he faced under § 924(c) to 14 years.

App. A, Opinion, p. 2.

The Sixth Circuit's decision warrants this Court's review for three important reasons. First, the majority's reading and interpretation of the Act are contrary to its very text as well as settled principles governing the interpretation of legislation.

Second, the majority's interpretation and its result are contrary to the very legislative purpose of the Act. Congress enacted the First Step Act to eliminate the very draconian mandatory-minimum sentence requirements at issue here. If the majority's opinion is permitted to stand, petitioner's mandatory-minimum sentence will increase from 14 years to 32 years. Additionally, the majority's decision would have the practical effect of requiring district courts in Michigan, Ohio, Kentucky, and Tennessee to apply the very sentences that Congress abolished as excessive, unfair, and unjust.

Third, the majority's opinion is in conflict with *United States v. Uriarte*, 975 F.3d 596 (7th Cir. 2020 (holding that Section 403 of the First Step Act

applies to pre-Act offenders whose sentences are vacated). This Court should grant the herein petition to resolve this conflict and provide guidance and clarity as to how §403 sentencing amendments are to be applied at resentencing hearings.

REASONS FOR GRANTING THE PETITION

I. The Majority's interpretation of §403 is Incorrect

In reversing the district court, the majority held that because petitioner had an initial sentence imposed prior to the effective date of the FSA, §403's sentencing amendments did not apply to his corrected sentence imposed after the FSA's effective date. App. A, Opinion, p. 2. But the majority's decision was based on an incorrect interpretation of the FSA's retroactivity provision and therefore should not be permitted to stand.

A. The Majority's Reading of the Text Belies its Argument

The statutory text at issue is the FSA's retroactivity provision, which provides:

> 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 for the offense has not been imposed as of such date of enactment.

FSA § 403(b).

A settled principle of statutory interpretation is that "courts must presume that a statute says what it means and means in a statute what is says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). Here, the majority misinterpreted what the FSA actually says and what it means.

In determining that the §403 sentencing amendments did not apply to petitioner, the majority focused on "two textual clues" within the statute's retroactivity provision. App. A, Opinion, p. 3. First, the majority considered the text's use of the indefinite article "a," arguing its use in "a sentence" indicated Congress intended "a sentence" to refer to *any* sentence and not the final sentence imposed. *Id.* Moreover, the majority further argued, if Congress had intended "sentence" to mean "the final sentence" or "actual sentence" it could have done so. Based on this reading of the text, the majority concluded the FSA's retroactivity provision did not apply if a sentence – lawful or unlawful– had been imposed on or before the effective date of the FSA. *Id.*

But the majority's argument falls on its own sword. Congress could have used "actual sentence" or the "final sentence" had it so chosen, so too could

Congress have used 'initial sentence" or "any sentence." But Congress did not. As such, "a sentence," within the meaning of §403(b), certainly includes a sentence imposed after vacatur and remand from the appellate court. *See United States v. Henry,* 983 F.3d 214, 222 (6th Cir. 2020). Accordingly, the text of §403(b) does not show, as the majority suggests, that Congress intended §403's sentencing amendments not to apply, like in petitioner's case, where a pre-Act sentence was vacated.

The majority next considered the use of the present-perfect tense in "has not been imposed," which they interpreted as asking whether the sentencing process has ended by the date of enactment. *Id.* But this reading of the text undercuts the majority's argument. Here, because petitioner's initial sentence was vacated, the sentencing process had not ended by the date of enactment. Accordingly, the use of the present-perfect tense does not preclude §403's application to petitioner, it *requires* it.

Moreover, reading the indefinite article "a" together with the present-perfect tense in "if a sentence for the offense has not been imposed" shows Congress intended to apply §403's sentencing amendments to defendants, like petitioner, whose pre-Act sentence was vacated on appeal and a final corrected sentence is imposed at a resentencing hearing.

B. Background Principles Show Congress Intended to Extend Relief, Not Restrict It

"Part of a fair reading of statutory text is recognizing that Congress legislates against the backdrop of certain unexpressed presumptions." *Bond v. United States*, 572 U.S. 844, 857 (2014). In drafting the First Step Act, Congress intended to provide relief to individuals who had committed offenses prior to the effective date of the Act, but who were not yet subject to a sentence for that offense.[2] This group of individuals would undoubtedly include those facing resentencing following vacatur of a prior sentence. Accordingly, Congress's use of "a sentence" was expansive and included any sentence imposed at a resentencing hearing. *See, e.g., United States v. Henry,* 983 F.3d 214, 222 ("The better reading of 'a sentence' requires the defendant to have a valid sentence at the time of the First Step Act's enactment, not a sentence at some point").

C. The Majority's Interpretation is Contrary to the Rule of Lenity

Here, the statutory language of the FSA is not ambiguous. Congress, as confirmed by the FSA's legislative history, intended to remedy the harsh and unjust effects of certain mandatory-

[2] *See* Brief for United States Senators Richard J. Durbin, Charles E. Grassley, and Cory A. Booker as Amici Curiae in Support of the Defendant-Appellant, *United States v. Mapuatuli* (9th Cir.) (No. 19-10233) ("Senators' Brief").

minimum sentences. But to the extent the language in §403(b) were ambiguous, the rule of lenity requires any putative ambiguity to have been resolved in petitioner's favor. *See United States v. Boucha,* 236 F.3d 768, 774 (6th Cir. 2001) ("If the statute remains ambiguous after consideration of its plain meaning, structure and legislative history, the rule of lenity is applied in favor of criminal defendants"). Furthermore, the rule of lenity applies to criminal statutes and criminal penalties. *United States v. Henry,* 983 F.3d 214, 225, citing *Bifulco v. United States*, 447 U.S. 381, 387, 100 S.Ct. 2247, 65L.Ed.2d 205 (1980) ("[T]his principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.").

Here, especially when considering the overriding remedial goals of the FSA, any ambiguity should be construed in petitioner's favor. *See Bell v. United States*, 349 U.S. 81, 83 (1955) ("It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.") The majority's interpretation of the FSA, therefore, is contrary to this very principle.

D. The Majority's Interpretation is Illogical and Its Effect Would Serve No Purpose

The majority's interpretation of §403(b) suggests Congress, in determining whether §403's

sentencing amendments would apply, simply intended to ask whether an individual had ever been sentenced as a historical fact.

Of course, this makes no sense. The legislative purpose of the FSA was to provide much needed relief from the draconian mandatory-minimum sentences, which Congress viewed to be manifestly unjust. Accordingly, the FSA's reach is expansive, and meant to include a wide breadth of individuals: "This section, and the amendments made by this section, ***shall apply to any offense*** …." FSA § 403(b) (emphasis added). Furthermore, there is no meaningful distinction between Pre-Act offenders facing initial sentencing and those, like petitioner, facing resentencing after an unlawful sentence had been vacated. As such, it defies common sense to think Congress intended to only provide one group relief from the harsh and draconian mandatory-minimum sentences the FSA expressly meant to eliminate. *See United States v. Bhutani*, 266 F.3d 661, 666 (7th Cir. 2001) ("When "construing a statute, courts ought not deprive it of the obvious meaning intended by Congress, nor abandon common sense."

Furthermore, the majority's interpretation that §403(b) simply asks whether a defendant was sentenced as a matter of historical fact, without consideration if the sentence was unlawful and therefore nullified, creates an absurdity, for it would require courts to give legal effect to unlawful sentences.

II. The Text of the First Step Act and Background Principles Show Congress Intended §403 to Apply to Defendants at Resentencing after the First Step Act's enactment

"The starting point in discerning congressional intent is the existing statutory text." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). Furthermore, Congress legislates against the backdrop of the existing legal landscape. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979).

Accordingly, when Congress drafted the statutory language of the FSA, it did so against the background principle that vacating a sentence "wipe[s] the slate clean" and requires sentencing as if a sentence had never been imposed. *Pepper v. United States*, 562 U.S. 476, 507 (2011); *United States v. Mobley,* 833 F.3d 797, 802 (7th Cir. 2016) ("when we vacate a sentence and order a full remand, the defendant has a 'clean slate'—that is, ***there is no sentence*** until the district court imposes a new one.")(emphasis added). This is because "a district court [has] authority to redo the entire sentencing process," as if the prior sentence had never occurred. *United States v. McFalls*, 675 F.3d 599, 606 (6th Cir. 2012); *United States v. Garcia-Robles*, 640 F.3d 159, 166 (6th Cir. 2011) ("[A]n order vacating a sentence and remanding the case for resentencing directs the sentencing court *to begin anew*.") (emphasis *sic*).

The FSA was enacted within the background of these settled principles. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms"). Furthermore, Congress passed the FSA to provide critical sentencing reform to 18 U.S.C § 924(c)'s mandatory-minimum sentences, which Congress viewed as manifestly unfair and unjust. As such, defendants whose prior sentences have been vacated, are treated no differently than individuals being sentenced for the first time: they both stand in the same posture of the sentencing process having not been completed. Accordingly, Congress, when drafting how the FSA would be applied to pending cases, carefully and purposefully selected the language "if a sentence for the offense has not been imposed" to include both groups. FSA § 403(b).

Moreover, the FSA contains a retroactivity provision directing how §403's sentencing amendments would be applied to pending cases. Congress, therefore, took specific action to ensure that the §403's sentencing amendments would apply to defendants that had been convicted but not yet sentenced. As such, Congress made clear that §403 applied to all defendants whose final sentence had not been imposed prior to the effective date of the Act, and this would include unlawful sentences that had been

Had Congress intended to limit the application of §403 only to pre-Act offenders facing their "first" or "original" sentence, it could have done so. But it did not. And that is because Congress intended §403 to apply where, like with petitioner, an unlawful sentence is vacated and the corrected sentence is imposed at a *de novo* resentencing hearing. *See, e.g, United States v. Henry,* 983 F.3d at 222.

III. The Majority's Interpretation of §403 Raises Issues of Profound Importance Because Its Effect Will Subject Defendants to the Very Draconian Mandatory-Minimum Sentences Congress Expressly Intended to Eliminate

Congress enacted The First Act § 403 to reform mandatory-minimum sentencing penalties under 18 U.S.C. § 924(c), which Congress believed were manifestly unjust and unfair. *See, e.g. United States v. Henry,* 983 F.3d 214, 224-225 ("the legislative history of the First Step Act demonstrates Congress's intent to remedy overly punitive mandatory-minimum sentences faced by defendants.") (citing Congressional Record). Furthermore, there is nothing in the text of the FSA or its legislative history suggesting Congress intended §403's ameliorative sentencing amendments to not apply to pre-Act offenders, like petitioner, whose unlawful sentences are vacated.

Permitting the majority's interpretation to stand would mean that petitioner would be exposed to the very harsh sentencing measures Congress expressly intended to abolish. Furthermore, if permitted to stand, the majority opinion would further subject defendants throughout the Sixth Circuit to the imposition of sentences Congress abolished as excessive and manifestly unjust. The effect of the majority's interpretation, therefore, is fundamentally at odds with the legislative purpose of the FSA and the Congressional intent and purpose behind it. Further, the majority's interpretation produces precisely the "kind of unfairness that modern statutes typically seek to combat." *Dorsey v. United States*, 567 U.S. 260, 277 (2012). As such, and because the majority's interpretation is incorrect and its effect is contrary to Congress's ameliorative intent in drafting the First Step Act, the majority opinion should not be permitted to stand.

CONCLUSION

For all of the above reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

/s/ Kevin M. Cafferkey
Kevin M. Cafferkey
Counsel of Record
55 Public Sq. – STE 2100
Cleveland, Ohio 44113
Office: (216) 363-6014
Fax: (216) 363-6015
kmcafferkey@hotmail.com

/s/ Christopher M. Kelley
Christopher M. Kelley
55 Public Sq. – STE 2100
Cleveland, Ohio 44113
Office: (216) 363-6014
Fax: (216) 363-6015
ckelley@thomasgkelleylaw.com

Counsel for Petitioner

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