Nos. 23-1002, 23-1150

In the Supreme Court of the United States

TONY R. HEWITT,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

COREY DEYON DUFFEY and JARVIS DUPREE ROSS,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Petitioners conspired with one another to commit a series of armed bank robberies in 2008. A jury found them guilty on all counts, and the District Court imposed a sentence for each of their offenses in 2010. Petitioners were then resentenced for the firearms offenses at issue in 2012. Six years later, Congress passed the First Step Act. Section 403 of the Act authorizes reduced minimum sentences for an "offense that was committed before the date of enactment of th[e] Act," but only "if a sentence for the offense has not been imposed as of such date of enactment." Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5222 (2018). After the date of enactment, Petitioners' sentences for the offenses at issue were vacated because their convictions for other offenses were set aside. At resentencing, Petitioners sought retroactive application of the First Step Act's reduced minimums.

The question presented is:

Whether a sentence imposed before the First Step Act's enactment qualifies as "a sentence" that "has . . . been imposed as of [the] date of enactment" if that sentence is later vacated for any reason.

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INTEREST OF *AMICUS CURIAE*[1]

By order dated July 26, 2024, this Court invited Michael H. McGinley to brief and argue this case as *amicus curiae* in support of the judgment below.

INTRODUCTION

Nearly two decades ago, Petitioners terrorized the Dallas-Fort Worth community through a series of armed bank robberies. They received a trial, and a jury found them guilty of committing all of the § 924(c) offenses at issue—each one for using a firearm in furtherance of a crime of violence. The District Court imposed a lawful sentence for those offenses in 2010. Then it imposed another lawful sentence for those offenses in 2012, after other convictions were vacated on appeal.

Petitioners were serving those sentences six years later, when Congress passed the First Step Act. Those sentences were subsequently vacated, in 2021, when Petitioners' convictions for other offenses were set aside. No court has ever held that any of the sentences for the § 924(c) offenses at issue was legally invalid. Petitioners now seek retroactive application of the First Step Act's modified sentencing regime for the crimes they committed in 2008.

But they cannot square their request with the statute's plain text. The Act applies to offenses committed before December 21, 2018 only if "a sentence for the offense has not been imposed as of

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person aside from *amicus curiae* and his law firm made a monetary contribution toward its preparation or submission.

such date of enactment." Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5222 (2018) ("FSA"). As this text makes clear, eligibility for the First Step Act's modified penalties turns on a simple historical inquiry. A sentencing court must look to the Act's "date of enactment"—December 21, 2018—and ask whether "a sentence" for the relevant offense has or "has not been imposed" as of that date. If a sentence has not been imposed "as of such date," then the defendant may be sentenced under the First Step Act's new rules. If a sentence has been imposed "as of such date," then the sentencing framework that predated the Act applies. Petitioners' pre-Act sentences for the offenses at issue thus foreclose their requested relief.

Petitioners and the Government have no good answer to this unambiguous text. Rather, they seek to rewrite it in multiple ways.

First, they encourage this Court to transform Congress's use of "*a* sentence" in § 403(b) to instead read "a *valid* sentence" that is not later vacated. Petitioners try to smuggle in this additional language based on a purportedly "universal principle" that a vacated order is treated as though it had never been entered. But a background legal principle cannot override the text of a duly enacted law. And, as the Government recognizes, Petitioners' supposed background principle is itself "incorrect." Gov.Br.26 n.4. In many contexts, "the historical fact" of a sentence's imposition "has legal significance even if that sentence (or the related conviction) is subsequently vacated." *Id.*

Second, Petitioners and the Government seek to remove the words "as of such date of enactment" from

the law. They pin their inquiry to the ongoing effect of a sentence on the date of resentencing. But Congress tied the inquiry to the "date of enactment," December 21, 2018. Petitioners' sentences "for the offense[s]" at issue were undisputedly valid and imposed "as of such date of enactment." Their 2012 sentences were later vacated only because *other* convictions for *other* offenses were set aside on unrelated grounds.

Third, Petitioners and the Government seek to support their atextual interpretation with a bevy of extratextual considerations. They appeal to drafting history, generic floor statements, an oblique title, purposivism, policy arguments, and lenity. But none of that provides any reason to disregard the ordinary meaning of the text Congress enacted. And even if any doubt remained, the federal saving statute would require this Court to construe the ambiguity *against* retroactive application.

In the end, "[t]he controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017) (citation omitted). Petitioners' pre-Act sentences each qualify as "a sentence" that has "been imposed as of [the First Step Act's] date of enactment." Therefore, the judgment below should be affirmed.

STATEMENT OF THE CASE

A. Petitioners Committed a String of Armed Bank Robberies in 2008.

Over 16 years ago, Petitioners Corey Deyon Duffey, Tony R. Hewitt, and Jarvis Dupree Ross decided to

"devote[] their respective talents to the enterprise of robbing banks." *United States v. Duffey*, 456 F. App'x 434, 435 (5th Cir. 2012). The FBI dubbed their "group of armed robbers" the "'Scarecrow Bandits,'" due to the distinctive garb they wore during their early robberies. *United States v. Duffey*, 2009 WL 2356156, at *1 (N.D. Tex. July 30, 2009). Over the course of several months, this group "violently robbed more than twenty banks." *Id.* "During these robberies, bank employees and customers were held at gunpoint and physically assaulted with firearms and stun guns." *Id.*

Petitioners themselves robbed at least "five banks in the Dallas-Fort Worth area." *Duffey*, 456 F. App'x at 436. They were major players in each heist. Indeed, "Duffey and Hewitt assumed leadership roles of their co-defendants," as they "would case banks, invite potential partners to join in the crimes, delegate roles and responsibilities to their co-conspirators, and participate in the robberies." *Id.* The Scarecrow "confederacy" executed these calculated operations by descending upon target banks in stolen vehicles while "bearing an array of guns" and tasers to coerce compliance. *Id.* at 436-37. On at least one occasion, "the robbers used a taser to stun bank tellers" while they ransacked the bank. *Id.* at 437. These robberies collectively netted roughly $350,000. *See id* at 436-37.

The "gang's crime spree" soon put authorities "on high alert." *Id.* at 437. By May 2008, FBI surveillance teams observed Petitioners abandon two additional planned armed robberies. *Id.* at 437-38. The FBI then learned that Petitioners planned to rob another bank on June 2, 2008. *Id.* at 438. When their crew arrived,

agents moved in to arrest the robbers near the target bank. *Id.* Some of Petitioners' co-conspirators "were arrested without incident." *Id.* But Petitioners refused to submit to the authorities without a fight. Hewitt, Duffey, and Ross—"all of whom were heavily armed—turned their attention from their crime to flight." *Id.* After multiple "high-speed chases" and "hostage-taking" (Ross broke into a woman's apartment and held her at gunpoint to avoid arrest), as well as "police stand-offs" and "collisions," Petitioners were eventually apprehended. *Id.*; Dist.Ct.Dkt.393, at 176-84.

A federal grand jury ultimately returned a 43-count superseding indictment against Petitioners, charging them with violations of 18 U.S.C. § 371 (conspiracy to commit bank robbery); 18 U.S.C. § 924(c)(1)(A)(i) (using or carrying a firearm during and in relation to a crime of violence); 18 U.S.C. §§ 2113(a), (d) and 18 U.S.C. § 2 (attempted bank robbery); 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (felon in possession of a firearm); 18 U.S.C. § 1201(a)(1) (kidnapping); and 18 U.S.C. §§ 2113(a), (d) and 18 U.S.C. § 2 (bank robbery). *See United States v. Duffey*, 2010 WL 184445, at *1 (N.D. Tex. Jan. 20, 2010).

"Following trial, a jury found [Petitioners] guilty on all counts charged." *Id.*

B. A Sentence for Each Offense at Issue Was Imposed in 2010 (and Again in 2012).

In 2010, the District Court imposed a sentence for each of the offenses at issue here. *See* Duffey.Br.10; Hewitt.Br.9. Petitioners appealed, and only Hewitt challenged his sentence. The Fifth Circuit rejected that challenge. *See Duffey*, 456 F. App'x at 444. The

court did, however, vacate Petitioners' convictions for attempted bank robbery and the related firearms counts. *See id.* at 443-44. In doing so, it found no defect in the sentences for any other offense. Those legally valid sentences thus could have been upheld.

However, when appellate courts invalidate one conviction in a multi-count judgment, they "routinely" vacate the sentences on all counts for plenary resentencing "so that the district court may increase the sentences for any remaining counts up to the limit set by the original aggregate sentence." *Dean v. United States*, 581 U.S. 62, 68-69 (2017). Consistent with that practice, the Fifth Circuit vacated and remanded for resentencing on the remaining counts. *See Duffey*, 456 F. App'x at 436.

On remand, the district court imposed another set of sentences for the offenses at issue. *See United States v. Duffey*, 92 F.4th 304, 307 (5th Cir. 2024). Petitioners do not suggest that any of these sentences were unlawful either. Indeed, the district court imposed the statutory minimum sentence for each of the § 924(c) convictions. *See* Dist.Ct.Dkt.491, at 2-5 (Ross); Dist.Ct.Dkt.506, at 2-4 (Duffey); Dist.Ct.Dkt.524, at 2-4 (Hewitt).

As all agree, the District Court correctly ordered those sentences to run consecutively to each other and any others, as was (and still is) required by law. *See* 18 U.S.C. § 924(c)(1)(D)(ii) (prohibiting § 924(c) sentences from running "concurrently with any other term of imprisonment"). At the time, Congress also required a mandatory, consecutive minimum sentence of at least 5 years for a first § 924(c) conviction, *see id.* § 924(c)(1)(A) (2006), and a minimum of 25 years for

"a second or subsequent conviction," *id.* § 924(c)(1)(C). These rules (sometimes referred to as "stacking" rules) applied whether a defendant's convictions were the result of "a single proceeding" or separate prosecutions resulting in multiple judgments. *Deal v. United States*, 508 U.S. 129, 137 (1993).[2] The District Court faithfully followed those rules.

The Fifth Circuit affirmed, and Petitioners' initial habeas petitions were denied. *See Duffey*, 92 F.4th at 307-08.

C. In 2018, Congress Enacted the First Step Act.

After Petitioners' initial round of habeas proceedings, Congress enacted the First Step Act of 2018. As relevant here, Section 403(a) of the Act modified the stacking rules for defendants with multiple § 924(c) convictions as follows:

> Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), 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".

FSA § 403(a). In simple terms, a second or subsequent § 924 conviction no longer carries a 25-year minimum sentence, if that conviction is obtained in the same proceeding as the first. Instead, defendants face at

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[2] In 1998, Congress increased the mandatory minimum for a "second or subsequent [§ 924(c)] conviction" from 20 to 25 years. Pub. L. No. 105-386, § 1, 112 Stat. 3469, 3469 (1998). It did not disturb the holding of *Deal*.

least a 5-year mandatory minimum sentence on each § 924(c) count. *See* 18 U.S.C. § 924(c)(1)(A).

At the same time, Congress tightly circumscribed the amendment's retroactive application. As Duffey and Ross observe, earlier iterations of the First Step Act would have retroactively applied to *all* defendants. *See* Duffey.Br.37 (citing, *inter alia*, the Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. § 104(b)(2)). But Congress ultimately took a different approach. It decided to draw a line at a specific date—the "date of enactment" of the First Step Act. FSA § 403(b). And writing from the perspective of a body legislating *before* that date, Congress specified that § 403(a) would apply only "if a sentence for the offense has not been imposed *as of such date of enactment*." *Id.* (emphasis added). It is undisputed that Petitioners were initially sentenced (and then resentenced) for each of the offenses at issue before the date of enactment.

D. Petitioners Were Later Resentenced After Their Convictions for Other Offenses Were Vacated.

Following the First Step Act's passage, this Court determined that § 924(c)'s "residual clause" was unconstitutionally vague. *See United States v. Davis*, 588 U.S. 445, 448 (2019). The Fifth Circuit then held that *Davis* applied retroactively, and that conspiracy to commit bank robbery is not a "crime of violence" under § 924(c)'s "elements clause." *See United States v. Reece*, 938 F.3d 630, 635 (5th Cir. 2019). It therefore authorized Petitioners to file a second habeas petition challenging their § 924(c) conspiracy convictions, "because the predicate offense for the enhancement"

on these offenses "no longer qualified as a crime of violence under § 924(c)(3)." *Duffey*, 92 F.4th at 308. The District Court granted the requested relief and "vacated [Petitioners'] § 924(c) conspiracy convictions and accompanying sentences." *Id.*

Those are not the § 924(c) offenses at issue. Instead, this dispute relates to Petitioners' other § 924(c) offenses, which produced undisputedly valid convictions and undisputedly valid mandatory-minimum sentences. Even so, the District Court followed the standard practice for multi-count judgments and "vacated the sentences on all remaining convictions" so that Petitioners could be resentenced once again. *See id.*

E. The Lower Courts Held that Petitioners Are Ineligible for Retroactive Relief Under the First Step Act.

During resentencing, Petitioners argued that they were eligible for the First Step Act's new penalties because none of their pre-Act sentences qualified as "a sentence" that "has . . . been imposed as of [the] date of enactment." FSA § 403(b). The District Court was unconvinced. It explained that "[t]he First Step Act was enacted on December 21st, 2018," at which time each Petitioner "was serving a sentence of imprisonment imposed by the Court." Duffey.Pet.App.30. "Therefore, the amendment to 924(c) is not retroactive to this case," and the mandatory minimum for each subsequent § 924(c) conviction is still 25 years. *Id.*

The Fifth Circuit affirmed, holding that the District Court's reading was "faithful to the statute's text." *Duffey*, 92 F.4th at 310. As a matter of ordinary

understanding, "a sentence is 'imposed' 'when the district court pronounces it.'" *Id.* (citation omitted). Thus, "§ 403(b)'s use of 'imposed' puts the 'focus on the historical fact' of a sentence's imposition." *Id.* (citation omitted). And "Congress unambiguously drew the line for the First Step Act's application based on the date a sentence was imposed." *Id.* at 311. Here, that date occurred well before the date of enactment. The decision below also explained that the legal concept of vacatur could not alter the First Step Act's plain text: A sentence that is "subsequently vacated" constitutes "'a sentence'" for an offense that "'has been imposed as of [the] date of enactment.'" *Id.* at 309-12 (quoting FSA § 403(b)). As a result, Congress did not authorize Petitioners to be retroactively sentenced in accordance with the First Step Act's modified stacking rules. *See id.* at 312.

SUMMARY OF ARGUMENT

The Fifth Circuit correctly held that Petitioners are ineligible for the First Step Act's modified sentencing rules.

I. Section 403(b)'s plain text forbids applying the First Step Act retroactively to the offenses at issue. Each of the pre-Act sentences imposed for those offenses qualifies as "a sentence for the offense" that "has . . . been imposed as of [the First Step Act's] date of enactment." FSA § 403(b).

A. This understanding is most faithful to the ordinary meaning of "a sentence." A "sentence" is "[t]he judgment that a court formally pronounces after finding a criminal defendant guilty." *Black's Law Dictionary* 1636 (11th ed. 2019). And Congress chose not to limit the types of sentences that would prevent

retroactivity here. On the contrary, it introduced the word "sentence" with the indefinite article "a," which is used in common parlance to point to a nonspecific object. That means any type of sentence that has been imposed for an offense counts, even if it was subsequently vacated.

Petitioners argue that Congress might have better reflected this understanding by using the word "any" instead of "a." But the words are synonymous. And the fact that Congress might have expressed itself more clearly provides no license to disregard the actual statutory text. Nor does the meaningful-variation canon. That canon is irrelevant to ubiquitous and interchangeable words like "any" and "a," particularly where, as here, they are used to introduce different terms.

Seeking to add to the statute, Duffey and Ross also insist that the ordinary meaning of "a sentence" is "a *valid* sentence." But that is not the text Congress enacted. And even that litigator's amendment does not rescue their claim. Their prior sentences were legally valid on December 21, 2018, and they were later vacated only because other convictions were set aside for unrelated legal error. Thus, Petitioners were serving "a [valid] sentence for the offense[s]" at issue "as of such date of enactment."

B. Section 403(b)'s use of the verb "imposed" reinforces Congress's focus on the historical fact of a sentence's imposition. A sentence is "imposed" when it is pronounced. For that reason, both this Court and Congress have frequently described a vacated sentence as one that nevertheless has been imposed. Duffey and Ross offer no textual basis for dispensing

with this ordinary meaning. Hewitt cherry-picks a contrary definition of "imposed" that could fit only if § 403(b)'s sentence structure and object were changed. And the Government offers a pair of unpersuasive arguments that flout the text and ignore the realities of both vacatur and sentencing.

C. Congress's use of the present-perfect tense—"has not been imposed"—only confirms the Fifth Circuit's reading. That tense is used to describe an act that is either ongoing *or* completed at some indefinite point in the past. Because the operative verb here is "imposed," only the latter usage makes sense. The imposition of a sentence occurs at a particular point in time when a judge pronounces the sentence in open court. That occurred here in 2010 and then again in 2012 for each of the relevant offenses.

Petitioners and the Government counter that this interpretation works only with the past-perfect tense—"had not been imposed." That is incorrect. Time and again, Congress has used the present-perfect when dictating a statute's application to pending cases at the time of enactment, just as it did in the First Step Act. That is because Congress legislates in real-time. It would be incongruous for Congress to employ the *past*-perfect when drawing a line in that *present* moment as to who is in and who is out.

In any case, Petitioners would fall on the wrong side of the line even if they were right that the present-perfect ties the inquiry to the "ongoing" imposition of a sentence. The text would still ask whether such a sentence has or "has not been imposed *as of [the] date of enactment*." As of that date, Petitioners were all

serving ongoing sentences for the offenses at issue. Their contrary argument seeks to delete that critical timing provision from the statute.

II. Petitioners ultimately cannot square their interpretation with the ordinary meaning of § 403(b). So they resort to atextual considerations. In their view, a background legal principle exists that a vacated sentence is no sentence at all. And they suggest that Congress silently incorporated this purported principle into § 403(b). This argument fails for three reasons.

A. *First*, in a contest between text and background principles, the text prevails. Indeed, it is telling that even Petitioners' own vacatur decisions refer to a vacated sentence as "a sentence." That is the language Congress used in the First Step Act. And that language controls here.

B. *Second*, there is no background principle that a vacated sentence must be disregarded for all purposes. Even the Government concedes that a vacated order is relevant in many contexts, including several related to sentencing. Congress has also shown that it knows how to exclude vacated convictions or sentences from a statute's reach when it wants to do so. It chose not to here. And each of Petitioners' purported counterexamples is inapposite. In fact, many defeat the universal principle they strain to establish.

C. *Third*, Petitioners' *implicit* background principle cannot override the federal saving statute's *explicit* direction that a sentencing law does not apply retroactively unless it "shall so expressly provide." 1 U.S.C. § 109. Given that command, this Court has required a clear statement before applying new

penalties to pre-enactment conduct. Congress came nowhere close to providing such a clear statement here.

III. Petitioners and the Government fare no better with any of their other extratextual arguments.

A. Duffey and Ross note that prior iterations of the First Step Act would have applied retroactively to all defendants. But the fact that Congress abandoned an approach that would have afforded Petitioners relief only undermines their attempt to smuggle that rejected policy into the text Congress later enacted.

B. Duffey and Ross next seek support in § 403's title. But that title says only that Congress was "clarif[ying] . . . Section 924(c)," to abrogate this Court's decision in *Deal*. It says nothing about the amended § 924(c)'s retroactivity. A title cannot overcome the operative statutory text in any event. And, even if it could, the more relevant title is § 403(b)'s, which specifies the Act's "applicability to *pending* cases." Petitioners' cases were not pending as of the date of enactment.

C. Petitioners' and the Government's reliance on legislative history is similarly misplaced. Legislative history is not the law. And the floor statements they quote provide no basis to depart from the statutory language that survived bicameralism and presentment. Nor do any of those general statements address the question presented.

D. Petitioners and the Government also appeal to purpose and policy. But there is no better indication of where Congress landed as a policy matter than the text it ratified through a formal vote. That text is what matters. And there are many reasons why

Congress might have thought it preferable to base eligibility on the imposition of a sentence prior to enactment, even if that sentence is later vacated. In fact, doing so furthers the very fairness principles that Petitioners espouse.

E. Finally, the rule of lenity is inapplicable. Section 403(b) contains no grievous ambiguity that could potentially trigger the rule. Even if it did, lenity still would play no role in defining the retroactive scope of this sentencing statute. Whether a sentencing law applies retroactively poses no fair-notice concerns. And the federal saving statute directs courts to resolve any ambiguity *against* retroactive application.

For all these reasons, the judgment below should be affirmed.

ARGUMENT

I. The Ordinary Meaning Of Section 403(b) Establishes That Petitioners Are Ineligible For Retroactive Application Of The First Step Act.

When interpreting a statute, a court's "job is to interpret the words consistent with their ordinary meaning at the time Congress enacted the statute." *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) (alteration adopted; citation omitted). And "[w]here, as here, that examination yields a clear answer, judges must stop." *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436 (2019).

Through the First Step Act, Congress modified the mandatory-minimum rules for a defendant who uses or carries a firearm in furtherance of multiple crimes

of violence. *See* FSA § 403(a). But Congress specified that these new rules apply to previous offenses only "if a sentence for the offense has not been imposed as of such date of enactment." *Id.* § 403(b). Thus, if "a sentence for the offense has . . . been imposed as of [December 21, 2018]," the statutory framework that predated the First Step Act applies.

That is the case here. Petitioners "indisputably had been sentenced" for the offenses at issue (twice) "before the First Step Act took effect." *United States v. Uriarte*, 975 F.3d 596, 606 (7th Cir. 2020) (Barrett, J., dissenting). That historical fact forecloses their claim to retroactive application of the First Step Act's modified regime.

A. The Decision Below Respects the Plain Meaning of "A Sentence."

Start with the statute's reference to "a sentence." As Petitioners and the Government observe, a "sentence" is "[t]he judgment that a court formally pronounces after finding a criminal defendant guilty." *Black's Law Dictionary*, *supra*, at 1636; Gov.Br.16; Duffey.Br.16. *Amicus* agrees that this definition "accurately captures the ordinary meaning" of the term. *United States v. Hernandez*, 107 F.4th 965, 968 (11th Cir. 2024). But it affirmatively cuts against Petitioners and the Government here. Petitioners' original sentences were plainly "'judgment[s]' that the district court 'pronounced' upon 'finding [Petitioners] guilty.'" *Id.* at 969 (alteration adopted). Accordingly, their own "definition fits [Petitioners'] original sentence[s] to a T." *Id.*

There is no indication that Congress meant to capture only the *final* sentence that a defendant might

receive for an offense. Had Congress intended to impose such a limitation, it could have easily referenced finality—as it did in the immediately preceding subsection of the First Step Act. *See* FSA § 403(a) (limiting the 25-year enhancement to § 924(c) convictions that follow a prior § 924(c) conviction that "has become final"). Or Congress could have achieved that result by referring to "a *valid* sentence," or "a sentence that continues to legally bind the defendant," or perhaps even to "*the* sentence." *Hernandez*, 107 F.4th at 969; *Uriarte*, 975 F.3d at 608 (Barrett, J., dissenting).

But Congress instead chose to introduce the term "sentence" with the indefinite article "a." That choice of article matters in discerning statutory meaning. *See Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2455 (2024). And "[w]hen used as an indefinite article, 'a' means 'some undetermined or unspecified particular.'" *McFadden v. United States*, 576 U.S. 186, 191 (2015) (alteration adopted) (quoting *Webster's New International Dictionary* 1 (2d ed. 1954)); *see also Chicago Manual of Style* ¶ 5.72 (17th ed. 2017) ("An indefinite article points to a nonspecific object, thing, or person that is not distinguished from the other members of a class."); Bryan A. Garner, *Garner's Modern English Usage* 1195 (5th ed. 2022) (similar).

The indefinite article "a" is thus synonymous with the word "any." *See, e.g.*, *Merriam-Webster's Collegiate Dictionary* 1 (11th ed. 2020); 1 *Oxford English Dictionary* 4 (2d ed. 1991); *Hernandez*, 107 F.4th at 969. Consequently, Congress's use of the indefinite article is "broad enough to refer to any

sentence that has been imposed for the offense, even one that was subsequently vacated." *Uriarte*, 975 F.3d at 608 (Barrett, J., dissenting). That is still "a sentence" for the offense.

Duffey, Ross, and the Government (but not Hewitt) resist this ordinary meaning by noting that Congress could have expressly used the word "any" instead of "a." Gov.Br.19; Duffey.Br.31. But the words are synonymous. And this Court "do[es] not demand (or in truth expect) that Congress draft in the most translucent way possible." *Pulsifer v. United States*, 601 U.S. 124, 137 (2024). Even if "Congress could have expressed itself more clearly," that does not change the fact that the decision below adopted the "right and fair reading of the statute." *Luna Torres v. Lynch*, 578 U.S. 452, 472-73 (2016).

Stuck with this ordinary meaning, Duffey, Ross, and the Government pivot to the meaningful-variation canon. They emphasize Congress's earlier use of the phrase "any offense" and suggest that the contrasting use of "any" and "a" between "any offense" and "a sentence" must subtly convey something. Gov.Br.19-20; Duffey.Br.32. But Congress's use of synonymous terms is not a variation, let alone a meaningful one. Moreover, the meaningful-variation canon's weight "grows weaker with each difference in the formulation of the provisions under inspection." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-36 (2002). That is precisely the case here. The nouns to which the two words are appended—"offense" and "sentence"—are different. And they serve different grammatical functions within the statute, with "any offense" serving as the direct object of an

independent clause and "a sentence" serving as the subject of a conditional dependent clause.

Petitioners' argument also founders because the meaningful-variation canon "is mostly applied to terms with some heft and distinctiveness, whose use drafters are likely to keep track of and standardize." *Pulsifer*, 601 U.S. at 149. It is less apt for "ubiquitous" (and synonymous) words like "a" and "any." *Id.* These words are often used interchangeably in ordinary speech and legislative drafting.[3] And this just goes to show why "interpretative canons are not a license for the judiciary to rewrite language enacted by the legislature." *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (brackets and citation omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 51 (2012) (emphasizing that the interpretive canons "are not 'rules' of

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[3] The First Step Act itself provides an example. The "safety valve" provision in Section 402 determines eligibility based on a defendant's total criminal history points, "excluding *any* criminal history points resulting from *a* 1-point offense." FSA § 402(a) (emphases added). But Congress of course did not mean to exclude certain "1-point offense[s]" simply because it used the word "a" instead of "any." Nor did Congress mean to exclude certain "firearm[s]" from § 924(c)'s reach merely because it used the phrases "a firearm" and "any crime of violence" in the same subparagraph. 18 U.S.C. § 924(c)(1)(A). Other examples of this fungible use of "a" and "any" abound. *See, e.g.*, *id.* § 924(c)(1)(D)(i) ("any person convicted of a violation"); *Smith v. United States*, 599 U.S. 236, 244 (2023) ("[A]nd a defendant charged with illegally shipping goods may be tried in any State through which the goods were illegally transported[.]"); *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257, 264 (2024) ("Section 11(a) prohibits any registration statement that 'contains an untrue statement of a material fact[.]'" (brackets and citation omitted)).

interpretation in any strict sense"). A court's obligation is to the ordinary meaning of the text.

Duffey and Ross also argue that the "ordinary meaning of the term 'sentence' is a valid sentence." Duffey.Br.14. This is nothing but an attempt to "add words to the law to produce what is thought to be a desirable result." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015). "[O]ur constitutional structure does not permit" courts "to 'rewrite the statute that Congress has enacted.'" *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 130 (2016) (citation omitted). Congress chose to determine eligibility based on whether "a sentence" for the offense has been imposed as of December 2018, and courts must respect that choice.

Nor does Petitioners' revision of the statute help them. Nobody disputes that Petitioners each received—and were serving—"a [valid] sentence for the offense[s]" at issue "*as of [the] date of enactment*." FSA § 403(b) (emphasis added). That is the date that matters under the statute's plain text. Petitioners' sentences were later vacated only because their convictions *for other offenses* were invalidated. *See Duffey*, 92 F.4th at 308. In other words, their sentences for the offenses at issue "were legally valid at the time of the enactment of the First Step Act and have never been deemed legally invalid." United States Br. in Opp'n at 11, *Jackson v. United States*, No. 21-5875 (U.S. Feb. 2, 2022). So, even if this Court were to accept Petitioners' revision, they would still be ineligible for relief.

B. Congress's Use of the Verb "Imposed" Reinforces the Fifth Circuit's Reading.

Other textual clues bolster this conclusion. For one, § 403(b)'s use of the verb "imposed" reinforces "the section's 'focus on the historical fact' of the sentence's imposition." *United States v. Carpenter*, 80 F.4th 790, 791 (6th Cir. 2023) (Kethledge, J., joined by Sutton, C.J., Thapar, and Bush, JJ., concurring in the denial of rehearing en banc) (quoting *Uriarte*, 975 F.3d at 607 (Barrett, J., dissenting)). Petitioners cannot dispute that the District Court "imposed" their initial sentences in 2010—eight years before the First Step Act's passage. The Act thus does not apply here.

Only that interpretation respects the plain meaning of the statute's terms. "[I]n ordinary usage a sentence is 'imposed' when the district court pronounces it." *Young v. United States*, 943 F.3d 460, 463 (D.C. Cir. 2019); *see also Lott v. United States*, 367 U.S. 421, 426 (1961) (observing that a "sentence is imposed" by "the pronouncement of judgment"). And nothing that occurs later can erase that historical fact. "That is why it is perfectly coherent to describe the procedural posture of a case by saying, 'a sentence was imposed last year, but it has since been vacated on appeal.'" *Uriarte*, 975 F.3d at 607 (Barrett, J., dissenting).

Indeed, this Court has frequently employed that very construction to describe a vacated sentence. For instance, in *Gregg v. Georgia*, the plurality opinion explained that "[t]he death sentences *imposed* for armed robbery, however, were *vacated*." 428 U.S. 153, 161-62 (1976) (emphases added). And in *Greenlaw v. United States*, the Court said that, "[i]n remanded

cases," trial courts "have imposed a sentence on the remaining counts longer than the *sentence* originally *imposed* on those particular counts." 554 U.S. 237, 253 (2008) (emphases added). These examples underscore that in ordinary parlance, a vacated sentence is still a "sentence" that has been "imposed."

Congress has likewise used this construction throughout the U.S. Code. Its choice of language consistently reflects the common-sense understanding that even a legally invalid sentence is a "sentence" that has been "imposed." *See, e.g.*, 18 U.S.C. § 3742(f)(1) ("If the court of appeals determines that . . . the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case[.]"); *id.* § 3742(a) (employing similar language). Indeed, the federal habeas statute that Petitioners invoked to vacate their § 924(c) conspiracy convictions employs this formulation. *See* 28 U.S.C. § 2255(a) ("A prisoner . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, . . . may move the court which imposed the sentence to vacate . . . the sentence.").

Hewitt fights this ordinary usage by suggesting that "imposed" can also mean "'enforce'" or "'apply'"—as in, "[a] sentence is *imposed* on . . . an offender during the entire duration of his or her incarceration." Hewitt.Br.28 (citation omitted). But § 403(b) does not use this "imposed on" structure. Nor does it tether the inquiry to a sentence's effect on an "offender" in the first place. It instead asks whether a sentence "for the

offense" has been imposed as of December 21, 2018. FSA § 403(b). That is undoubtedly the case for Petitioners' offenses. The district judge imposed "a sentence" for those offenses "as a matter of fact at a singular point in time" in 2010, and then imposed another sentence for those offenses during resentencing in 2012 (which remained in effect on the date of the Act's enactment). Hewitt.Br.28.

Duffey and Ross, for their part, fail to muster any textual basis for abandoning this ordinary understanding. In fact, they acknowledge that "Congress tied the application of Section 403(a) to whether 'a sentence . . . has . . . been imposed,'" thereby using an admittedly "broad phrase that does not distinguish between 'original sentencing' proceedings and 'resentencing' proceedings." Duffey.Br.31. That is, any sentence counts as one that has been imposed under the provision's plain text—whether imposed at "original sentencing" or "resentencing."

As for the Government, it contends that this construction "disregards Congress's use of the passive voice." Gov.Br.29. But that does not work either. "The passive voice focuses on an *event* that occurs without respect to a specific actor"—here, the *imposition* of a sentence for the offense before the date of enactment. *Dean v. United States*, 556 U.S. 568, 572 (2009) (emphasis added). That event undisputedly occurred here. And the Government fails to explain how any actor other than a district court could have imposed such a sentence. *See Bartenwerfer v. Buckley*, 598 U.S. 69, 76 (2023)

("[C]ontext can confine a passive-voice sentence to a likely set of actors.").

Switching gears, the Government argues that the First Step Act "presupposes that no sentence has already been imposed" because a "defendant cannot *simultaneously* have two sentences for the same crime." Gov.Br.20 (emphasis added). But that is irrelevant to whether "a sentence" has or "has not been imposed" at the relevant time. And it misunderstands what happens with vacatur: A sentence for the offense is imposed; that sentence for the offense is vacated; then later, at resentencing, a *new* sentence for the offense is imposed. There is nothing simultaneous about those two sentences. The Government's argument thus elides the key textual point, which is that the District Court "imposed" "a sentence" for each offense before the "date of enactment." That is an immutable historical fact. "For better or worse, it *happened*, and nothing—not even the sentence's later vacatur—can erase the historical record." *Hernandez*, 107 F.4th at 971.

C. Congress's Use of the Present-Perfect Tense Confirms the Fifth Circuit's View.

Congress's use of the present-perfect tense—"has not been imposed"—further confirms its textual "focus on the historical fact" of sentencing. *Uriarte*, 975 F.3d at 606-07 (Barrett, J., dissenting). The present-perfect tense "is formed by using *have* or *has* with the principal verb's past participle." *Chicago Manual of Style*, *supra*, ¶ 5.132. "It denotes an act, state, or condition that is" *either* "now completed *or* continues to the present." *Id.* (emphasis added). Here, the District Court completed the act of imposing a

sentence well before the date of enactment. By that point in December 2018, Petitioners were several years into serving their imposed sentences.

Petitioners respond that Congress's use of the present-perfect shows that the imposition of a sentence must "continue[] into the present." Duffey.Br.32-33; *see* Hewitt.Br.26. But this argument fails because it ignores the more logical application of the present-perfect tense. As explained above, that tense "sometimes represents an action as having been completed at some indefinite time in the past." Garner, *supra*, at 1082; *see, e.g.*, *Barrett v. United States*, 423 U.S. 212, 216 (1976) (observing that Congress's use of the present-perfect tense "denot[ed] an act that has been completed"). And that usage is more fitting here. "[T]he act of imposing a sentence could not possibly 'continue up to the present'—because the imposition of a sentence occurs at a fixed point in time, when the district court 'states in open court the reasons for its imposition of the particular sentence.'" *Carpenter*, 80 F.4th at 791 (Kethledge, J., concurring) (alteration adopted) (quoting 18 U.S.C. § 3553(c)).

Petitioners' reading also conspicuously ignores the second half of § 403(b). Rather than speak of a sentence that continues into the present, Congress pegged the inquiry to a particular date by asking whether a sentence for the relevant offense has or "has not been imposed *as of [the Act's] date of enactment*." FSA § 403(b) (emphasis added). "Because Congress was creating law 'in real-time,' so to speak, § 403(b)'s use of the phrase 'as of [the] date of enactment' means, in effect, 'as of *today*,'" when we (Congress) enact this

law. *Hernandez*, 107 F.4th at 969. Thus, on the date of the Act's passage, the full universe of defendants who qualify under § 403(b) could be fully and easily ascertained. And Congress's header for § 403(b)—"APPLICABILITY TO *PENDING* CASES"—reinforces that understanding of the statutory text. *See Dubin v. United States*, 599 U.S. 110, 120-21 (2023) ("'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.'" (citation omitted)). Petitioners' cases were not "pending" on the date of enactment.

Petitioners and the Government nevertheless argue that if Congress wanted to include vacated sentences, it could have instead used the past-perfect tense—"*had* not been imposed." Gov.Br.17; Duffey.Br.32-34. But, as Judge Newsom has explained: "That substitution would have made a syntactical hash of § 403(b), which then would have extended § 403(a)'s modified stacking rule to pre-Act convictions provided (with [the] 'as of today' paraphrase) that 'a sentence for the offense *had* not been imposed as of [today].'" *Hernandez*, 107 F.4th at 970 (second alteration in original). That mixing of the past-perfect and present day makes no sense.

The Government digs up one example it believes is to the contrary from the Crime Control Act of 1990. Gov.Br.18. But "[i]t would hardly be surprising if [28] years later, [§ 403(b)'s] drafters did not perfectly harmonize their [tense] usage" with an unrelated statute-of-limitations provision from three decades earlier. *Pulsifer*, 601 U.S. at 151. In fact, Congress has since used the present-perfect tense in several

other statute-of-limitations provisions.[4] And, even more relevant here, it has since used the present-perfect in a host of other contexts relating to pending actions.[5] Congress's use of the present-perfect here is thus entirely consistent with how it has used that tense in other statutes, particularly when defining a statute's applicability to cases pending at the time of enactment.

Finally, even if Petitioners were right (which they are not) that the present-perfect tense here puts the focus on a sentence's "continuing" effect, Hewitt.Br.13; Duffey.Br.32, they would still lose. One of their own cases makes that clear. In *Lewis v. United States*, a

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[4] *See, e.g.*, Pub. L. No. 111-147, § 513(d), 124 Stat. 71, 112 (2010) (applying amendments to "returns filed on or before such date [of enactment] if the period specified . . . for assessment of such taxes has not expired as of such date"); Pub. L. No. 101-508, § 11317(c), 104 Stat. 1388, 1388-458 (1990) (similar).

[5] *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999) ("This provision was made applicable to 'applications filed before, on, or after' April 24, 1996, 'if final action *has not been taken on them before such date*.'" (emphasis added) (quoting AEDPA, Pub. L. No. 104-132, § 413(g), 110 Stat. 1214, 1269-70 (1996))); Pub. L. No. 104-208, § 2505, 110 Stat. 3009, 3009-469 (1996) ("The amendments made by this subtitle shall be applicable with respect to any claim that *has not been finally adjudicated as of the date of enactment* of this Act." (emphasis added)); Pub. L. No. 115-72, § 1005(c), 131 Stat. 1224, 1234 (2017) ("The amendments made by this section shall apply to . . . any bankruptcy case . . . in which the plan . . . *has not been confirmed on the date of enactment* of this Act[.]" (emphasis added)); Pub. L. No. 115-123, § 41108(d), 132 Stat. 64, 158-59 (2018) ("The amendments made by this section shall apply to information provided before, on, or after the date of the enactment of this Act with respect to which a final determination for an award *has not been made before such date of enactment*." (emphasis added)).

defendant challenged his conviction under a prior felon-in-possession statute, which made it unlawful for "[a]ny person who . . . *has been convicted*" of a felony to possess a firearm. 445 U.S. 55, 56 n.1 (1980) (emphasis added) (quoting 18 U.S.C. App. § 1202(a)). The defendant argued that the predicate state felony conviction was invalid because he had not been represented by counsel. *Id*. at 57-58. This Court assumed that the conviction was invalid and subject to vacatur, but it nevertheless rejected the defendant's argument. *See id*. at 58-59, 64-65. Concentrating on the "language of the statute itself," this Court explained that the law's proscription was "directed unambiguously at any person who 'has been convicted by a court . . . of a felony.'" *Id*. at 60. "No modifier is present, and nothing suggests any restriction on the scope of the term 'convicted.'" *Id*. That language is "sweeping, and its plain meaning is that the *fact of the felony conviction*" on the date of possession is all that matters for imposing a firearm disability. *Id*. at 61 (emphasis added).[6]

[6] In dicta, the Court suggested that a conviction "finally reversed" before the operative date of firearm possession might not support a later felon-in-possession charge. *See Lewis*, 445 U.S. at 61 n.5. But the Court recognized that this did not honor the statute's actual language and was based on an atextual, "common-sense notion" of what Congress intended for that particular status-based offense. *Id.* The Court need not consider that dicta here because Petitioners' "sentence[s]" remained in place as of the operative "date of enactment." FSA § 403(b). Also, there is no reason to believe that Congress would treat vacated sentences the same way it treats a finally vacated conviction in a separate, status-based law. Only the latter bears on a defendant's guilt (and therefore his status as a felon).

The same logic applies here, where the question is whether "a sentence for the offense has not been imposed as of [the First Step Act's] date of enactment." FSA § 403(b). Even under Petitioners' blinkered interpretation, the focus is on the "fact" of whether the relevant order—in *Lewis* a conviction, and here a sentence—"has" or "has not" been imposed as of that specific date. There is no question that a sentence has been imposed, as of that date, for each of the offenses at issue. That is why Petitioners were incarcerated on December 21, 2018.

II. The Legal Effect Of Vacatur Does Not Change The Ordinary Meaning Of Section 403(b).

Left without a foothold in the statutory text, Petitioners urge this Court to abandon ordinary meaning in favor of atextual considerations. They suggest that, "[a]ccording to settled background principles, the law treats a vacated sentence as never having been pronounced," such that a vacated sentence should not be treated as "a sentence" at all. Hewitt.Br.16; *see* Duffey.Br.28. But "[t]his argument teeters on a contorted framing of contested general background principles rather than [§ 403(b)'s] text and context." *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 302 (2023). It is therefore unpersuasive.

A. A General Background Principle Cannot Override Statutory Text.

As an initial matter, "a background principle cannot overcome statutory text." *Uriarte*, 975 F.3d at 609 (Barrett, J., dissenting). This Court has made that point recently and repeatedly. *See, e.g.*, *Corner*

Post, 144 S. Ct. at 2454; *MOAC Mall Holdings*, 598 U.S. at 301-02; *Honeycutt v. United States*, 581 U.S. 443, 453 (2017); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 174-76 (2014). And for good reason: To hold otherwise would ignore the specific text that survived the legislative gauntlet in favor of unexpressed principles that Congress has neither adopted nor endorsed.

"[T]he best course, as always, is to stick with the ordinary meaning of the text that actually applies." *Corner Post*, 144 S. Ct. at 2454. That means "the question in this case is not simply whether there exists some background principle," *Hood*, 571 U.S. at 174, that a "vacated sentence, in the eyes of the law, was never a sentence at all," Duffey.Br.3 (emphasis omitted). Instead, "the question is whether Congress intended that courts engage" in such historical fiction when interpreting the words "a sentence." *Hood*, 571 U.S. at 174. There is no basis to think that Congress did. Its contrary "intent is clear from the statutory text." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 132 (2018).

If anything, Petitioners' own cases refute their theory. They rely on precedents that tellingly characterize a vacated sentence as "a sentence" that has been "imposed." In *Pepper v. United States*, for instance, this Court said that the relevant "sentencing framework applies both at a defendant's initial sentencing and at any subsequent resentencing after *a sentence* has been set aside on appeal." 562 U.S. 476, 490 (2011) (emphasis added). And in *North Carolina v. Pearce*, this Court explained that a defendant could constitutionally "receive a longer sentence than the

one originally *imposed*" if convicted again on remand. 395 U.S. 711, 722 (1969) (emphasis added). The First Step Act uses the same words in the same way, and the "text of the statute controls this case." *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 587 U.S. 262, 269 (2019).

B. There Is No Universal Background Principle that a Vacated Sentence Must Be Disregarded for All Purposes.

Even if a background principle could override statutory language (which it cannot), the Government itself concedes that it would "be incorrect to adopt any general 'background legal principle[]' that 'vacatur makes a sentence void from the start' for all purposes." Gov.Br.26 n.4. The Government's view is correct.

1. Petitioners' Purported Background Principle Is Inconsistent with Related Statutory Provisions.

As a legal matter, a "complete vacatur does not require the district court to proceed as if the initial sentencing never happened." *Uriarte*, 975 F.3d at 608 (Barrett, J., dissenting). Congress has in fact required the opposite. The Sentencing Reform Act—which was passed before the First Step Act—instructs that when a sentence is vacated on appeal, the district court must apply the Sentencing Guidelines "that were in effect *on the date of the previous sentencing* of the defendant prior to the appeal." 18 U.S.C. § 3742(g)(1) (emphasis added). This sentencing statute therefore "belies [Petitioners'] claim that Congress legislate[d] against a background understanding" in 2018 "that a vacatur

erases the initial sentence for all purposes." *Uriarte*, 975 F.3d at 608-09 (Barrett, J., dissenting).

Petitioners would have this Court ignore that express statutory context. Instead, they presume—with no basis in the statutory text—that Congress silently instructed district courts to "recognize the fact of the defendant's prior sentence for purposes of determining his guidelines range (as required by § 3742(g)), but at the same time pretend that sentence never happened for purposes of determining the defendant's mandatory minimum." *Carpenter*, 80 F.4th at 792 (Kethledge, J., concurring). There is no reason to "read § 403(b)'s text to create such incongruity." *Duffey*, 92 F.4th at 312.

Indeed, when Congress wants to exclude vacated sentences or convictions from a statute's reach, it knows how to do so. For instance, the definitional section that applies to § 924 provides that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter." 18 U.S.C. § 921(a)(20). Through this definition, Congress specifically excluded vacated convictions from the meaning of "conviction" for purposes of § 924. But it did not do the same for vacated "sentences." This indicates that Congress understood—consistent with ordinary usage—that a vacated conviction or sentence is still "a conviction" or "a sentence." But it treated the two differently, by including one while excluding the other. That is yet another contextual strike against Petitioners' contortion of § 403(b)'s language. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

"Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision." *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019).

2. A Vacated Order Remains Relevant in Many Contexts.

The historical fact of a vacated order often remains legally relevant to the application of a statute in many other contexts.

Felon-In-Possession. As the government observes, convictions under § 922(g)(1) "turn[] on the person's status on the date he possesses a firearm, even if he subsequently succeeds in vacating the predicate conviction." Gov.Br.26 n.4 (listing cases). That could not be so if the law "treats a vacated" conviction "as never having been pronounced." Hewitt.Br.16; *see* Duffey.Br.28. If the conviction had never been pronounced, then the federal defendant would not have violated § 922(g)(1) on the day he possessed the firearm. But such "belated success in vacating" a conviction does not erase its reality from the historical record. *United States v. Snyder*, 235 F.3d 42, 53 (1st Cir. 2000); *see United States v. Padilla*, 387 F.3d 1087, 1091 (9th Cir. 2004) ("[T]he only relevant circumstance for present purposes is [the defendant's] status as a convicted felon at the time he possessed a firearm. The state court's later order, *nunc pro tunc* or not, has no effect on that status.").

Double Jeopardy. The historical fact of a vacated conviction has relevance for double jeopardy purposes too. Sometimes, a jury will render an inconsistent split verdict acquitting on some charges but convicting on others. *See Bravo-Fernandez v. United States*, 580

U.S. 5, 8 (2016). And, sometimes, an appellate court will vacate the convictions for "legal error unrelated to the inconsistency." *Id.* at 18. Before retrying the now-vacated convictions, a court must ask if the acquittals issue-preclude the retrial. *See id.* at 20. To do that, the court must divine whether, by acquitting on some charges, the "jury actually decided that [the defendant] did not violate" the criminal statute. *Id.* A court in that position is free to consider the "fact that the jury convicted" the defendant under that very statute, even though that conviction was later vacated. *Id.* (cleaned up); *see also id.* at 22 ("A conviction that contradicts those acquittals is plainly relevant to that determination, no less so simply because it is later overturned on appeal for unrelated legal error[.]"). Far from a "legal nullity," the historical fact of the vacated conviction can decide the issue-preclusion question. *See id.* at 20-24. It can also dictate how the defendant may be sentenced if convicted again following a new trial. Any time served for a vacated conviction "must be fully 'credited' in imposing sentence upon a new conviction for the same offense." *Pearce*, 395 U.S. at 718-19.

Sex Offender Registration. The Sex Offender Registration and Notification Act likewise gives legal effect to the historical fact of conviction. That statute defines a "sex offender" as anyone who "was convicted of a sex offense," 34 U.S.C. § 20911(1), and it criminalizes failure to register with the appropriate sex-offender registry, *see* 18 U.S.C. § 2250(a). Courts have held that the phrase "'was convicted' refers to the fact of conviction and does not refer just to a 'valid' conviction." *United States v. Roberson*, 752 F.3d 517, 522 (1st Cir. 2014). If a later-vacated conviction

factually existed when the defendant failed to register, then he is guilty of failing to register. *Id.*

Fraud. Similarly, lying about the existence of an order that is later vacated does not retroactively make the statement true. The lie can still be the basis for a criminal fraud conviction. *See United States v. Miller*, 891 F.3d 1220, 1241 (10th Cir. 2018) ("Defendant's license had indeed been suspended, and the vacatur of the suspension order did not effectively remove it from historical existence and permit Defendant to state that his license had never been suspended.").

Immigration. Duffey and Ross concede that vacated convictions can also be relevant in the immigration context. Duffey.Br.24 n.12. "A vacatur or expungement obtained under a rehabilitative statute, or granted simply in order to help the alien avoid 'immigration hardships,' has no effect for immigration law purposes." *Garces v. U.S. Att'y Gen.*, 611 F.3d 1337, 1344 (11th Cir. 2010) (citation omitted); *see also, e.g.*, *Sutherland v. Holder*, 769 F.3d 144, 146 (2d Cir. 2014). Courts must still consider the vacated order.

* * *

These statutes and holdings confirm that "vacatur does not erase [Petitioners'] prior sentence[s] from history" even as a legal matter. *United States v. Jackson*, 995 F.3d 522, 525 (6th Cir. 2021). That is especially true where, as here, the sentence for the relevant offense is vacated "for unrelated legal error" on another offense. *Bravo-Fernandez*, 580 U.S. at 22; *see also Garces*, 611 F.3d at 1344. There is no basis to conclude that Congress departed from the ordinary

meaning of "sentence" in the First Step Act to exclude Petitioners' later-vacated sentences.

3. Petitioners' Various Counterexamples Are Inapposite.

Against this textual and contextual evidence, Duffey and Ross offer a number of examples that they say establish their purported universal background principle. But their examples all fail to support their theory. In fact, many contradict it.

Their criminal procedure examples all fall flat. *See* Duffey.Br.18-19. A defendant's rights to allocution, to be present, and to be sentenced in open court during resentencing have nothing to do with vacatur. They are instead—as Duffey and Ross appear to recognize—dictated by the text of various rules and statutes. Each of those sources uses the term "sentence" or "sentencing." *See* Fed. R. Crim. P. 32(i)(4)(A) (allocution); Fed. R. Crim. P. 43(a)(3) (presence); 18 U.S.C. § 3553(c) (open court). This shows that a sentence imposed during resentencing is "a sentence." But it does not suggest the opposite about a sentence imposed during the initial sentencing proceedings.

Petitioners' reliance on the Sentencing Guidelines only harms their cause. *See* Duffey.Br.22-23. The Sentencing Commission has stated that prior sentences "resulting from *convictions*" that "have been reversed or vacated" for certain reasons "are not to be counted." U.S.S.G. § 4A1.2 cmt. n.6 (emphasis added). But Petitioners' relevant *convictions* were never vacated, let alone for any of the reasons set forth in the commentary. And sentences resulting from convictions that have been vacated "for reasons unrelated to innocence or errors of law," the

Sentencing Commission has said, "*are* to be counted." *Id.* § 4A1.2 cmt. n.10 (emphasis added). That is, the historical fact of sentencing still matters, notwithstanding the vacatur.

Petitioners try to blur the distinction between vacatur of a conviction and vacatur of a sentence in other ways. *See* Duffey.Br.20-25. But this overlooks important differences between the two concepts. For instance, when a court vacates a conviction for an offense, the defendant "must be presumed innocent of that charge." *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988). Accordingly, it sometimes makes sense to disregard the conviction. The same cannot be said when a *sentence* for the offense is vacated—particularly not where, as here, it is vacated for reasons unrelated to the underlying offense. Moreover, many of Petitioners' own examples are themselves riddled with exceptions, even for vacated convictions. *See supra* Section II.B.2. This further undermines their professed background principle.

The concept of *Munsingwear* vacatur is even further afield. *See* Duffey.Br.25; Hewitt.Br.20. That equitable doctrine applies in "civil case[s]" to "clear[] the path for future relitigation of the issues between the parties" where a case becomes moot before the losing party can obtain meaningful appellate review. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). But it appears this Court "has never applied *Munsingwear* in a criminal case." *United States v. Tapia-Marquez*, 361 F.3d 535, 538 (9th Cir. 2004); *accord United States v. Silva*, 2023 WL 3001570, at *3 (6th Cir. Apr. 19, 2023). Nor would it make any sense in the sentencing context, where issues become moot,

for example, because a sentence has expired or the defendant has passed away. *See United States v. Sampson*, 26 F.4th 514, 516 (1st Cir. 2022). *Munsingwear* thus provides no support for the notion that the phrase "a sentence for the offense" excludes a later-vacated sentence.

Petitioners also fumble for support in cases and historical sources as far back as the 1400s. Duffey.Br.26-28; Hewitt.Br.18-21. But statutory interpretation seeks to discern the "ordinary meaning" of the text "*at the time* Congress enacted the statute." *Wis. Cent. Ltd.*, 585 U.S. at 277 (emphasis added; citation omitted). Petitioners never explain how these historical sources "long predat[ing]" the First Step Act's passage in 2018 might "illuminate the scope" of the law's text. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 34 (2022). Nor is there any reason to believe that members of the 115th Congress (not to mention the American people) were even aware of these decisions from lower courts and the Queen's Bench, let alone that § 403(b) silently incorporated some supposed background principle from them. Indeed, with the exception of *Pepper*, Petitioners' detours through history fail to uncover a single vacatur case that arose in the resentencing context. *See* Duffey.Br.17, 26-28, Hewitt.Br.18-21.[7] And as already demonstrated, by 2018, the historical fact of a prior vacated order was relevant in that context and

[7] Duffey and Ross's lead case, *Miller v. Aderhold*, 288 U.S. 206 (1933), was not even a vacatur case. The trial court there lacked authority to issue its permanently suspended sentence, so nothing prevented it from rendering an actual sentence at the succeeding term. *See id.* at 209-11.

many others. Petitioners' reliance on historical sources is thus simply misplaced.

That leaves Petitioners to hang their interpretive hat on *Pepper*. They note that this Court there said that vacatur "effectively wiped the slate clean" for purposes of the law-of-the-case doctrine. Duffey.Br.18 (quoting *Pepper*, 562 U.S. at 507). This, they say, means that each of their prior sentences "was null and void from the start" and "*never* a sentence at all." Duffey.Br.3; *see* Hewitt.Br.20-21. That reasoning impermissibly "gives technical legal effect to a figure of speech." *Carpenter*, 80 F.4th at 792 (Kethledge, J., concurring). Vacatur "wipes the slate clean insofar as the defendant will be sentenced anew." *Uriarte*, 975 F.3d at 608 (Barrett, J., dissenting). But even *Pepper* recognized that a later-vacated sentence is "a sentence." 562 U.S. at 490. Thus, *Pepper* does not come anywhere close to creating a "sufficiently well established" background principle that a vacated sentence was never "a sentence" at all. *Pasquantino v. United States*, 544 U.S. 349, 368 (2005).

C. The Federal Saving Statute Forecloses Petitioners' Position.

Regardless, even if there were a universal background principle that vacatur prohibits courts from looking at the historical fact of a sentence's imposition, Petitioners' theory would still fail. That is because Congress has expressly adopted a countervailing background principle. The federal saving statute provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless the repealing act shall so*

expressly provide." 1 U.S.C. § 109 (emphasis added). "[T]he word 'repeal' applies when a new statute simply diminishes the penalties that the older statute set forth." *Dorsey v. United States*, 567 U.S. 260, 272 (2012). That is how Petitioners attempt to read the First Step Act—to retroactively authorize reduced penalties nearly two decades after they "commit[ted] the underlying conduct that ma[de] [them] liable." *Id.*

Given the federal saving statute's express language, though, courts "must assume that Congress did *not* intend those [new] penalties to apply unless it *clearly* indicated to the contrary." *Id.* at 265 (second emphasis added). "Congress is well aware of [this] background principle when it enacts new criminal statutes." *Id.* at 274. But Petitioners would have this Court replace that *express* (and duly enacted) statutory background principle with an *unexpressed* (and contested) one. And they would do so in order to thwart the ordinary meaning of the law. That gets the interpretive task precisely backwards.

Duffey and Ross retort that the First Step Act "clearly abrogates Section 109's interpretive principle" because "Section 403 applies at least to *initial* sentencing." Duffey.Br.46; *see also* Gov.Br.24 (observing that § 403 applies "to at least some prior offenders"). But that is beside the point. Petitioners are seeking to apply the Act retroactively to their *re*sentencing. Accordingly, the question remains "whether Congress has clearly indicated that the Act should apply" retroactively when a defendant is resentenced for an offense after the date of enactment. *Carpenter*, 80 F.4th at 791 (Kethledge, J., concurring). It clearly has not.

III. Petitioners' And The Government's Remaining Arguments Are Unpersuasive.

"Unable to anchor [their] preferred reading in the statutory text," Petitioners and the Government "seek[] refuge in a litany" of other "extratextual considerations." *Nat'l Ass'n of Mfrs.*, 583 U.S. at 129. They rely on drafting history, a statutory title, general floor statements, purported notions of congressional purpose, and the rule of lenity. But those considerations "provide no basis to depart from the statute's plain language." *Id.*

A. The Drafting History Cuts Against Petitioners' Interpretation.

Duffey and Ross rely on drafting history that actually disproves their argument. They note that "[e]arlier versions of the First Step Act would have made Section 403 fully retroactive." Duffey.Br.37. From this, they insist that "Congress intended to cover the waterfront of *all* Section 924(c) cases—'pending' and 'past.'" Duffey.Br.38.

That fundamentally misunderstands the legislative process. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). Congress ultimately decided *not* to apply § 403 to "past" cases like Petitioners', in which "a sentence for the offense has . . . been imposed as of [the] date of enactment." FSA § 403(b). This Court cannot expand the statute

to cover situations that Congress conspicuously left out.

B. Section 403's Title Does Not Bear on the Statutory Text.

Duffey and Ross also latch onto Congress's labeling of § 403 as a "clarification." They claim this "indicates that Congress *always* intended Section 924(c) to prohibit the stacking of enhanced mandatory minimums for first-time offenders" and "never intended the result reached in *Deal*." Duffey.Br.41-42. But that is neither true nor relevant.

It is not true, because the 115th Congress that passed the First Step Act cannot speak to the intent of the 90th Congress that passed the original mandatory-minimum provisions 50 years earlier. *See* Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224 (1968). Nor can it speak to the intent of any of the 24 Congresses in between that left the original language in place, even as they otherwise amended § 924(c) in *Deal*'s wake. *See, e.g.*, Pub. L. No. 105-386, § 1 (1998). Those amendments, if anything, suggest that previous Congresses *did* agree with the result in *Deal*. *See Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 722 (2018) ("Congress is presumed to be aware" of a "judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (citation omitted)).

The "clarification" title is also irrelevant because Congress's "clarification" was to the substantive scope "of Section 924(c) of Title 18," FSA § 403 (capitalization altered), not to the scope of retroactivity. Congress's choice of title merely confirms that it intended to abrogate *Deal*, which is a

point that nobody disputes. In all events, "a title or heading should never be allowed to override the plain words of a text." Scalia & Garner, *supra*, at 222; *see, e.g.*, *Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998). As already explained, Petitioners find no support in the actual text of § 403(b). If anything, the relevant heading is § 403(b)'s, which indicates that the provision addresses "pending cases." Petitioners' cases were not "pending" on the date of enactment. They were closed, and Petitioners were serving sentences imposed years earlier.

C. The Legislative History Does Not Support Petitioners' Interpretation.

Petitioners and the Government also invoke a smattering of legislative history to muddle the text. In fact, the Government (tellingly) leads its entire argument with legislative history. Gov.Br.14-15. But "legislative history is not the law," and so no amount of it can override statutory language. *Azar v. Allina Health Servs.*, 587 U.S. 566, 579 (2019) (citation omitted). Only that final text has survived the "single, finely wrought and exhaustively considere[d] procedure" that our Constitution demands for legislation. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

Besides, "scattered floor statements by individual lawmakers"—which Petitioners and the Government rely on—are "'among the least illuminating forms of legislative history.'" *Advocate Health Care Network v. Stapleton*, 581 U.S. 468, 481 (2017) (citation omitted). That is particularly true here, where Petitioners and the Government rummage for support in generalized statements that have nothing to do with the question presented. *See* Gov.Br.14-15; Duffey.Br.39-40;

Hewitt.Br.31. They merely seek to "divine messages from congressional commentary directed to different questions altogether—a project that threatens to 'substitute the Court for the Congress.'" *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018) (alteration adopted; citation omitted).

Even if this Court were to consider the legislative history, it would support affirming the decision below. If that history can be said to reveal anything, it is that Congress understood that the First Step Act's mandatory-minimum reforms "don't apply to individuals currently incarcerated." 164 Cong. Rec. S7775 (daily ed. Dec. 18, 2018) (Sen. Cardin). Petitioners were "individuals currently incarcerated" at the time of enactment and for many years both before and after that—including at the time of resentencing and up through this day. *See* 18 U.S.C. § 3143(a)-(b); *United States v. Olis*, 450 F.3d 583, 587 (5th Cir. 2006).

D. Petitioners' Appeals to Statutory Purpose Cannot Salvage Their Atextual Reading.

Petitioners and the Government next "retreat[] to that last redoubt of losing causes," contending that "the statute at hand should be liberally construed to achieve its purposes." *Director, Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995); *see* Hewitt.Br.31-33; Gov.Br.23-25; *see also* Duffey.Br.36. That "overrid[ing]" purpose, they say, is to promote "the fairness of broadly applying the First Step Act's reduced penalties." Gov.Br.23.

But the "glitch in this argument is of course the text" of the statute Congress enacted. *NLRB v. SW*

Gen., Inc., 580 U.S. 288, 306 (2017). "[I]t is quite mistaken to assume"—as Petitioners and the Government have—"that 'whatever' might appear to 'further[] the statute's primary objective must be the law.'" *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017) (citation omitted). "[N]o law pursues its purposes at all costs." *Luna Perez v. Sturgis Pub. Sch.*, 598 U.S. 142, 150 (2023) (alterations adopted; citation omitted). The First Step Act is no exception. *See Pulsifer*, 601 U.S. at 152. All agree that Congress did not afford retroactive "relief to all defendants, but only to some." *Id.* "And to determine the exact contours of that class, [this Court] can do no better than examine [§ 403(b)'s] text in context." *Id.* That text in context dooms Petitioners' claim.

The Government and Hewitt likewise submit that "no sound reason exists" as a policy matter for denying retroactive relief to defendants with later-vacated sentences. Gov.Br.26; *see* Hewitt.Br.34. But that misunderstands this Court's interpretive task. "Policy arguments are properly addressed to Congress, not this Court." *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 368 (2018). And this Court has repeatedly explained that "'even the most formidable' policy arguments cannot 'overcome' a clear statutory directive." *BP P.L.C. v. Mayor & City Council of Baltimore*, 593 U.S. 230, 245 (2021) (quoting *Kloeckner v. Solis*, 568 U.S. 41, 56 n.4 (2012)). "If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, [they] would risk failing to 'take account of' legislative compromises essential to a law's passage and, in that way, thwart rather than honor 'the effectuation of congressional intent.'" *New*

Prime Inc. v. Oliveira, 586 U.S. 105, 120-21 (2019) (alterations adopted; citation omitted).

In any event, there *are* sound reasons for Congress drawing the line where it did. For starters, it is a clear rule that can be easily applied from the date of enactment onward—which the text itself indicates was Congress's goal. Also, accepting Petitioners' contrary argument would invite unfairness of its own. For instance, it would illogically "favor defendants whose appeals—for whatever reason—took longer to resolve." *United States v. Hodges*, 948 F.3d 160, 164 (3d Cir. 2020). An example offered by the Third Circuit illustrates the point:

> Imagine two § 924(c) defendants sentenced before the First Step Act who successfully appeal their sentences. Suppose the first defendant homes-in on a single dispositive issue, allowing vacatur and resentencing before the First Step Act's passage. But suppose the second defendant complicates his appeal with multiple yet non-meritorious issues, delaying resentencing until after the First Step Act passes. The first defendant would not benefit from the new mandatory minimum, but the second defendant would.

Id. Petitioners' reading would also reward criminal defendants who might have "delayed the [district] court with continuances." *Uriarte*, 975 F.3d at 610 (Barrett, J., dissenting). And it would amplify the risk that co-defendants—who are usually sentenced at similar times—will receive large disparities in punishment based on the timing quirks of later appellate and habeas proceedings. *See id.*

This case itself provides another example of why it made sense for Congress to draw the line where it did. Petitioners' sentences were vacated for reasons that had nothing to do with the § 924(c) offenses at issue. Consequently, Petitioners were resentenced only because they committed *more* dangerous behavior. Had they not conspired with one another to commit armed bank robbery and instead acted alone, they would have never been resentenced. Applying the First Step Act's modified mandatory-minimum rules retroactively to Petitioners' cases would thus provide preferential treatment to them over otherwise similarly situated individuals who committed fewer, less dangerous crimes. *Cf. Iannelli v. United States*, 420 U.S. 770, 778 (1975) ("This Court repeatedly has recognized that a conspiracy poses distinct dangers quite apart from those of the substantive offense.").[8]

Of course, the text of the law, not these policy concerns, controls the analysis. But Petitioners' and the Government's policy arguments fail even on their own terms. And these sorts of "disparities, reflecting a line-drawing effort, will exist whenever Congress

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[8] Duffey and Ross also suggest that the Fifth Circuit's reading would produce "extreme results" in a hypothetical case where a defendant secured a new trial on appeal before the First Step Act's passage. Duffey.Br.50 (capitalization altered). But "this Court's task is to discern and apply the law's plain meaning as faithfully as [it] can, not 'to assess the consequences of each approach and adopt the one that produces the least mischief.'" *BP*, 593 U.S. at 246 (citation omitted). Nor is it "strange," as Duffey and Ross maintain, Duffey.Br.51, to resentence a criminal defendant consistent with how other offenders who committed the same crimes on the same dates and received their sentences at the same time as the defendant's initial sentence.

enacts a new law changing sentences." *Dorsey*, 567 U.S. at 280. That is all the more reason to heed the First Step Act's text and "the limits up to which Congress was prepared to go." *New Prime*, 586 U.S. at 121 (quotation marks omitted). Congress chose to draw the line at the imposition of a sentence for the offense by the date of enactment.

E. The Rule of Lenity Does Not Apply.

Finally, Petitioners invoke the rule of lenity. Duffey.Br.42-44; Hewitt.Br.35-37. But that substantive canon "applies only when a criminal statute contains a 'grievous ambiguity or uncertainty,' and 'only if, after seizing everything from which aid can be derived,' the Court 'can make no more than a guess as to what Congress intended.'" *Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016) (citation omitted). For the reasons already explained, there is no ambiguity—let alone a grievous ambiguity—in this case.

Even if there were, lenity would still play no role. The rule of lenity exists "to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990). But, "in the sentencing context," these theoretical justifications "are weak at best." Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. Tol. L. Rev. 511, 514 (2002). They are even weaker insofar as the retroactivity of a sentencing provision is concerned—for two critical reasons.

First, there are no "fair warning" concerns here. *Crandon*, 494 U.S. at 158. When the Scarecrow Bandits committed their string of armed bank

robberies in 2008, the mandatory minimums that Petitioners would face for their § 924(c) offenses were well established. *See Deal*, 508 U.S. at 137. Thus, to the extent Petitioners considered their potential punishments when deciding to commit their many bank robberies, they would have expected to face the very sentences they both initially and ultimately received.

Second, construing the retroactive scope of a sentencing law broadly in favor of defendants does not promote the separation of powers. It thwarts it. As explained above, Congress "is well aware of the background principle" that "before interpreting a new criminal statute to apply its new penalties to a set of pre-Act offenders," courts will "assure themselves that ordinary interpretive considerations point *clearly* in that direction." *Dorsey*, 567 U.S. at 274-75 (emphasis added). That principle is the result of Congress's own overarching command that modifications to penal statutes will not be construed retroactively unless they "so expressly provide." 1 U.S.C. § 109. Applying the rule of lenity would flip that statutory presumption on its head and disrespect Congress's instructions. The federal saving statute's text "serves to remove the ambiguity that is a necessary precondition to invocation of the rule." *Dorsey*, 567 U.S. at 296 (Scalia, J., dissenting). And lenity cannot countermand that congressional direction.

* * *

In the end, "only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock v. Clayton County*, 590 U.S. 644, 654 (2020). The decision below faithfully applied that

law by adhering to § 403(b)'s plain text. "If Congress enacted into law something different from what it intended," then it can of course "amend the statute to conform it to its intent." *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004). Or if the Executive believes it would be more "fair[]" to reduce Petitioners' sentences, Gov.Br.26, it can utilize the pardon power to commute those sentences, *see* U.S. Const. art. II, § 2, cl. 1. But this Court's role is "to apply, not amend, the work of the People's representatives." *Henson*, 582 U.S. at 90. Petitioners were initially sentenced for the offenses at issue in 2010. They were resentenced for those offenses in 2012. And they were serving those sentences when Congress enacted the First Step Act more than six years later, on December 21, 2018. The fact that they later received a third go-round for resentencing does not mean that "a sentence for the offense has not been imposed as of such date of enactment." FSA § 403(b). As a result, Petitioners are ineligible for retroactive application of the First Step Act's modified mandatory-minimum rules.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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