No. _____

In the Supreme Court of the United States

KENNETH J. JACKSON, JR.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
from the Sixth Circuit Court of Appeals
to the United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in finding that its prior decision was not clearly erroneous and would work a manifest injustice?

2. Whether the sentencing amendments to 18 U.S.C. § 924(c) enacted by the First Step Act apply to Defendants who were originally sentenced prior to the effective date of the Act, but whose sentences were then vacated and remanded for resentencing after the Act's effective date?

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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PETITION FOR A WRIT OF CERTIORARI

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 opinion of the Sixth Circuit Court of Appeals (App. 1a-20a) is not published in the Federal Reporter but is re-printed at 2023 U.S. App. LEXIS 34069 *.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on December 21, 2023. A timely petition for rehearing *en banc* was denied by the Court of Appeals on April 2, 2024. App. 21a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 24(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. § 24(c) imposes for any subsequent violation 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 the "Act"), Pub. L. No. 115-391, 132 Stat. 5194 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

I. Legal Background

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). Furthermore, § 924(c) convictions must run consecutively rather than "concurrently with any other term of imprisonment." 18 U.S.C. § 924(c)(1)(D)(ii).

Congress passed the First Step Act as a critical sentencing reform of the 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. App. 2a. The FSA, however, greatly reformed this draconian measure, now requiring that a prior §924(c) conviction become "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, expressly provided that the ameliorative changes to 18 U.S.C § 924(c) "shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has

[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").

not been imposed as of such date of enactment." First Step Act, § 403(b).

The Third, Fourth, and Ninth Circuits have held that the sentencing reforms of the FSA apply at a resentencing of a defendant, who was originally sentenced before the FSA's effective date, but whose sentence was vacated and remanded for resentencing after the FSA's effective date. The Fifth and Sixth Circuits, in contrast, have held that it does not. Additionally, the government now disagrees with the Fifth and Sixth Circuits and believes the sentencing reforms of the FSA should apply at ***any*** sentencing occurring after the FSA's effective date.

II. Factual and Procedural Background

In 2017, Petitioner was convicted of three counts of carjacking under 18 U.S.C. § 2119(2) and three counts of brandishing a firearm during a crime of violence under 18 U.S.C. § 924(c)(1)(A)(ii). *United States v. Jackson*, 918 F.3d 467, 471 (6th Cir. 2019) (*Jackson I*). Petitioner was then sentenced to eighty-seven months' imprisonment as to the three carjacking counts and consecutive sentences of seven, twenty-five, and twenty-five years as to the firearms counts. *Id.* at 477. At the time of Petitioner's sentencing, §924(c) required a mandatory sentence of twenty-five years for any subsequent violation of the statute, even if the violation occurred in the same case. App. 2a.

The FSA was enacted in December 2018. Following the enactment of the FSA, one of Petitioner's § 924(c) convictions was vacated on appeal. App. 2a. At Petitioner's resentencing, the district court applied the

FSA but imposed an enhanced guidelines sentence. *United States v. Jackson*, 995 F.3d 522, 524 (6th Cir. 2021) (*Jackson II*). Petitioner then appealed his sentence, and the government appealed the district court's application of the FSA to Petitioner's § 924(c) convictions. App. 3a. The Sixth Circuit then held that the district court erred in applying the FSA at Petitioner's resentencing, finding that the plain language of the FSA did not apply to a defendant who had already been sentenced prior to the FSA's enactment date. *Id.* The court of appeals further held the fact that petitioner's pre-FSA sentence had been vacated was of no consequence because it still had existed "historically" at a moment in time. *Id.* Petitioner then petitioned this Court for a writ of certiorari to review the above judgment of the court of appeals, but the petition was denied. *Kenneth J. Jackson, Jr. v. United States* (No. 21-5875).

Petitioner's matter was then remanded for a second resentencing. App. 3a. The district court applied the pre-FSA penalties under § 924(c) and imposed a sentence of twelve months on the carjacking counts and consecutive seven and twenty-five year sentences on the § 924(c) offenses. *Id.*

This Petition seeks review of a split decision of the Sixth Circuit, which affirmed the above sentence after finding that Petitioner failed to present any change in law or facts warranting reconsideration of the Sixth Circuit's decision in *Jackson II. United States v. Jackson,* No. 22-3958, 2023 U.S. App. LEXIS 34069 (6th Cir. Dec. 21, 2023)(unpublished)(*Jackson III*). Judge Moore dissented, arguing that *Jackson II* was clearly erroneous and would work a manifest injustice "because it

disregards basic rules of grammar and statutory interpretation, conflicts with every other circuit to address the issue, and imposes draconian punishment on defendants, such as Jackson, despite Congress's clear directive to end such practices." App. 12a.

Moreover, the government now concedes that the majority's reasoning in *Jackson II* was fundamentally flawed, stating:

> The best reading of Section 403, considered in light of the statutory text, context, and purpose, is that the amended statutory penalties set forth in Section 403 should apply at <u>any</u> sentencing that takes place after the Act's effective date.

App. 48a, n. 3 (emphasis in original).

The Sixth Circuit's decision warrants this Court's review for two important reasons. First, *Jackson II* was clearly erroneous and would work a manifest injustice. The text, context, background principles and legislative purpose of the FSA all establish that Congress intended the sentencing reforms of the FSA to apply at a resentencing of a pre-Act sentence that had been vacated.

Second, by granting certiorari in this case, this Court would resolve an increasingly entrenched split among the circuits as to whether the FSA applies at a resentencing of a pre-Act sentence that had been vacated, which is an issue of extraordinary importance.

REASONS FOR GRANTING THE PETITION

I. Reconsideration of *Jackson II* Was Warranted Because its Ruling Was Clearly Erroneous and Would Work a Manifest Injustice

A court of appeals may reconsider a prior panel's ruling where "(1) substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *United States v. Haynes*, 468 F.3d 422, 426 (6th Cir. 2006). The majority concluded Petitioner failed to establish any basis under *Haynes* warranting reconsideration of *Jackson II*, and, in regard to the third *Haynes* prong, simply found that an inter-circuit split is insufficient. App. 7a.

But the majority glosses over the fact that the government now concedes that *Jackson II* was wrongly decided. App. 19a, 48a, n. 3. As such, the government's position now is that the amended statutory penalties set forth in §403 should apply at any sentence occurring after the FSA's effective date, which would include a pre-FSA sentence, like Petitioner's, that had been vacated. *Id.*

Moreover, *Jackson II* was clearly erroneous because it disregarded basic rules of grammar and contradicted the plain language of the statute. The actual text of the FSA provides that the sentencing reforms of §403 "shall apply to any offense that was committed before the date of enactment of [the FSA], if a sentence for the offense ***has not been imposed*** as of such date of enactment." FSA § 403(b) (emphasis added). Congress's use of the present-perfect tense is instructive. The present-perfect tense "denotes an act, state, or condition that is now completed or

continues up to the present." THE CHICAGO MANUAL OF STYLE ¶ 5.132 (17th ed. 2017). As a matter of logic, a vacated sentence, like Petitioner's, does not and cannot "continue up to the present" and therefore "has not been imposed" for the purposes of the FSA. This is because, as this Court has held, vacatur "wipe[s] the slate clean." *Pepper v. United States*, 562 U.S. 476, 507 (2011); *See also 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."); *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).

Jackson II does not analyze the statute as written. Instead, *Jackson II* replaces the present-perfect tense "has been imposed" with the past-perfect tense "had been imposed." *See Jackson II* at 525 ("We must look at Jackson's status as of December 21, 2018 and ask whether—at that point—a sentence had been imposed on him." Because a sentence that has been vacated can never be considered a sentence that "has been imposed", replacing the present-perfect tense with the past-perfect tense is the only way *Jackson II* could attempt to square its reasoning with the actual statute. The Fifth Circuit – the only other circuit that has adopted the reasoning in *Jackson II* – also had to replace the present-perfect tense with the past-perfect tense in order to attempt to square its logic with the actual text of the FSA. *See United States v. Duffey*, 92 F.4th 304, 310 (5th Cir. 2024) (stating § 403(b) "applies to defendants for whom 'a sentence . . . ha[d] not been imposed' as of the enactment date").

In addition to being clearly erroneous, *Jackson II* further undermines Congress's intent in drafting the FSA. "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).

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*, 562 U.S. at 507. Moreover, "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. This group of individuals would undoubtedly include those facing resentencing following vacatur of a prior sentence. Congress, therefore, chose to use the indefinite article "a" in "a sentence" to expansively include any sentence imposed at a resentencing hearing. *See, e.g., United States v. Henry*, 983 F.3d 214, 222 (6th Cir. 2020) ("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").

Finally, *Jackson II* would clearly work a manifest injustice. The FSA uses identical language in both §403 and §401(c), which applies the sentencing reforms of the FSA to certain drug offenses. As such, *Jackson II* will directly impact the applicability of the FSA's sentencing reforms on a wide breadth of offenses throughout the

Circuit Courts, likely denying relief to a multiple classes of defendants Congress expressly intended to grant relief to.

II. Granting Certiorari Would Resolve a Deeply-Entrenched Circuit Split on an Issue of Exceptional Importance

Congress enacted The First Act § 403 to reform the draconian mandatory-minimum sentencing penalties under 18 U.S.C. § 924(c), which Congress believed were manifestly unjust and unfair. *See, e.g. Henry,* 983 F.3d at 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.

The circuits remain increasingly split on the question whether the FSA applies at a resentencing following vacatur of a pre-FSA sentence. *Compare United States v. Mitchell,* 38 F.4th 382, 386–89 (3d Cir. 2022) (holding First Step Act applies at resentencing), *United States v. Merrell*, 37 F.4th 571, 575–78 (9th Cir. 2022) (same), and *United States v. Bethea*, 841 F. App'x 544, 548–53 (4th Cir. 2021) (unpublished) (same)*, with Duffey,* 92 F.4th at 309-312 (holding First Step Act does not apply), and the Sixth Circuit's decision in this matter. App. 2a.

The split has only deepened since this Court denied review of the above question in *United States v.*

Carpenter, 2023 WL 3200321, at *5 (6th Cir. May 2, 2023) (holding [*Jackson* II] dictates that § 403 of the First Step Act did not apply at resentencing), cert. denied, No. 23-251, 2024 WL 674738 (U.S. Feb. 20, 2024). Accepting certiorari, then, would present this Court with the much-needed opportunity to both reconcile a circuit split and finally settle the meaning of two fundamentally crucial provisions of the FSA's sentencing reforms.

Permitting the majority's interpretation to stand would mean that Petitioner would be exposed to the very 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. Finally, 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).

Moreover, the questions presented here carry much broader implications. Because §401(c) and §403 of the FSA contain identical language as to the Act's retroactivity, determining whether §403 applies to a pre-Act sentence that has been vacated will also impact those with vacated sentences under §401(c).

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. And in order to ensure that all defendants – regardless of the circuit in which they are sentenced – properly benefit from Congress's intent to end grossly overlong mandatory sentences, this Court should grant review.

CONCLUSION

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

Dated: June 28, 2024

Respectfully submitted,

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