

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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TONY R. HEWITT,)
Petitioner,)
v.) No. 23-1002
UNITED STATES,)
Respondent.)
- - - - -

COREY DEYON DUFFEY AND)
JARVIS DUPREE ROSS,)
Petitioners,)
v.) No. 23-1150
UNITED STATES,)
Respondent.)
- - - - -

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 23-1002,
5 Hewitt versus United States, and the
6 consolidated case.

7 Mr. Kimberly.

8 ORAL ARGUMENT OF MICHAEL B. KIMBERLY
9 ON BEHALF OF THE PETITIONERS

10 MR. KIMBERLY: Mr. Chief Justice, and
11 may it please the Court:

12 After decades of urging by sentencing
13 judges and the Sentencing Commission, Congress
14 in 2018 enacted Section 403 of the First Step
15 Act. The point of Section 403 was to override
16 Deal against United States, which called for
17 extraordinarily harsh mandatory-minimum
18 sentences even for first-time offenders.

19 In enacting this override, Congress
20 had to balance two countervailing values:
21 first, justice in sentencing, and, second,
22 finality of judgments. Congress struck the
23 balance in 403(b) by making 403(a) retroactively
24 applicable to offenders whose conduct predated
25 the Act but whose cases were pending and

1 non-final as of that date, those for whom "a
2 sentence for the offense has not been imposed."

3 For at least four reasons, that
4 language calls for application of 403(a) to all
5 post-enact -- enactment plenary sentencing
6 proceedings, including plenary resentencings
7 following vacatur.

8 First, a sentence that has been
9 imposed does not include a sentence that has
10 been vacated because a sentence that has been
11 vacated is treated as though it never was
12 imposed.

13 Second, Congress's use of the
14 present-perfect tense with the preposition "as
15 of" connotes an ongoing condition. It makes no
16 sense to say that a sentence has been imposed as
17 of the date of enactment but that it has since
18 been vacated.

19 Third, the statutory structure
20 confirms that when Congress wishes to accomplish
21 the objective that the amicus is defending, it
22 uses the past tense and a different preposition.

23 And, finally, Your Honors, the rules
24 of statutory construction do not require the
25 Court to turn a blind eye to common sense.

1 Amicus's interpretation produces an anomalous
2 result which there is no evidence Congress
3 intended, and it's one that is flatly contrary
4 to its acknowledged purpose.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Would you make any
7 distinction or do you think there's -- it's a
8 better -- there is a better argument for pre-Act
9 vacatur as opposed to post-Act vacatur?

10 MR. KIMBERLY: I -- I don't think so,
11 Your Honor. I think, regardless when the
12 vacatur occurs, the upshot is that the case is
13 pending, and it's one as to which the finality
14 interests which drove Congress's rejection of
15 what had been introduced as Section 403(b)(2) do
16 not attach at that point.

17 JUSTICE THOMAS: It seems to me that
18 the -- the Act actually focuses more on
19 imposition of the vacatur as opposed to the
20 vacatur itself.

21 What do you make of that argument? I
22 think that was an argument that the dissent in
23 the Seventh Circuit case made.

24 MR. KIMBERLY: Well, Your Honor, I --
25 I -- as I understand the -- the position of

1 Justice Barrett in the Uriarte case in the
2 Seventh Circuit and other courts that aligned
3 with her position, it -- it turned on the word
4 "imposed" and the idea that "imposed" describes
5 a sort of immutable historical fact.

6 But I -- I think there are two things
7 to say about that. The first is the effect of a
8 vacatur is, in fact, at -- by operation of law,
9 by operation of a legal fiction, to undo that
10 historical fact on a prospective basis. So, at
11 the time of application of 403(b), which is at
12 the time of resentencing, the judge has to ask
13 whether a sentence that was imposed
14 pre-enactment but has since been vacated is one
15 that has been imposed as of December 21st, 2018.
16 And the answer to that question is no because it
17 has been vacated and because a vacated sentence
18 is treated as though it was never imposed. I --

19 CHIEF JUSTICE ROBERTS: Well, this
20 is -- I mean, it is a fortuitous windfall for
21 your client, right? The -- the sentence was
22 vacated for reasons having nothing to do with
23 the pertinent sentence that's at -- at issue
24 here. Is that right? They're totally unrelated
25 issues?

1 MR. KIMBERLY: It's true, Your Honor,
2 that the basis upon which the vacatur of this
3 sentence was entered did not have to do with
4 these -- the convictions on which the sentences
5 were being reestablished.

6 CHIEF JUSTICE ROBERTS: Well, putting
7 aside -- and I'm not saying that the technical
8 nuances won't control -- but, sort of as a
9 matter of substantive fairness, this is just a
10 windfall -- he's just lucky that there were
11 those errors with respect to other unrelated
12 issues, right?

13 MR. KIMBERLY: Well, he -- he may have
14 been lucky, Your Honor. I think luck plays a
15 large role in sentencing across the board. What
16 I would say is what's clear is Congress was
17 focused on finality. It made clear that it did
18 not want Deal to continue applying to newly
19 imposed sentences. And, at the same time, it
20 wanted to -- to respect the finality of ongoing
21 valid sentences in past cases.

22 And, once a vacatur has been entered,
23 the case is no longer a past case as to which
24 any finality interests are any longer present.

25 And I would note in addition, Your

1 Honor, that the use of the present-perfect tense
2 and the preposition "as of" are entirely
3 consistent with our perspective on the role that
4 a vacatur plays.

5 You -- you know, consider, for
6 example, this -- this hypothetical: An award
7 will be -- an awards ceremony will be held for
8 anyone who has been awarded a medal as of
9 January 1st. And now imagine that Jones was
10 awarded a medal before January 1st but that
11 after January 1st and before the awards
12 ceremony, the award was stripped from him.

13 Nobody would say that he's still
14 entitled to attend the awards ceremony as an
15 honoree despite that he had technically been
16 awarded a medal before January 1st, before the
17 January 1st cutoff, and the reason is because
18 nobody would say that I have been awarded a
19 medal or he has been awarded a medal unless he
20 still had the medal.

21 If the medal had been stripped, one
22 would say he was awarded a medal, but then it
23 was taken away.

24 JUSTICE KAVANAUGH: I don't know if
25 that context really translates here. Whenever

1 Congress is enacting a new sentencing law and
2 determining how retroactive to make it, they
3 have to draw a line. And the draw -- the line
4 could be, as it is in other provisions of the
5 First Step Act, to everyone, or it could be to
6 everyone but not if you have a conviction. So
7 conviction could be the key moment. Or it could
8 be to the -- everyone but not if you've been
9 sentenced. Or it could be -- you know, they
10 could draw those lines.

11 And each of those lines is going to
12 create anomalies, to your point in your opening
13 about anomalies. For example, yours, to pick up
14 on the Chief Justice's question, creates the
15 anomaly that two people committed the acts on
16 the exact same day, the exact same acts, one of
17 whom got the sentence vacated, will get the
18 benefit of this new provision, whereas the other
19 person on the same day committed the same acts
20 but doesn't, for whatever technical reason, get
21 a vacated sentence, is still stuck with the old
22 regime with the -- without the benefit of the
23 anti-stacking provision.

24 So that -- anomalies are going to
25 always exist, is my point, and so I don't know

1 that the common sense that you reference really
2 translates to retroactive sentencing provisions.

3 MR. KIMBERLY: So, Your Honor, I -- I
4 meant something a little bit different when I
5 said common sense. What I meant was, is there
6 any reason -- and -- and I appreciate there are
7 unfairnesses and anomalies on both sides. It's
8 inevitable whenever Congress changes a law like
9 this concerning sentencing, especially one --

10 JUSTICE KAVANAUGH: Well, can I just
11 stop you there then? Because there are always
12 going to be anomalies, why not just read the
13 language as written?

14 You say sometimes in your brief -- and
15 I agree with this, and I've said this -- you got
16 to look at the broader context, don't be a
17 literalist. I appreciated the language you had
18 in the brief on that, and I agree with that.

19 But, here, it's not as if, if we move
20 the line, suddenly, the anomalies will disappear
21 and that makes more sense.

22 MR. KIMBERLY: So -- so what --

23 JUSTICE KAVANAUGH: That's -- that's
24 my concern about departing from the language
25 here.

1 And I take the literalist point, but,
2 here, there are going to be anomalies either
3 way.

4 MR. KIMBERLY: So what I meant, Your
5 Honor, when -- when I referred to an anomaly is
6 that the -- the line that the amicus ascribes to
7 403(b) is not one that is relevant at all to the
8 considerations that were before the Congress.

9 If Congress was concerned to respect
10 finality on the one hand while ensuring that
11 Deal would cease applying in future sentencings
12 on the other hand, the line that we propose
13 respects that distinction.

14 JUSTICE KAVANAUGH: And that's a good
15 point for you, but Congress was well aware --
16 and I think that's one of the better points for
17 you -- but Congress was well aware that lots of
18 sentences get vacated. And --

19 MR. KIMBERLY: Well, that --

20 JUSTICE KAVANAUGH: -- and yet,
21 Congress could have easily -- you can always say
22 this to both sides -- but Congress could have
23 easily put in language that referred to those
24 whose sentences were vacated and are going to
25 face a resentencing.

1 MR. KIMBERLY: Right.

2 JUSTICE KAVANAUGH: That would have
3 been very easy to write.

4 MR. KIMBERLY: As would the inverse,
5 Your Honor.

6 JUSTICE KAVANAUGH: Yeah.

7 MR. KIMBERLY: So, certainly, Congress
8 could have said "initial sentence." Just the
9 same, it -- it could have said "valid sentence."

10 So the question is: Presented with
11 that linguistic possibility one way or the
12 other, how do you determine which Congress
13 intended? And I think the answer is you have to
14 look to the background legal conventions that
15 Congress is presumed to comply with when it
16 enacts laws like this.

17 JUSTICE ALITO: Mr. Kimberly, have you
18 been employed by Mayer Brown?

19 MR. KIMBERLY: Yes, I have.

20 JUSTICE ALITO: Well -- but you're not
21 anymore?

22 MR. KIMBERLY: Correct.

23 JUSTICE ALITO: So what does that do
24 with your -- what you tried to derive from the
25 use of the present-perfect tense?

1 MR. KIMBERLY: Well, I -- I think
2 the -- the natural way to describe the fact that
3 I've been employed by one firm before being
4 employed by another firm is to use the past
5 perfect.

6 And in further response to Justice
7 Kavanaugh's question, Congress did exactly that
8 in the surrounding provisions.

9 JUSTICE ALITO: Well, was the sentence
10 that I -- the question that I asked you
11 grammatically confusing? Should I have said:
12 Mr. Kimberly, had you ever been employed by
13 Mayer Brown?

14 MR. KIMBERLY: I think it would be
15 perfectly acceptable to put it in those terms.
16 You could use the past tense as well.

17 JUSTICE ALITO: Well, I could say
18 "were you ever." But "had you ever been,"
19 wouldn't that be very odd?

20 MR. KIMBERLY: Well, that would
21 because the past-perfect tense is used to
22 describe a -- a discrete past event antecedent
23 to some other past event.

24 So, here, it would be the imposition
25 of a sentence before December 21st, 2018. In

1 Your Honor's hypothetical, there's no other past
2 event to which my prior employment is
3 antecedent.

4 JUSTICE ALITO: Did the trial judge
5 have an obligation to vacate these sentences?

6 MR. KIMBERLY: No, there was no
7 obligation. It is the standard practice when
8 other counts of a conviction -- of a verdict are
9 vacated to vacate the sentence.

10 JUSTICE ALITO: But -- so you refer to
11 these as invalid convictions, but -- or invalid
12 sentences, but they weren't invalid. They were
13 sentences that were vacated based on a
14 convention.

15 And the only reason I can think of for
16 this convention -- you'll tell me that I'm wrong
17 if there are other reasons -- but the only
18 reason I can think of for this convention is a
19 reason that cuts against the interests of the
20 defendant. It is to allow the judge to impose a
21 more severe sentence on the remaining valid
22 counts have -- in light of the -- the vacatur of
23 the invalid counts.

24 MR. KIMBERLY: Your Honor, I don't
25 think it follows necessarily that the imposition

1 of a new sentence would necessarily be more
2 severe.

3 JUSTICE ALITO: No, it wouldn't
4 necessarily be more severe. But what's the
5 reason for vacating perfectly valid sentences
6 just because some other sentences -- sentences
7 on other counts were vacated?

8 MR. KIMBERLY: Well, I -- it's as --

9 JUSTICE ALITO: What's the reason for
10 that convention?

11 MR. KIMBERLY: -- it's as the Court
12 said in Pepper, that the -- a sentencing on a
13 multi-count case is sort of a -- a holistic
14 package. And the way that the judge might
15 approach sentencing would differ if it's a
16 different subset of underlying convictions.

17 JUSTICE ALITO: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Anything further?

21 JUSTICE THOMAS: No.

22 CHIEF JUSTICE ROBERTS: Justice Alito?

23 JUSTICE ALITO: What do you make of
24 the fact that the Solicitor General does not
25 defend the -- your argument that the vacatur of

1 a sentence means that the sentence was void ab
2 initio for all purposes?

3 MR. KIMBERLY: Your Honor, I
4 understand the government's hesitation on this
5 front to concern status offenses.

6 And so I want to be clear that when we
7 say a -- a -- a vacated order or judgment or
8 sentence is treated as void ab initio by a
9 vacatur, what we mean is that it is treated as
10 void ab initio prospectively. So, moving
11 forward, that order or sentence or judgment is
12 treated as though it never happened.

13 You -- you -- you've got to understand
14 that principle from the point of application of
15 the statute that depends on the thing that's
16 being vacated.

17 So, when you're talking, for instance,
18 about a status offense, that's the point at
19 which the offense conduct takes place. And so,
20 if at the time the offense conduct takes place a
21 prior conviction had been vacated, it would not
22 serve as a predicate fact giving rise to
23 criminal liability.

24 JUSTICE ALITO: All right. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: We -- the
3 questioning started in part with the
4 arbitrariness of this point. In fact, the First
5 Step Act, in its retroactivity, is arbitrary --

6 MR. KIMBERLY: That's right.

7 JUSTICE SOTOMAYOR: -- because it's
8 not tied to the time of the commission of the
9 offense, correct?

10 MR. KIMBERLY: That's correct, Your
11 Honor.

12 JUSTICE SOTOMAYOR: And so there are
13 some defendants who committed the crime earlier
14 and got convicted earlier and their sentence
15 stands. And there are some defendants who
16 happen to commit it on the exact same day, it
17 could be co-defendants, and one of them was
18 sentenced after the First Step Act, and they
19 wouldn't -- they wouldn't get the benefit of it
20 under this interpretation, correct?

21 MR. KIMBERLY: That's correct. The
22 date of finality of the sentence --

23 JUSTICE SOTOMAYOR: All right.

24 MR. KIMBERLY: -- doesn't turn on the
25 date of the conduct.

1 JUSTICE SOTOMAYOR: The part of this
2 conversation that hasn't been discussed is the
3 fortuity to the defendant, but I thought that
4 one of the motivating facts for this change was
5 not the effect on defendants but the effect on
6 courts, meaning that there was an outcry -- I
7 think many, many decisions by judges --
8 complaining that their hands were tied in an
9 unfair way in calculating a proper sentence
10 because prosecutors held the decision of whether
11 to charge multiple crimes or a single crime.

12 So, if in a jurisdiction where
13 multiple crimes were charged as having been
14 committed after one incident, they were
15 stacked -- they were stacked. In other
16 jurisdictions, where multiple incidents were
17 charged as one crime, they weren't stacked.
18 Correct?

19 MR. KIMBERLY: That's correct, Your
20 Honor.

21 JUSTICE SOTOMAYOR: And so that us
22 ruling in favor of the argument raised by amicus
23 would go back to tying the hands of district
24 courts, correct?

25 MR. KIMBERLY: That's right, Your

1 Honor.

2 JUSTICE SOTOMAYOR: And answering or
3 responding to Justice Alito's point, that is one
4 of the reasons to vacate the entire sentence,
5 isn't it?

6 MR. KIMBERLY: It's certainly a
7 consideration that a judge could take into
8 account.

9 JUSTICE SOTOMAYOR: And to the extent
10 that a judge in a resentence like this
11 situation, where there's less of a mandatory
12 minimum, would have the freedom now to craft a
13 sentence higher than the mandatory minimum,
14 they're at liberty to do that, correct?

15 MR. KIMBERLY: That's correct.

16 JUSTICE SOTOMAYOR: Thank you,
17 counsel.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 JUSTICE KAGAN: Mr. Kimberly, I want
20 to give you my intuition about the statutory
21 language, and then you tell me either or both
22 why that intuition is wrong and, even if I --
23 if -- even if that intuition is right, why you
24 nonetheless can win.

25 So my intuition about the statutory

1 language is that it just was not meant with this
2 case in mind, that they -- that the drafters of
3 this language had front and center in their
4 heads the view that, you know, someday we're
5 going to pass this statute, and on that day,
6 there are going to be a bunch of people who have
7 committed crimes but who haven't been sentenced
8 yet, and we need a provision to take care of
9 those people.

10 And they weren't talk -- thinking
11 about resentencings, and they especially weren't
12 thinking about resentencings where the vacatur
13 happened after the date of enactment.

14 And if you think that my -- like, my
15 intuition about what they were thinking about
16 totally fits the language. I mean, has, had, as
17 of. I mean, if you're thinking about that set
18 of people, they wrote exactly the language that
19 one would expect. And I guess my intuition is
20 that you're trying to sort of shoehorn in a
21 different case.

22 Now I'm not saying that they -- like,
23 obviously, the drafters of this statute -- we
24 know this because they filed an amicus brief.
25 You know -- you know, presented with this case,

1 they think it should come out the same way and
2 probably thought at the day they drafted this
3 statute it should come out the same way. But my
4 intuition is they wrote a provision without this
5 in their heads at all.

6 So what should I do with that if I
7 think that's right? And do you think I'm just
8 wrong about that?

9 MR. KIMBERLY: I -- I think,
10 respectfully, Your Honor, you -- you -- you may
11 be mistaken. I think what they were singularly
12 focused on was finality, and we know this from
13 the drafting history. There was an earlier
14 version introduced in the House with a
15 subparagraph 2 under (b) that allowed for
16 modifications of past sentences. We know they
17 stripped that out.

18 So that -- we know that Congress was
19 concerned to respect the finality of sentences
20 that were final and valid as of the date of
21 enactment.

22 The -- the situation that we have here
23 falls into the other side, the other sort of
24 bucket of sentences -- of cases, those that are
25 pending, where finality interests simply don't

1 attach.

2 And I -- I would tell you, even if we
3 don't have you just purely on the language,
4 we've got to have you instead on the background
5 legal convention that a vacatur undoes a
6 sentence.

7 And I would point the Court, as an
8 example, to 922(g)(1), which is the unlawful --
9 excuse me -- the felon in possession statute.
10 That also uses the present tense -- the
11 present-perfect tense. It says: "It shall be
12 unlawful for any person who has been" -- "who
13 has been convicted in any court of a felony to
14 possess a firearm."

15 But this Court said in Lewis in
16 Footnote 5, rightly so, where I am certain that
17 if you're -- if you have been convicted, but
18 your conviction has been vacated, you may
19 lawfully possess a firearm.

20 If that's right, then our
21 interpretation of 403(b) also has to be right.

22 CHIEF JUSTICE ROBERTS: Justice
23 Gorsuch?

24 JUSTICE KAVANAUGH: Just to follow up
25 on that, and I think that made -- Justice

1 Kagan's intuition kind of seems -- seems
2 consistent with what I think too about what was
3 going on.

4 On the other hand, I guess, why
5 weren't they thinking about this is not a -- a
6 unusual permutation to have a resentencing
7 proceeding?

8 MR. KIMBERLY: Well, I -- I'm not --
9 I -- I -- I can't speak to why specifically they
10 weren't thinking about it. What I would say is
11 that background legal conventions exist to
12 answer precisely this question.

13 JUSTICE KAVANAUGH: Well, on that
14 point, there are a couple things that -- that go
15 the other way on that, and this is why I think
16 this is a really close case.

17 And so the things that go the other
18 way are the general federal provision that says
19 you don't apply statutes retroactively. And,
20 obviously, this does to some extent. But then
21 the corollary to that principle might be -- and
22 I know you can test this -- that you -- you --
23 you don't construe it more broadly than the text
24 goes in terms of the retroactivity of the
25 provision. And that would obviously hurt you

1 here, that background convention.

2 The other is the general principle
3 that the sentencing guidelines in effect at the
4 time of sentencing are -- are used even in a
5 resentencing provision sometimes.

6 MR. KIMBERLY: So I -- I think both of
7 those considerations cut in our direction. As
8 to Section 109, this Court in Dorsey made very
9 clear that you don't need an express clear
10 statement overriding the general principle that
11 retroactivity is not the norm. All you need is
12 a -- a fair implication.

13 And so there's no question that 403(a)
14 does apply retroactively. The question here is,
15 is there a fair implication that it applies not
16 only to cases where no sentence was initially
17 imposed but cases like this one?

18 And I would say that fair implication,
19 my friend on the other side's position is a
20 linguistic possibility at best. But ours is
21 also a linguistic possibility. And so, to break
22 that tie, I think you've got to look at context.

23 You -- you've got the linguistic
24 context with use of the present-perfect tense,
25 the statutory context, 3582(c), which uses the

1 "has been imposed" locution to refer to ongoing
2 valid sentences that can be modified.

3 You've got the legal context, which is
4 the background presumption that I mentioned.
5 You've got the historical context, which
6 indicates that Congress meant to clarify its
7 view -- the 115th Congress meant to clarify its
8 view that Deal was never rightly decided. So
9 why would Congress want it to continue to apply
10 to any new resentencings? You've got the
11 drafting history as part of the historical
12 context, and you've got the purpose context,
13 with you -- which you, Your Honor, in Harrington
14 against Purdue, said is an important part of the
15 consideration.

16 All of those favor Petitioner. None
17 favor the --

18 JUSTICE KAVANAUGH: That was -- that
19 was a dissent, but anyway.

20 (Laughter.)

21 JUSTICE KAVANAUGH: Thank you.

22 MR. KIMBERLY: Thank you.

23 JUSTICE BARRETT: Well, my cards are
24 on the table, but don't worry, I'm not going to
25 be hard -- hard on you.

1 I -- I think that the best argument is
2 the background legal principle argument, the
3 best argument for your side, not the best
4 argument overall, the best argument on your
5 side.

6 (Laughter.)

7 JUSTICE BARRETT: And I actually --
8 I -- I wonder if you could say a little bit
9 about how to think about this background legal
10 convention in this case as a matter of
11 interpretation because, I mean, I do think, you
12 know, Judge Bibas's opinion going through this
13 is the best one, you know, for -- for -- at
14 least in the way I would think about the case on
15 the other side.

16 But, normally, when we look at those
17 background conventions, I mean, one context
18 would be, like, the old soil principle, and so
19 we would look at a word and say this is the old
20 soil principle and this is how it works.

21 Or we might say there are statutory
22 gaps, so we know, if Congress doesn't say
23 anything about a statute of limitations or if it
24 doesn't mention criminal defenses, we assume
25 they apply.

1 But this is really different because
2 the statute doesn't use the word "vacatur." And
3 it's not like it's coming in from the background
4 to fill in gaps in the same way we would think
5 of as a statute of limitations. So could you
6 say a little bit about that or how you might
7 think of that working? Because I think, just as
8 a matter of the theory of statutory
9 interpretation, it's not evident. I can't think
10 of another analogue, which is the thing that
11 gives me pause about that argument.

12 MR. KIMBERLY: Well, Your -- Your
13 Honor, I'd point to your opinion in Biden
14 against Nebraska, where you -- you explained the
15 importance of background legal conventions and
16 you cited two examples. You mentioned the rule
17 that when Congress enacts a statute of
18 limitations, it's presumed to incorporate
19 equitable tolling. That is not a principle that
20 is -- you -- you know, emanates from any
21 particular word. It's just a principle that
22 Congress is presumed to adopt with respect to
23 statute of limitations. And -- and -- and there
24 are -- there are additional examples as well.

25 I think the -- the -- the general --

1 here, I -- I think the idea that something has
2 been imposed connotes a -- an action by a court,
3 and -- and when a vacatur has the effect by a
4 legal fiction, which is -- you -- you know, it's
5 an assumption in law that something that is true
6 is -- is false for some limited legal purpose.
7 When that -- when -- when what it is that's been
8 imposed is undone, it's a natural application of
9 that principle.

10 So I think, in this case, you get it
11 from the word "imposed." I think you get it
12 from the word "sentence." What was -- what was
13 done pre-enactment is neither of those things we
14 know by operation of this principle.

15 JUSTICE BARRETT: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 JUSTICE JACKSON: So I guess I'm a
19 little surprised at your response to Justice
20 Kagan, and I'm trying to see if I understand
21 your argument.

22 I think that if Congress was
23 singularly focused on finality, then I would
24 think that they would be relying or would have
25 relied exclusively on the background default

1 rule that courts apply the law in effect at the
2 time of sentencing -- or excuse me, at the time
3 of the offense. That's the background
4 principle. And everybody would be out of luck.
5 You just look at the date of the enactment and
6 anybody who offended after that would get the
7 benefit.

8 But, here, it appears as though
9 Congress was actually trying to target a
10 particular group and allow them to do something
11 other than the default, allow them to have the
12 benefit even though they had offended prior to
13 the Act. So that's the group of people that
14 Justice Kagan says we're focused on. And maybe
15 Congress wasn't really homing in on resentencing
16 versus sentencing.

17 But what I thought your argument was,
18 was that in focusing on that group of people,
19 Congress was drawing the line around whether you
20 had already been sentenced and you were serving
21 what was, in effect, a final sentence or you
22 still had to be sentenced for this offense.

23 And, if that's the line they're
24 drawing, partly in response to Justice
25 Kavanaugh, I guess the question becomes why

1 would Congress have wanted to further delineate
2 in the world of people who still have to be
3 sentenced between people who had previously been
4 sentenced and their sentence was vacated and
5 people who hadn't.

6 I -- what I can't figure out is why it
7 makes sense to distinguish in the group of
8 people who still have to be sentenced for this
9 offense between those who previously had one and
10 those who didn't. So can you offer -- and I'll
11 certainly ask the other side this question, but
12 it seems to me that that's the key question that
13 we need to really ferret out when we're trying
14 to understand where the lines are being drawn in
15 this statute.

16 MR. KIMBERLY: And -- and, Your Honor,
17 I don't see any reason Congress would have
18 wanted to draw that line. I think the issue
19 is -- you -- you know, this is sort of a -- a
20 problem that's underlying the questions in the
21 briefing that isn't really openly addressed
22 until the replies.

23 The question is: What is the time
24 perspective at which you're applying 403(b)? If
25 your -- the general rule, the -- the -- the

1 standard understanding, is that statutes are
2 written to be read and interpreted from the time
3 of their reading and application, not the time
4 of their adoption.

5 So, if you're sitting in the seat of a
6 sentencing judge applying this law at the time
7 that somebody is before you for a plenary
8 resentencing, you're asking the question: Okay,
9 this individual was sentenced before the Act,
10 but can I say today that he has been sentenced
11 as of December 21st, 2018, when, in fact, his
12 sentence has been vacated?

13 JUSTICE JACKSON: And my question, I
14 guess, is -- why would it have mattered from
15 Congress's --

16 MR. KIMBERLY: Well, exactly right.

17 JUSTICE JACKSON: -- perspective?
18 That's the key. So, fine. Even if the question
19 is, okay, he was sentenced back then, why would
20 Congress have said, and, therefore, while you're
21 sentencing him today, don't take the First Step
22 into account, whereas the next guy who walks in
23 who you're sentencing today would get the
24 benefit because he didn't get sentenced before?

25 MR. KIMBERLY: Right.

1 JUSTICE JACKSON: I don't understand
2 why that -- that line is there --

3 MR. KIMBERLY: I -- I --

4 JUSTICE JACKSON: -- and what it's
5 doing.

6 MR. KIMBERLY: -- I don't understand
7 it either, Your Honor. And I think it's -- I
8 think it's negated by some of the broader
9 contexts, including the -- the headings of the
10 paragraphs at issue here.

11 Congress made clear in paragraph (a)
12 that it was clarifying its view that Deal was
13 never rightly decided and that 924(c)(1) should
14 not apply to any future plenary sentencings.

15 There's no reason to think Congress
16 would have meant to distinguish between a
17 plenary sentencing, as to which there is no
18 finality, cost, following a vacatur that's a
19 resentencing or simply an initial sentencing.

20 JUSTICE JACKSON: Thank you.

21 MR. KIMBERLY: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Ms. Hansford.

25

1 ORAL ARGUMENT OF MASHA G. HANSFORD
2 ON BEHALF OF THE RESPONDENT
3 IN SUPPORT OF THE PETITIONERS

4 MS. HANSFORD: Mr. Chief Justice, and
5 may it please the Court:

6 Section 403 can reduce an offender's
7 sentence by decades. It applies where "a
8 sentence for the offense has not been imposed as
9 of the enactment date."

10 The reference to "a sentence imposed
11 on its own" creates an ambiguity: Does it cover
12 sentences that were imposed as a matter of
13 historical fact or sentences whose imposition
14 was not subsequently undone?

15 That ambiguity is familiar. When we
16 speak of medals received by an athlete or
17 articles published by a scholar or diagnoses
18 given by a doctor, sometimes we mean to include
19 medals that were stripped based on doping
20 allegations, articles retracted based on data
21 problems, and diagnoses corrected. And other
22 times we don't. The answer depends on context.

23 And two aspects of the context here
24 indicate that Congress meant to refer to
25 operative sentences, sentences that stuck.

1 First is the use of the
2 present-perfect tense. And, second, focusing on
3 the operative sentence perfectly reflects the
4 compromise Congress struck between fairness and
5 finality or breadth and finality, whereas
6 amicus's historic fact interpretation excludes
7 offenders based on a consideration that has, as
8 Justice Jackson just indicated, little
9 conceivable relevance.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: What's the difference
12 between your argument and Petitioners' argument?

13 MS. HANSFORD: The -- the difference
14 is that we disagree that the background
15 principle resolves this case, and we disagree on
16 lenity. But, in terms of the best
17 interpretation of the statute, our argument is
18 the same.

19 JUSTICE KAGAN: Do you disagree on
20 those matters because you have a wealth of other
21 cases where those -- where, if you agreed on
22 those matters, it would come back to haunt you?

23 MS. HANSFORD: Yes, Justice Kagan.

24 (Laughter.)

25 MS. HANSFORD: So I -- I think the way

1 that Petitioner has kind of narrowed the
2 background principle is a little bit better for
3 us, but we're very concerned about the idea that
4 some kind of void ab initio principle would
5 suggest that a felon in possession statute, if
6 a -- a -- a prior conviction is vacated after
7 the fact, or a SORNA conviction for failing to
8 register, if a conviction is vacated after the
9 fact, void ab initio would suggest it never
10 existed, and it would imperil those, false
11 statement convictions, immigration contexts.

12 There's a wealth of contexts where we
13 think kind of a robust view of that would create
14 all kinds of problems and goes against what the
15 Court has already decided in cases like Lewis.
16 And we don't think it's needed in this case
17 because we think just the term "sentence
18 imposed" on its own is ambiguous.

19 And I think we're willing to spot
20 Petitioner that maybe it's particularly
21 ambiguous when you're talking about a sentence
22 or a conviction because a vacated sentence is
23 a -- a particularly void thing, but that's as
24 far as we're willing to go.

25 JUSTICE KAVANAUGH: I don't --

1 JUSTICE KAGAN: I -- I mean, I do
2 think that you're giving away, as Justice
3 Barrett said, your best argument here as to this
4 case. And I -- I guess what I'm wondering is,
5 is there a version of the argument that
6 Mr. Kimberly made that you think would not come
7 back to haunt you in other cases but that could
8 benefit your reading here?

9 MS. HANSFORD: So two reactions to
10 that, Justice Kagan.

11 First, I think the version that would
12 not come back to haunt us is just a recognition
13 that on its own, a reference to a sentence, or
14 a -- a sentence imposed, does have some
15 ambiguity and you do need to look to other
16 contextual tools to resolve that ambiguity. And
17 so I think that that's the thrust of
18 Petitioners' argument, and I think we're
19 comfortable with that to that extent.

20 I do think that is sufficient for us
21 to win this case. I don't think you need
22 something more robust than that. And I think
23 that the contextual considerations are
24 incredibly strong.

25 So I -- I -- I -- I think that the

1 line that is crystal-clear that Congress was
2 drawing here is between breadth, giving this
3 transformative modification of the prior
4 sentencing penalty that makes a difference for
5 each of Petitioners of 80 years, it decided to
6 apply it broadly.

7 How do we know that? It departed from
8 the traditional rule that pre-Act offenders
9 don't benefit.

10 And that is the key rule and I think
11 the most fair way to minimize disparities.
12 After all, pre-Act offenders are on notice when
13 they offend of this really harsh stacking
14 regime, and yet, still Congress wanted these
15 people to benefit, but it drew the line.

16 And I think exactly what Congress was
17 thinking about, to go back to your question to
18 Petitioners' counsel, is -- what -- the
19 principle that Congress was trying to reflect is
20 it did not want Section 403 to be the tool for
21 reopening otherwise final sentences. Congress
22 went back and forth in the various drafts on how
23 much to impair finality, and it decided not to.

24 And I think that's the precise
25 compromise Congress struck. And I think our

1 interpretation tracks that compromise perfectly,
2 whereas amicus's interpretation, it narrows the
3 universe but in a kind of arbitrary way based on
4 something that doesn't have any conceivable
5 relevance, what the initial sentence was.

6 And just to go back to what Congress
7 was thinking, I think you might be right,
8 Justice Kagan, that it wasn't considering this
9 particular scenario, but I think that what it
10 was thinking is this finality consideration of
11 how do we capture sentences without hurting
12 finality.

13 And I think the best indication of
14 that is that Congress -- the -- the language
15 here perfectly mirrors the language of 3582(c),
16 which is the provision that defines the
17 imposition -- or that defines the finality
18 concerns that attach to a criminal sentence, and
19 that provision says the court may not modify a
20 term of imprisonment once it has been imposed.

21 So I think what happened here is
22 Congress pulled open that provision and said:
23 Oh, we don't want to do that. Once it's been
24 imposed and finality attaches, we don't want to
25 capture it. And so it drafted this language in

1 precisely the way to dovetail with that
2 provision, and I think our interpretation --

3 JUSTICE KAVANAUGH: You --

4 MS. HANSFORD: -- respects that
5 judgment by Congress.

6 JUSTICE KAVANAUGH: -- you said that
7 it's ambiguous a few times. I guess I don't see
8 it on its face as ambiguous. It just says "has
9 been imposed." "Has a sentence been imposed?"
10 Yes.

11 The question to me really is how does
12 it apply to this circumstance that -- where
13 Congress might not have meant it to apply. But
14 I don't really see that as ambiguity as much as
15 maybe context informing how to -- how broadly to
16 read it.

17 MS. HANSFORD: We disagree with that,
18 Justice Kavanaugh. So, if I ask, "How many
19 articles did she publish as of 2022?" -- to take
20 it outside the sentencing context -- you might
21 be meaning to include in that articles that she
22 published that were subsequently retracted or
23 you might not be.

24 And I think the way that we would
25 address that is we would -- we would say: What

1 are you wondering about? Are you wondering
2 about the strength of the early body of her
3 work? In which case it suggests that articles
4 retracted based on data problems are not the
5 kinds of things you're asking about.

6 JUSTICE KAVANAUGH: So it's like a --
7 to me, it's more like a literal -- and maybe
8 this is what you're saying -- a literalism
9 versus how an ordinary reader would understand
10 it in context.

11 MS. HANSFORD: But -- I --

12 JUSTICE KAVANAUGH: Maybe that's
13 not -- maybe this is too theoretical.

14 MS. HANSFORD: I --

15 JUSTICE KAVANAUGH: The point -- the
16 reason why I'm -- I'm concerned about this
17 case -- and the government's obviously been on
18 both sides of this, so I feel good about that in
19 terms of my own thinking -- is there are still
20 disparities, like really, really big
21 disparities, and really big unfairness even
22 under your reading, which, usually, when we say,
23 well, the literal reading can't be right, it's
24 because the non-literal reading makes more sense
25 in context. And, here, there are still going to

1 be big-time disparities.

2 MS. HANSFORD: So a -- a few reactions
3 to that.

4 The first is that I do think the
5 disparities are worse on amicus's reading,
6 but -- and -- and -- and then -- and then I'll
7 get to a couple of other thoughts.

8 I think the --

9 JUSTICE SOTOMAYOR: Explain that.

10 MS. HANSFORD: I -- I think the
11 disparities are worse on amicus's reading
12 because, if you have two co-defendants who
13 offend at the same time, but one is rushed into
14 a plea that's involuntary or that's inadequately
15 counseled, before the enactment day of sentence,
16 before the enactment date is then -- then has
17 the sentence go up on appeal, the court of
18 appeals throws it out. The co-defendant goes
19 back down.

20 But now, because there's this initial
21 completely unlawful sentence, he is stuck with
22 the application of the old, outdated, unjust,
23 unduly expensive regime, whereas his
24 co-defendant, who wasn't rushed in that way,
25 gets to benefit.

1 And I don't think that makes any
2 sense, but I also think that if we're thinking
3 about fairness, the -- the -- the best principle
4 is this time of offense principle, and the fact
5 that Congress is departing from that suggests
6 that Congress wants to go more broadly than
7 that. And I think that the next most relevant
8 principle is finality.

9 And -- and I think that if you --
10 under any reading, including amicus's, people
11 who are more dilatory, who evade arrest, who ask
12 for continuances, do still get to benefit from
13 the First Step Act's enactment if their sentence
14 is a post-enactment sentence. And that's
15 precisely because I don't think what Congress is
16 trying to do --

17 JUSTICE KAVANAUGH: But the -- the --

18 MS. HANSFORD: -- is minimize
19 disparities.

20 JUSTICE KAVANAUGH: You used the --
21 sorry to prolong this, but the bank robber --

22 MS. HANSFORD: Yeah.

23 JUSTICE KAVANAUGH: -- who has the --
24 the conspiracy charge tacked on gets the benefit
25 of Davis and, therefore, gets the benefit of

1 what you're offering here. The bank robber who
2 didn't have a conspiracy charge tacked on does
3 not even though they might have participated in
4 the same bank robbery.

5 MS. HANSFORD: Yes. Correct. And
6 that gets to the Chief Justice's initial
7 question about the windfall as well. I think
8 those two people are fundamentally differently
9 situated because one has a final sentence
10 imposed. So there's a profound cost to
11 reopening that sentence to give him the benefit
12 of this new scheme, whereas the person whose
13 sentence was vacated for whatever reason,
14 regardless of his merit or how good his crime
15 was, he does not have a final sentence, so there
16 isn't that same cost to impose.

17 And that's exactly why an individual
18 who is on the lam and delayed his initial
19 sentencing until after the enactment gets to
20 benefit as well. I think the principal
21 distinction is based on who has the final
22 sentence. And if there's no final sentence,
23 there's really no downside. There's no cost.

24 And I think that the only way that
25 amicus's view reduces any disparities is in --

1 by narrowing the class of offenders in this
2 arbitrary way.

3 JUSTICE ALITO: As I understand
4 your -- your answer, it has nothing to do with
5 fairness to these two defendants. It has to do
6 with the burden on the court.

7 MS. HANSFORD: I -- I think it does
8 have to do with the -- the -- what Congress's
9 view that the old regime was an unfair one and
10 also -- did not give district courts sufficient
11 discretion.

12 JUSTICE ALITO: Well, you haven't --

13 MS. HANSFORD: But I don't think it
14 has to --

15 JUSTICE ALITO: In Justice Kavanaugh's
16 example, you have a defendant who is -- sentence
17 has invalid sentences on -- on -- on a couple of
18 counts, valid sentences on other counts. You
19 say that person gets the benefit of the First
20 Step Act. But, if you have an identical -- a
21 person who's identical except there were no
22 invalid sentences, then that person doesn't get
23 the benefit of the First Step Act.

24 I don't see why that is fair and why
25 treating the -- the former person more favorably

1 than the latter is supported by fairness. Your
2 argument, as I understood it, was, well, it's a
3 big burden for the court to have to reconsider
4 cases that were completely sentenced and there
5 was nothing wrong.

6 MS. HANSFORD: I think there's no
7 reason to ask the court to apply a discarded
8 sentencing scheme at a post-enactment Act
9 resentencing because I think those individuals
10 whose sentences were vacated for any reason no
11 longer have an imposed sentence. There's no
12 longer a finality cost. In Pepper, this Court
13 says that the differences in procedural
14 opportunities that result because some have
15 their sentences vacated are not a kind of
16 unwarranted disparity. And I think that fits
17 perfectly the situation here.

18 But I think that your intuition,
19 Justice Alito, would support Congress's drafting
20 the statute in a different way and not -- and
21 not applying it to any pre-Act offenders at all.
22 Why apply it to any pre-Act offenders? Because
23 that's how important Congress thought it was.

24 And the operative sentence
25 interpretation tracks that finality cost

1 perfectly. It means that Section 403 does not
2 allow reopening of otherwise final sentences,
3 but it also allows a court to impose this new
4 updated scheme that reflects Congress's updated
5 judgment about what is fair and makes a huge
6 difference to individuals whenever it can do so
7 without harming the critical principle of the
8 finality of sentences.

9 JUSTICE GORSUCH: Ms. -- Ms. Hansford,
10 I -- I just want to see if I understand how
11 you've squared your view with -- with
12 Petitioners on what's void and voidable.

13 As I understand it, you're -- and I
14 just want to see if I've got it, okay -- that
15 you would say that the felon in possession and
16 the SORNA cases are different because those
17 statutes ask about a status in a time past and
18 prior to the vacatur of the sentence, of the
19 conviction.

20 Here, we have a vacatur, and once it's
21 vacated, it's treated as void ab initio. Is --
22 is that fair? Is that a fair summary?

23 MS. HANSFORD: That -- that -- that --
24 that's -- that's really close. I would say that
25 for the 9 --

1 JUSTICE GORSUCH: Well, I'm glad I'm
2 in the neighborhood.

3 (Laughter.)

4 MS. HANSFORD: Yeah. And -- and --
5 and I -- I don't know if this is -- if this is
6 important, but I'll just put this caveat out
7 there. I think that the -- the 922(g) asks for
8 a conviction at the present time, and the
9 relevant present --

10 JUSTICE GORSUCH: Yes. The relevant
11 time --

12 MS. HANSFORD: -- is the time of the
13 conduct when the penalty attaches.

14 JUSTICE GORSUCH: That -- that's the
15 time with respect to those. Here, the time is
16 the present at the moment of sentencing.

17 MS. HANSFORD: Exactly.

18 JUSTICE GORSUCH: Okay.

19 MS. HANSFORD: That's exactly right,
20 Justice Gorsuch.

21 JUSTICE GORSUCH: All right. I got
22 it. And then I'm just curious, without stack --
23 with stacking, these defendants face a hundred
24 years or -- or so in prison. Without stacking,
25 what's the maximum they could receive?

1 MS. HANSFORD: With -- without, I -- I
2 think the maximum is still life --

3 JUSTICE GORSUCH: Yeah.

4 MS. HANSFORD: -- for the various
5 offenses. So I -- the minimum goes from 130 to
6 135 years based on Petitioner to -- to 50 to 55
7 years based on Petitioner. That's the minimum.
8 Of course, the district court can go above that.

9 And I think that also helps go to the
10 exchange I was having --

11 JUSTICE GORSUCH: We all wind up in
12 the same place anyway.

13 MS. HANSFORD: The -- the sentences
14 are still extremely, extremely harsh, reflecting
15 the severity of their crimes, but --

16 JUSTICE GORSUCH: And the district
17 judge on -- on -- on resentencing could issue
18 the same sentence he issued before.

19 MS. HANSFORD: Absolutely.

20 JUSTICE GORSUCH: All right.

21 MS. HANSFORD: And this was a
22 provision that was trying to give district
23 courts discretion, and that's part of the reason
24 that Congress was applying it as broadly as it
25 could with them.

1 JUSTICE ALITO: Do -- do you have any
2 idea how many cases fall into the category
3 that's involved here?

4 MS. HANSFORD: Yes. So the -- the
5 current universe of cases, there are 16
6 offenders that we're aware of who have already
7 benefited from this interpretation. And then
8 there are eight additional ones that we're aware
9 of who -- whose -- for -- for whom this question
10 is open.

11 Now I do want to note that the
12 universe could increase anytime this Court
13 issues a decision that affects the validity of
14 924(c) sentences. Additional individuals might
15 be able to get into court on a 2255. So
16 Petitioners actually ended up getting in court
17 after -- into court after this Court's decision
18 in Davis.

19 So I think it's a small universe,
20 and -- but it's not a closed universe. So I do
21 want to -- to -- to caveat that.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas?

25 Justice Alito?

1 JUSTICE ALITO: The sense -- you --
2 you talk about void ab initio, but in what sense
3 were these -- the sentences on these counts void
4 ab initio? There was nothing wrong with them
5 when they were imposed. There was nothing wrong
6 with them at the time when they were vacated.
7 There was nothing wrong with them when -- at the
8 time when the sentence was imposed later.

9 They were vacated based on a -- a
10 practice that is not required.

11 MS. HANSFORD: We completely agree
12 with that, Justice Alito. We don't think these
13 were void ab initio. We think these were
14 perfectly valid. But we think the relevant
15 question is whether it's a historical sentence
16 or an operative sentence. And we think that
17 these are not operative sentences because they
18 were vacated, and that means there's no finality
19 consideration that attaches to them.

20 But we don't think there was anything
21 wrong with the sentences inherently.

22 JUSTICE ALITO: And what is your
23 understanding of the basis for this like -- this
24 practice of vacating all the sentences on all
25 counts if the sentence on one or more counts

1 must be vacated?

2 MS. HANSFORD: The idea is that a
3 district court should be able -- because a
4 district court's understanding of the sentence
5 it's imposing on other counts may affect its
6 judgment of the appropriate sentence on this
7 count, its weighing of the 3553(a) factors, the
8 district court should be able to, when sentences
9 are vacated, reweigh the sentencing package as a
10 whole.

11 And, of course, that is a
12 discretionary judgment and -- but that is a
13 judgment that courts of appeals often make or
14 district courts often make when vacating some
15 counts.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 JUSTICE SOTOMAYOR: I'm looking at the
19 wealth -- I was looking at the wealth of
20 statutes that both -- everybody here cited about
21 when Congress was applying the purported
22 background principle of retroactivity or not,
23 and the principle I came to in reading
24 everything is taken from Minerva -- Minerva
25 Surgical, where we said Congress "legislates

1 against the background of common law
2 adjudicatory principles," but it does not expect
3 those principles to apply "when a statutory
4 purpose to the contrary is evident." Correct?

5 MS. HANSFORD: Yes, I -- I do think
6 this is a case where --

7 JUSTICE SOTOMAYOR: All right. So now
8 what you're saying to me, I thought, was a
9 statutory purpose is evident to the contrary --
10 or not to the contrary, is evident here because,
11 first, they use the present-perfect tense. Is
12 that -- my judgment, is that correct?

13 MS. HANSFORD: So we think the
14 present-perfect tense is one of the textual
15 clues that that's not what Congress meant --

16 JUSTICE SOTOMAYOR: What's the second?

17 MS. HANSFORD: -- and the purpose
18 is -- is -- is reflected in the text that
19 Congress used, the fact that the text mirrors
20 3582(c) and how the various provisions strike
21 the finality balance. So I think there are all
22 kinds of textual indicia here about what
23 Congress's purposes was.

24 JUSTICE SOTOMAYOR: No, I was -- I was
25 dealing -- one of the main purposes that the

1 other -- the amici and most of the decisions
2 that have relied have taken a contrary position
3 has been on the use of this -- of the word
4 "sentence imposed."

5 So I went back to why you think there
6 was an ambiguity, and I found it, which is I
7 looked at every single dictionary, and every
8 dictionary that uses "sentence imposed" or
9 "conviction imposed" -- Black's Law Dictionary,
10 Webster's, American Heritage, and the Oxford
11 English Dictionary -- does exactly what you say.
12 It says it can mean a historical date or it can
13 mean continuing validity.

14 So that's why you saying "sentence
15 imposed" can't tell you anything, right?

16 MS. HANSFORD: I --

17 JUSTICE SOTOMAYOR: Because it's
18 ambiguous on its face?

19 MS. HANSFORD: Yes, I think "sentence
20 imposed" is ambiguous on its face, whether it's
21 a historic sentence or operative sentence.

22 And I think that there is a grammar
23 mistake that amicus's view ascribes to Congress
24 because the -- the present-perfect tense cannot
25 be used when the "now" component of the period

1 is excluded.

2 And so you can say: He has played
3 hundreds of rounds of golf. But you would say:
4 He had played hundreds of rounds of golf until a
5 recent knee surgery forced him to the sidelines.

6 And I think that's precisely the
7 mistake that a amicus has Congress making. And
8 I think having Congress both make a mistake of
9 grammar and draw this kind of arbitrary line, I
10 think that's -- that's a worse interpretation
11 than ours, which has Congress not make a mistake
12 of grammar, use tenses precisely, and also have
13 a purpose that's coherent.

14 JUSTICE SOTOMAYOR: So, for your
15 purposes or -- I -- I went back to
16 dictionaries -- to the Chicago Manual of Style
17 and to the Cambridge Grammar of the English
18 Language, and both of them make it very clear
19 that present-perfect tense "denotes an act,
20 state, or condition that is now completed and
21 continues up to the present." Correct?

22 MS. HANSFORD: Yes, that's correct.

23 JUSTICE SOTOMAYOR: And -- and you
24 used the past tense. In fact, what was striking
25 to me is all of the opinions that support amici,

1 including that of the Seventh Circuit, had to
2 change the present-perfect tense to say "had
3 been sentenced," correct?

4 MS. HANSFORD: Yes, that's right,
5 because you would say -- you could say, "A
6 sentence was imposed on Jones," if you're
7 referring to the past. But you would say, "A
8 sentence had been imposed on Jones but was
9 vacated."

10 You could not say, "A sentence has
11 been imposed on Jones but has been vacated."
12 That makes a grammar mistake that Huddleston and
13 Pullum, for example, describe.

14 JUSTICE SOTOMAYOR: All right. Thank
15 you, counsel.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?
17 Justice Gorsuch?

18 JUSTICE KAVANAUGH: On the closed
19 universe that you mentioned, is it closed as to
20 Davis claims? You had a caveat, and I wanted
21 to -- just on the caveat, is it closed as to
22 Davis claims?

23 MS. HANSFORD: Yes, I think it's
24 closed as to Davis claims because of the
25 one-year period --

1 JUSTICE KAVANAUGH: Okay.

2 MS. HANSFORD: -- and the 2255.

3 So, if there's a future decision of
4 this Court, which, of course, the government
5 hopes there will not be, that is shedding light
6 on predicates in 924(c). And, of course, it's
7 the same language in 401, so it could come up in
8 that context as well.

9 But we do think that the universe is
10 going to be very, very small. Even if there is
11 another decision of that sort, which could, if
12 it's a constitutional decision, create a new
13 one-year period for 2255 decisions, we still
14 think it would be on the order of a couple of
15 dozen offenders. We think the universe is very
16 small here.

17 JUSTICE KAVANAUGH: Then, on Justice
18 Sotomayor's question, I just want to make sure.
19 The purpose derived from the text, I don't think
20 you got to the second point, which is that
21 there's fairness and finality, and we've asked
22 you, and I was asking you, fairness -- there's
23 still going to be unfairness.

24 I think what you've -- are saying, but
25 correct me if I'm wrong, is Congress was

1 concerned about fairness and correcting
2 unfairness up to the point where it would
3 infringe on finality?

4 MS. HANSFORD: That -- that's exactly
5 right, Justice Kavanaugh.

6 JUSTICE KAVANAUGH: Yeah.

7 MS. HANSFORD: I think -- I think
8 that's what Congress was thinking here.

9 And -- and I think it's really
10 inexplicable otherwise how -- why it would draw
11 this particular line. I think, if it just
12 wanted to minimize disparities, it would stick
13 with a time-of-offense line.

14 And so I think, if you look at the
15 whole universe of disparities, we think we have
16 fewer disparities, but we also think we have the
17 more principled set of disparities where the
18 differences are based on offenders who have
19 different finality considerations, which this
20 Court has recognized is a significant and not
21 arbitrary.

22 JUSTICE KAVANAUGH: The question for
23 me then is whether you can really get that out
24 of the text, but I'll explore that with amicus.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 Justice Jackson?

4 Thank you, counsel.

5 Mr. McGinley.

6 ORAL ARGUMENT OF MICHAEL H. MCGINLEY,

7 COURT-APPOINTED AMICUS CURIAE

8 IN SUPPORT OF THE JUDGMENT BELOW

9 MR. MCGINLEY: Mr. Chief Justice, and
10 may it please the Court:

11 Petitioners do not qualify for
12 retroactive relief under Section 403(b) of the
13 First Step Act. The plain text of that
14 provision says that Section 403(a)'s changes
15 apply to a pre-Act offense only if a sentence
16 for the offense has not been imposed as of the
17 date of enactment.

18 Petitioners each indisputably received
19 a sentence before the date of enactment. It
20 makes no difference that their sentences were
21 later vacated after that date for unrelated
22 reasons.

23 This is the most natural common-sense
24 understanding of the statute's text read as a
25 whole. Indeed, Congress's use of the indefinite

1 article "a" captures any sentence that has been
2 imposed before enactment, even those that are
3 later vacated.

4 Section 403(b) does not refer to "the
5 final sentence" or "a sentence that has not
6 later been vacated." It refers to "a sentence."

7 The statute's use of the
8 present-perfect tense has not been imposed, also
9 confirms this reading. The present-perfect
10 tense denotes an act, state, or condition that
11 is either completed or continues to the present.
12 Here, the former meaning is more fitting.

13 Imposing a -- a sentence is a discrete
14 historical event that occurs when the sentence
15 is pronounced in open court. And Congress drew
16 the dividing line as of the date of enactment.

17 Petitioners and the government would
18 nullify this statutory phrase by arguing that a
19 sentence must remain in place until the present
20 day. That is not what Congress said.

21 If Congress had wished to adopt that
22 approach, it could have said that Section 403(a)
23 applies to a sentence imposed after the date of
24 enactment. But, under the actual statutory
25 text, Petitioners do not qualify. And if there

1 were any ambiguity, the federal savings statute
2 would preclude retroactive effect here.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: What if -- assuming
5 that I agree that there is a background vacatur
6 rule, what role does it play in your analysis?

7 MR. MCGINLEY: So the Court has said
8 repeatedly that a background vacatur rule cannot
9 override clear statutory text. And so, here,
10 the statutory text is whether a sentence has
11 been imposed.

12 If you think the vacatur rule applies,
13 for example, as it did in Lewis, then that still
14 would not save Petitioners here. And I think
15 the government's argument essentially concedes
16 this without saying it because the vacatur did
17 not occur before the date of enactment in this
18 setting.

19 And so repeat -- repeated -- sorry,
20 Your Honor.

21 JUSTICE SOTOMAYOR: No.

22 MR. MCGINLEY: Repeatedly, the Court
23 has said that a background principle can't
24 override the plain text. We think the plain
25 text is clearly in our favor here.

1 We also think that's why the
2 government agrees with us that there is no
3 background vacatur principle that could apply in
4 this way because, if it did, it would
5 essentially gut 922(g) for people who have their
6 sentences vacated after they've possessed the
7 weapon.

8 JUSTICE SOTOMAYOR: Counsel, I -- I
9 just don't know how you can say "sentence
10 imposed" is clear when every dictionary I look
11 at -- I mentioned them before, Black's Law,
12 Webster's, American Heritage, the Oxford English
13 Dictionary -- all say, when you use the phrase
14 "sentence imposed," you can mean one of two
15 things. You can mean a historical moment when a
16 sentence was pronounced in court, which is the
17 way you're using it, or you can refer to the
18 continuing application of a legal judgment to
19 the defendant.

20 So, if every dictionary says that's
21 ambiguous, that's where the government starts,
22 then you have to look to other contextual clues
23 to support your view. Tell me what they are.

24 MR. MCGINLEY: I have three contextual
25 clues for you, Your Honor.

1 JUSTICE SOTOMAYOR: Outside of that
2 one, because "sentence imposed" is ambiguous.

3 MR. MCGINLEY: So --

4 JUSTICE SOTOMAYOR: Because it -- it
5 could mean one of two things. You have to look
6 at the context.

7 MR. MCGINLEY: Sure.

8 JUSTICE SOTOMAYOR: What's the context
9 here?

10 MR. MCGINLEY: So the context -- the
11 first thing I'd point you to is 3553(c), which
12 is how the Congress has defined when imposition
13 happens. 3553(c) says that imposition happens
14 when a sentence is pronounced in open court,
15 when the judge looks the defendant in the eye,
16 provides his reasons under 3553 -- his or her
17 reasons under 3553 for imposing the sentence.
18 And that's a historical event that occurs.

19 JUSTICE SOTOMAYOR: But there -- but
20 that's for purposes of appeal and for -- not
21 for -- not for all interpreted purposes.

22 MR. MCGINLEY: So let me give you a
23 few more, Your Honor.

24 So then the second contextual clue I
25 would point you to is, in this particular

1 statute, it says "as of the date of enactment."
2 That is telling you whether or not -- the
3 analysis is whether or not this historical event
4 has happened or even if the -- if you wish to
5 adopt the condition language, it's still --

6 JUSTICE SOTOMAYOR: So why use the
7 present-perfect tense? Why not use the past
8 tense, which is the cleanest way to do it?

9 MR. MCGINLEY: Because it makes --

10 JUSTICE SOTOMAYOR: Was --

11 MR. MCGINLEY: I'm sorry, Your Honor.

12 JUSTICE SOTOMAYOR: Was imposed as of
13 the date. But, instead, they choose -- chose a
14 different tense. So go to your third.

15 MR. MCGINLEY: Sure. The -- so,
16 actually, then I'll have four.

17 So the third one in that context is
18 "as of the date of enactment" tells you what is
19 the now in that -- in that construction of the
20 sentence. You say "As of the date of enactment,
21 has a sentence been imposed."

22 JUSTICE SOTOMAYOR: Now at the date
23 that a sentence is being imposed?

24 MR. MCGINLEY: No, Your Honor. The --
25 the statutory phrase is "as of the date of

1 enactment."

2 And the last thing I'll say, my fourth
3 point, is, if you think this is ambiguous, then
4 109 governs and it precludes retroactive relief.

5 JUSTICE GORSUCH: Mr. McGinley --

6 JUSTICE SOTOMAYOR: And then -- I'm
7 sorry.

8 JUSTICE GORSUCH: I'm sorry. No,
9 please.

10 JUSTICE SOTOMAYOR: What do you do
11 with the 109, Dorsey, where we say Congress
12 doesn't have to use magical words? And this
13 statute has already illuminated the question of
14 retroactivity. It's saying, yes, you make it
15 retroactive. You want something -- you want a
16 clear statement even further. Make it even
17 clearer.

18 MR. MCGINLEY: So what Dorsey says is
19 that there has to be a clear indication that
20 Congress intended to do this. And what -- what
21 that clearly means --

22 JUSTICE SOTOMAYOR: They meant some
23 retroactivity.

24 MR. MCGINLEY: Sure. But the question
25 is always how much retroactivity, and that's how

1 Dorsey addressed the question. Dorsey asked
2 whether the particular people in that setting,
3 the petitioners there, who had not yet received
4 an initial sentence, I want to be clear, whether
5 they qualified for retroactive relief.

6 And then Dorsey looked to the way that
7 the Fair Sentencing Act -- very explicitly
8 interacted with the Sentencing Reform Act and
9 with the guidelines and said that for those
10 particular set of people, there was
11 retroactivity.

12 JUSTICE GORSUCH: Mr. McGinley, most
13 of your examples that you rely on to show the
14 continuing legal effect of a vacated sentence
15 inquire into the defendant's conduct while he
16 was subject to the disabling effect of the then
17 valid order. That's the felon in possession
18 cases, the SORNA cases, the fraud cases.

19 Those seem meaningfully different
20 here, or maybe, because there's no valid
21 sentence at the relevant time here, which is
22 resentencing. Why should we give weight to
23 those --

24 MR. MCGINLEY: So --

25 JUSTICE GORSUCH: -- cases then?

1 MR. MCGINLEY: -- with all respect, I
2 think the relevant time according to the
3 statutory language is as of the date of
4 enactment.

5 JUSTICE GORSUCH: I thought that's
6 what you were going to say.

7 MR. MCGINLEY: Yeah.

8 JUSTICE GORSUCH: So let's suppose
9 we're at resentencing in this case, vacated,
10 vacated -- vacated sentences. In what world
11 does the judge say that he -- he's -- the judge
12 is going to issue a sentence for the offense
13 that has been -- for -- is going to -- is going
14 to issue a sentence for and say that a sentence
15 has -- for this offense has been imposed already
16 in 2018?

17 MR. MCGINLEY: So the same way that
18 Pepper spoke about a sentence that had been
19 imposed before.

20 JUSTICE GORSUCH: Ah, exactly, "had."
21 Not "has." I can't see a judge, after a vacated
22 sentence, saying that a sentence has been
23 imposed for the very offense that he's about to
24 sentence for.

25 MR. MCGINLEY: So, just with respect,

1 Your Honor, I think, actually, there's a very
2 easy way. You can say: A sentence has been
3 imposed as of 2018. That sentence was later
4 vacated, and I now impose a new sentence.

5 JUSTICE GORSUCH: That's -- that --
6 that's a very strange locution, though, isn't
7 it --

8 MR. MCGINLEY: I -- I --

9 JUSTICE GORSUCH: -- to say that a
10 sentence was imposed or had been imposed? But
11 you can't -- I mean, 3582, you can't modify an
12 existing sentence, right? I mean, that's --
13 that's black letter law. You -- you'd agree
14 with that?

15 MR. MCGINLEY: I -- I do agree with
16 that, but that's because, if you look at 3582 --

17 JUSTICE GORSUCH: I mean, the whole
18 point of resentencing is that there is no
19 sentence. That's the only way in which a judge
20 can issue a sentence.

21 MR. MCGINLEY: Right. And I might
22 agree with you if this statute did not say "as
23 of the date of enactment." If this statute
24 instead said whether or not -- if -- if a
25 sentence has not been imposed up until the

1 present day, I still think that the --

2 JUSTICE GORSUCH: Do you agree that --

3 MR. MCGINLEY: -- the historical
4 reading is correct, but --

5 JUSTICE GORSUCH: -- do you agree that
6 most -- most statutes are supposed to be read at
7 the time they're being applied?

8 MR. MCGINLEY: If there's no other
9 contextual clue, then I do think that that's the
10 normal way it's interpreted. Here, there is a
11 contextual clue that's quite explicit in the
12 statutory text.

13 JUSTICE JACKSON: Mr. McGinley, I -- I
14 guess what is troubling me about your
15 argument -- and I raised it with your friends on
16 the other side -- is that the line that you seem
17 to suggest that Congress is drawing doesn't seem
18 to have any rational relevance to what the
19 statute is doing, what Congress's goals are.

20 I mean, they -- the -- the -- the
21 other side has a pretty clear, principled
22 distinction. They say that Congress is drawing
23 a line between those who have yet to be
24 sentenced and those who have -- are serving
25 final sentences in the sense that they would

1 need to be reopened in order to take advantage
2 of the First Step Act.

3 Do you concede that if that is what
4 Congress was doing or wanted to do, that these
5 Petitioners fall in the category of people who
6 have yet to be sentenced for this offense?

7 MR. MCGINLEY: I don't, Your Honor.
8 And, in fact, I'm glad you asked the question
9 because I think that there is a very clear
10 explanation for what Congress is doing here, and
11 I think it's treating similarly situated people
12 alike.

13 And the question is: Who are the
14 similarly situated people to those who have
15 received sentences like Petitioners here? And
16 those are the people who committed their crimes
17 at the same time and were initially sentenced at
18 the same time. That's when the full machinery
19 of --

20 JUSTICE JACKSON: But why is that
21 the -- I don't understand why that -- if you
22 think about what Congress was doing to carve out
23 these people and give them the benefit, why
24 would it matter that they initially received
25 their sentence? "Initial" is not in the

1 statute. And I don't understand why that would
2 be a factor. What difference does it make?

3 They're saying the key factor is
4 whether the court has to give this person a
5 sentence, whether their case is pending. And,
6 in any pending cases after the First Step Act is
7 enacted, when a -- when you come to the court
8 for resentencing, this statute says you get the
9 benefit.

10 MR. MCGINLEY: So, with respect,
11 that's not what the statute says. And, in fact,
12 when Congress wants to do that, it phrases the
13 statute differently. It phrases it to say, for
14 example, a sentence imposed after the date of
15 enactment. That's essentially how 402(b), which
16 deals with the savings statute, speaks of it.
17 There, it's talking about a conviction.

18 But I went back and looked, and
19 when -- in 1994, when Congress created the
20 safety valve, they actually used precisely this
21 language. And I can give you the citation,
22 which is Public Law 103-322, Section 80001(c),
23 where Congress said that the safety valve would
24 apply to "all sentences imposed on or after 10
25 days after enactment." That means that all --

1 JUSTICE JACKSON: Yeah, but that --
2 but there --

3 MR. MCGINLEY: -- future -- I'm sorry.
4 I didn't mean to --

5 JUSTICE JACKSON: Go ahead. That
6 means that -- I'm sorry.

7 MR. MCGINLEY: That means that all
8 initial sentencings and resentencings will get
9 the benefit of the safety act. That is not how
10 Congress constructed it here.

11 JUSTICE JACKSON: I understand, but --
12 but your conception of it doesn't have any
13 logical application. I mean, if you think about
14 the category of people that Justice Kagan was
15 trying to isolate in her intuition, which is
16 people -- we're starting with the universe of
17 people who committed their offense before this
18 statute was enacted. Traditionally, the rule
19 would be none of them get the benefit.

20 Congress is then carving out, giving
21 the benefit to people who are yet to be
22 sentenced. They have not been sentenced as of
23 the date of the enactment of this statute.
24 That's the work, I think, of "as of the date of
25 this enactment." Your sentencing is coming even

1 though you previously offend -- you -- you
2 previously committed the offense.

3 What -- what -- you're right about
4 treating similarly situated people similarly.
5 And what I can't understand is why people in the
6 universe of sentencing to be coming, why there's
7 a difference between people who have sentencing
8 to be coming because their prior sentence was
9 vacated versus people who have sentencing to be
10 coming because they weren't sentenced before.

11 If you can't give an answer to that, I
12 don't understand how you can win.

13 MR. MCGINLEY: No, I can give you two
14 answers to that --

15 JUSTICE JACKSON: Okay.

16 MR. MCGINLEY: -- at least.

17 JUSTICE JACKSON: Okay.

18 MR. MCGINLEY: The first goes to
19 Justice Kavanaugh's example, and I think --
20 where you could have people who committed less
21 crimes. We say this in the brief. Let me give
22 you -- even just on the facts of this case,
23 imagine one of these three defendants had not
24 engaged in the conspiracy, okay?

25 They all are convicted, they're all

1 sentenced initially on the same day, but one of
2 them who committed fewer crimes in the bundle of
3 events does not get the benefit of Davis, does
4 not get to vacate the sentence 12 years later,
5 and does not get resentencing under the First
6 Step Act. That person who committed fewer
7 crimes gets dramatically -- a dramatically
8 higher sentence.

9 JUSTICE JACKSON: Yes, but I'm -- I'm
10 positing that what Congress cared about was
11 reopening the sentence. This is what your
12 colleague on the other side says is the finality
13 concern.

14 Congress is not looking at or caring
15 about what is happening to individual defendants
16 and what they're ultimately going to get on --
17 in sentencing in this particular scenario. This
18 carveout is about making sure that people who
19 still have to be sentenced get the benefit of
20 this, but people whose sentences are closed
21 don't have them reopened.

22 Start with that premise --

23 MR. MCGINLEY: Sure.

24 JUSTICE JACKSON: -- and tell me how
25 these people whose sentences have been vacated

1 and still have to be sentenced are any
2 different.

3 MR. MCGINLEY: Sure. So here's my
4 second answer, which is that if you're asking
5 who's similar -- similarly situated, you can be
6 sure that people who have not yet been initially
7 sentenced as of -- who have committed the
8 crime --

9 JUSTICE JACKSON: Yes.

10 MR. MCGINLEY: -- but have not yet
11 been initially sentenced as of the date of
12 enactment, that's going to be a small universe
13 of people, all of whom committed their crimes
14 very close in time to each other, whereas, here,
15 you have people who committed crimes decades ago
16 that will receive the benefit of a change that
17 makes them very differently situated in terms of
18 how they're punished than the people who did
19 commit the crime in close proximity to them.

20 I also would --

21 JUSTICE KAGAN: Mr. McGinley --

22 MR. MCGINLEY: Yeah.

23 JUSTICE KAGAN: I'm sorry.

24 MR. MCGINLEY: Go ahead, Your Honor.

25 JUSTICE KAGAN: I -- I -- I want to

1 ask you about this brief we have from four
2 members of Congress. So Senators Durbin,
3 Grassley, Booker, Lee, these are not guys who
4 link arms very often.

5 (Laughter.)

6 JUSTICE KAGAN: And I think everybody
7 understands them to be the drivers of this piece
8 of legislation.

9 MR. MCGINLEY: Sure.

10 JUSTICE KAGAN: I mean, that's what
11 they were in the Senate. And they seem to think
12 that Mr. Kimberly's position is what they meant.
13 I mean, they state this in no uncertain terms,
14 that both with respect to their understanding of
15 the text, their understanding of the purpose,
16 their understanding of the background rule, that
17 everything lines up to give these Petitioners
18 relief.

19 And I -- I know that we don't usually,
20 like, think about the sort of after-the-fact
21 comments of -- but this is so strong both in the
22 certitude in which this is expressed and in who
23 these people are and the coalition they
24 represented in the Senate at least that I'm
25 wondering whether we, like, don't really have to

1 give this more respect than maybe we usually do.

2 MR. MCGINLEY: So, with respect to
3 those four Senators, and I mean that genuinely,
4 I don't think you do. They're four Senators who
5 are offering you the equivalent of
6 after-the-fact legislative history in an amicus
7 brief. We know that earlier versions of the
8 bill would have granted broader retroactive
9 effect than Congress actually provided here.
10 And so saying -- and -- and, obviously, the
11 sponsors of a bill are the ones who want to
12 extend the purpose as far as possible.

13 This Court has repeatedly said that no
14 statute pursues its purpose at all costs, and so
15 what the Court instead has to do is look at the
16 words that were --

17 JUSTICE KAGAN: But I -- I don't think
18 that they're suggesting that it pursues its
19 purpose at all costs. I think what they're
20 suggesting is something along the lines of what
21 Justice Jackson was saying, is that this statute
22 was motivated by a very clear purpose, which is:
23 We don't want these first offenders to be
24 getting these hundred-year sentences.

25 We also understand that there are

1 finality interests involved, but where we can
2 prevent this practice without interfering with
3 finality interests, that's what we want to do.
4 And that's the whole purput -- port of this
5 statute.

6 MR. MCGINLEY: Right. And if --

7 JUSTICE KAGAN: And these people, the
8 Petitioners, fit that understanding of the
9 statute, as well as the people who just hadn't
10 been sentenced at all yet when the statute was
11 enacted.

12 MR. MCGINLEY: So -- I I don't think
13 they fit that. I -- what I will tell you,
14 though, is if that's what Congress had intended
15 to do, if that's what those four drafters had
16 intended to do, there's a very simple way they
17 could have done it. They did it in 402(b).
18 They could have constructed the sentence to say
19 that 403(a) applies to any sentence imposed
20 after the date of enactment.

21 As I mentioned, that's how Congress in
22 1994 applied the safety valve to all sentences,
23 initial and resentencing, after the date of
24 enactment. But that's not what they did here.

25 And Congress always legislates against

1 the backdrop, in this particular setting,
2 against 109, which says that without a clear
3 indication to the contrary, the court should not
4 assume that a repeal applies retroactively to
5 reduce the penalties incurred by a defendant
6 under the previous regime.

7 JUSTICE KAVANAUGH: On -- on your
8 point about treating similarly situated people
9 the same, I think both sides fail on that in
10 this case because there are going to be, as I've
11 said, discrepancies, disparities, no matter
12 what.

13 So then you need another reason, I
14 think, for the line that you say is meant and
15 stated in the statute. And I thought Congress
16 might have just wanted an easily administered
17 line and chose -- chose that, it's easily --
18 easily administered.

19 The other side, though, then says:
20 Well, the broader purpose, evident from the
21 text, is, as I said before Justice Kagan was
22 just saying, was the balance of fairness and
23 finality. And why isn't that the -- so, to me,
24 it comes down to: Do they just want easily
25 administered, or were they looking at this

1 fairness versus finality? And if -- why -- why
2 is the fairness versus finality not the -- the
3 purpose that's more evident from the text?

4 MR. MCGINLEY: So I -- I think it's
5 probably a mix of all of those things that they
6 were looking at.

7 And so what they're asking is:
8 What -- who are similarly situated? I -- I
9 provided the answer to Justice Jackson. I think
10 your example, Your Honor, shows why that
11 matters.

12 But then also, with regard to
13 administrability, if you adopt our position, you
14 know that the universe closes very quickly after
15 enactment. That respects finality. It also
16 respects administrability. Whereas, if you
17 adopt the other side's argument -- and the
18 government concedes this -- that there will be
19 people that spring into this largely by virtue
20 of this Court's decisions, you know, for years
21 and years and years to come.

22 Obviously, at some point, that will
23 end because there will cease being people who
24 were originally sentenced under the Deal
25 stacking regime, but it's going to be a long

1 time.

2 And so, if you're looking at
3 administrability, this is the -- Congress was
4 setting a set universe of people at the time of
5 enactment.

6 JUSTICE KAVANAUGH: And your point
7 there is each time we have a new decision like
8 Davis or something akin to that, we'll spring
9 into effect a whole new round of times where
10 there are going to be 2255s, and that defeats
11 finality? Is that your point?

12 MR. MCGINLEY: That's correct. And
13 it -- and then it just exacerbates your point
14 about how people who committed more crimes are
15 more likely to get the benefit of resentencing.

16 JUSTICE SOTOMAYOR: I don't understand
17 this. This does nothing to change that, meaning
18 finality is destroyed by changes in law, like
19 Davis, by us randomly. We do it. We don't do
20 it on the basis of how we read this statute,
21 meaning this statute is not what's opening up
22 the sentence. What's opening up the sentence
23 was Davis, and Davis ordered a new sentencing.

24 So I'm not sure why you're reading
25 respects finality.

1 MR. MCGINLEY: It -- so, Your Honor,
2 the question, of course, is what did Congress
3 construct here. And Congress chose not to draw
4 a strict finality line because they chose to
5 apply it retroactively to a small set of people.

6 And the question is: Where did they
7 draw that line and why did they draw that line?

8 The text tells you where they --

9 JUSTICE SOTOMAYOR: But I think you're
10 miss -- you're mix -- you're missing my point,
11 which is our reading does nothing to finality.
12 What does to finality or what undoes to finality
13 is Congress's choice to make this retroactive,
14 correct?

15 MR. MCGINLEY: That's correct. But
16 the question, of course, is how retroactive did
17 they make it.

18 JUSTICE SOTOMAYOR: Well, how -- why
19 does that matter to finality? Meaning nothing
20 about this law is changing the finality of the
21 conviction qua the crime. It was Davis that did
22 that. Davis ordered the resentencing.

23 You're looking at finality as if it's
24 the finality of how you do that resentencing.

25 MR. MCGINLEY: Okay. I -- I

1 understand, Your Honor. And I -- maybe I should
2 clarify.

3 My responses to Justice Kavanaugh were
4 about administrability and similar situation.
5 Congress has obviously already made the decision
6 not to have a strict line of finality.

7 JUSTICE SOTOMAYOR: Right. And
8 administrability. The resentencing has to occur
9 here. So we're not serving any administrative
10 purpose by ruling this way because the
11 resentencing wasn't ordered by the First Step
12 Act. It was ordered by Davis. Correct?

13 MR. MCGINLEY: That's correct.

14 JUSTICE SOTOMAYOR: All right. Thank
15 you, counsel.

16 MR. MCGINLEY: Thanks.

17 JUSTICE JACKSON: Can I just -- I
18 don't understand your argument about Congress
19 saying "after the date of enactment" and that
20 that somehow would solve this problem, because
21 it seems to me that a statute that says this
22 applies to sentences imposed after the date of
23 enactment, which is what you say they could say
24 to make it clear, is materially
25 indistinguishable from a statutory statement

1 that this doesn't apply if a sentence has been
2 imposed as of the date of enactment, which is
3 the statute that we have here.

4 They're just the flip side. It's the
5 same thing. So I don't understand how "after
6 the date of enactment" helps you at all.

7 MR. MCGINLEY: I don't think they're
8 the flip side.

9 I want to make sure I understand your
10 question. Here, what it's saying is if a
11 sentence for the offense has not been imposed as
12 of the date of enactment. Here, a sentence was
13 imposed, twice, in fact, for each of these
14 defendants.

15 If, instead, it had said that the --
16 that 403(a) applies to any sentence imposed
17 after the date of enactment, then we would agree
18 that that includes resentencing. And that's why
19 I pointed to the safety valve's retroactivity
20 provision, because that's clearly what Congress
21 wanted there. But, here, it drew a very
22 different line.

23 And I think it's meaningful that in
24 402(b), when setting forth the retroactivity of
25 the safety valve changes, it used a different

1 construction. Here, it uses this construction.

2 I also just want to make sure I point
3 out that Footnotes 4 and 5 of our brief point to
4 a -- a number of statutes that use precisely the
5 same construction, largely in the context of
6 statute of limitations, which makes sense
7 because what -- similar to a retroactivity
8 provision in a statute of limitations provision,
9 what Congress is trying to define is whether or
10 not the statute -- some -- a statute applies if
11 an event has occurred as of a certain date.

12 JUSTICE JACKSON: But what -- can you
13 think of any other regime in which the mere
14 historical fact in this way has this kind of
15 implication?

16 MR. MCGINLEY: Sure. So, I mean --

17 JUSTICE JACKSON: Yeah.

18 MR. MCGINLEY: -- I think the
19 government concedes that in 922(g) and in the
20 predecessor felon in possession statute --

21 JUSTICE JACKSON: Those are status --
22 those are status. They're different.

23 MR. MCGINLEY: But I think, on the
24 government's view of what it means for a
25 sentence to be imposed, it's the status here as

1 well. And status at the time of enactment of
2 this statute was that they had a sentence
3 imposed.

4 And even on the government's reading,
5 that sentence remained imposed as of that date
6 of enactment, which is why I don't think the
7 government can -- can win in this case on their
8 reading unless you read the words "as of the
9 date of enactment" out of the statute.

10 JUSTICE JACKSON: And it would matter
11 to Congress that that historical fact occurred
12 with respect to their resentencing why?

13 MR. MCGINLEY: Well, for the same
14 reason that in 3742(g)(1), Congress said that
15 when a sentence isn't -- vacated on appeal and
16 you are resentenced under the guidelines, the
17 guidelines that exist -- that were in effect at
18 the time of your initial sentencing apply.

19 And so it's clear that Congress does
20 at times want old sentencing regimes to apply.
21 Also, against the backdrop of one --

22 JUSTICE JACKSON: In the context of a
23 statute where they're clearly carving out the
24 old sentencing regime as unfair?

25 MR. MCGINLEY: So, in that context,

1 it's -- it's guidelines, right?

2 So I want to be clear. 3742(g)(1) is
3 about the guidelines. And, there, if there is a
4 retroactive change to the guidelines after a
5 sentence is vacated on appeal, that retroactive
6 change does not apply.

7 And so we are not arguing 3742(g)(1)
8 is -- governs this case. But you're asking a
9 question: Has Congress ever done this before?
10 And the answer is: Yes, it has done it before.

11 And all of that, at the end of the
12 day, because we're here talking about statutory
13 minimums, you have to interpret all of it
14 against the backdrop of 109. And 109 tells you
15 that --

16 JUSTICE JACKSON: This isn't a
17 carveout to -- I thought this was -- this was
18 engaging with 109 in saying --

19 MR. MCGINLEY: So --

20 JUSTICE JACKSON: -- that we don't
21 want that to apply.

22 MR. MCGINLEY: So we agree that for
23 people who have not yet received any sentence,
24 109 is satisfied. But the question here is
25 whether the different set of people who were --

1 who did receive a sentence before date of
2 enactment but later had it vacated, whether they
3 qualify. 109 tells you that if there's any
4 ambiguity, you have to go against retroactivity.

5 I think the government conceding that
6 there's ambiguity here, which I didn't
7 understand them to be conceding in their brief,
8 actually just loses the case for them because
9 109 would then mean that the ambiguity cuts
10 against retroactive applications.

11 JUSTICE GORSUCH: Mr. McGinley, would
12 you agree that the -- the present-perfect tense
13 usually refers to something that has continuing
14 effect?

15 MR. MCGINLEY: I think the Chicago
16 Manual of Style says it either can be that or
17 something that has been completed.

18 JUSTICE GORSUCH: But it -- it
19 often -- I mean -- I mean, isn't that how you
20 learned your high school grammar, that you don't
21 use the present-perfect tense for something
22 that's wholly completed and in the past, with no
23 continuing effect?

24 MR. MCGINLEY: I think, if you have a
25 date reference, as you do here, then I think it

1 is a very normal construction to say that
2 something --

3 JUSTICE GORSUCH: Okay.

4 MR. MCGINLEY: -- has been done as of
5 a certain date.

6 JUSTICE GORSUCH: All right. So you
7 disagree with that? You think it's possible?

8 MR. MCGINLEY: I think it's possible.

9 JUSTICE GORSUCH: Okay. If it's
10 possible, you don't -- I -- I just want to go
11 back to 3582(c) because you don't address it in
12 your brief directly. And 3582(c) uses the
13 present-perfect tense, "has been imposed."

14 And it -- and it says you can't mess
15 with the sentence once it's "has been imposed."
16 And it would be the most natural thing in the
17 world to think that perhaps that statute uses
18 the present-perfect tense in the same way it's
19 used here, right?

20 MR. MCGINLEY: Yes, although,
21 obviously, the -- the statutory --

22 JUSTICE GORSUCH: But you're asking --
23 you're asking us to interpret the words
24 differently.

25 MR. MCGINLEY: No, Your Honor. What

1 we're saying is those are two different
2 statutory provisions with different surrounding
3 words, different constructions addressing
4 different circumstances.

5 JUSTICE GORSUCH: Talking about
6 whether a statute has been imposed is pretty
7 darn similar.

8 MR. MCGINLEY: Well, right, but --
9 this one says "as of a certain date," and it's
10 about retroactivity. 3582 cannot --

11 JUSTICE GORSUCH: Right. And one can
12 either read it to be something wholly in the
13 past, as you suggest, or something with
14 continuing effect. And we know in 3582(c) it
15 has to have continuing effect because you can
16 modify a vacated sentence, right?

17 MR. MCGINLEY: So that's one way to
18 read 3582(c). I actually don't know that that's
19 the only way to read 3582(c) because you could
20 also view it as historical fact, and the reason
21 why is because you only ever are going to be
22 talking about modifying a sentence under 3582(c)
23 if it -- if that sentence has not been vacated.

24 JUSTICE GORSUCH: Ah, but once it's
25 vacated -- once it's vacated, I can do something

1 with it. If it hasn't been vacated, I can't do
2 something --

3 MR. MCGINLEY: Well, no, because
4 you --

5 JUSTICE GORSUCH: -- with it, right?

6 MR. MCGINLEY: Sorry. You -- you
7 would not be modifying the sentence that was
8 vacated at that point. You would just be
9 imposing a new sentence.

10 JUSTICE GORSUCH: A new sentence.
11 It's possible to mess with it, but it's not
12 possible to mess with it if it has continuing
13 legal effect.

14 MR. MCGINLEY: Yeah. I -- I don't
15 want to quarrel with you here, I -- but I do
16 think --

17 JUSTICE GORSUCH: Quarrel away.

18 MR. MCGINLEY: -- but I do think --
19 (Laughter.)

20 MR. MCGINLEY: I do enjoy it, but I do
21 think --

22 JUSTICE GORSUCH: I know you do.
23 (Laughter.)

24 MR. MCGINLEY: I -- I do think that
25 under either reading of the present-perfect

1 tense, 3582(c) still works because what it's
2 saying is that once it's been imposed, you can't
3 modify it, which could also mean that before
4 it's been imposed, you could modify it. And so
5 the judge could -- maybe there was a colloquy
6 and the judge thought he was -- he or she was
7 going to impose a certain sentence, changed his
8 or her mind, and that's perfectly fine before
9 the imposition, which, as I said, was a
10 historical act. 3553(c) makes that clear.

11 I'd also point you to Judge
12 Kethledge's opinion in the -- in the Carpenter
13 case below, which I think does a really nice job
14 of articulating that principle.

15 JUSTICE KAVANAUGH: I think, in
16 response to Justice Sotomayor, you acknowledged,
17 I think correctly, that there's not so much of a
18 finality problem with the other side's position.
19 Your -- your position is that it's easily
20 administered, but the reopenings -- the new
21 sentencing proceedings are going to happen
22 either way.

23 I guess there's a small point that you
24 had there that there would be more for the
25 sentencing judge to do, I suppose, if the other

1 side prevailed, but it's going to be reopened
2 either -- I mean, there's going to be a new
3 sentencing proceeding either way.

4 MR. MCGINLEY: So I -- I want to make
5 sure I don't -- I don't give away too much.
6 Maybe I'd say it's a small "f" finality concern
7 because, yes, there's going to have to be some
8 form of new sentence imposed, although I will go
9 back to Justice Alito's point that it's not
10 required that a sentence -- that a judge vacate
11 and --

12 JUSTICE KAVANAUGH: Right.

13 MR. MCGINLEY: -- order plenary
14 resentencing. I think that actually creates
15 another anomaly here where you could have some
16 judges who say -- particularly if you adopt the
17 other side's view, some judges might say -- may
18 I finish the --

19 CHIEF JUSTICE ROBERTS: Certainly.

20 MR. MCGINLEY: Some judges might say,
21 well, I'm not going to vacate for plenary
22 resentencing because that means that these
23 people will get the benefit of 403(a), and,
24 instead, I'll just correct the sentence, as they
25 could have done here, whereas other judges might

1 open for plenary resentencing, then you have a
2 whole 'nother similarly situated anomaly.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas?

7 Justice Alito?

8 JUSTICE ALITO: Well, it's always fun
9 to talk about grammar and --

10 (Laughter.)

11 JUSTICE ALITO: -- and usage. But I
12 wonder if you would agree with me that the
13 present-perfect tense sometimes means in
14 context, sometimes suggests in context that the
15 past event continues to have present effect.

16 Mr. Kimberly gave an example sort of
17 along these lines. Anybody who would be -- this
18 is similar. Anybody who won a gold medal at the
19 Olympics can participate in a particular parade.
20 And, in context, that would probably mean that
21 somebody who won a gold medal that was later
22 revoked due to violation of doping rules would
23 not be entitled to march in the parade. Okay.

24 But there are -- I could give you a
25 thousand examples of situations in which

1 present-perfect tense is used to refer to an
2 event that doesn't have continuing -- that does
3 not continue up to the present.

4 Were you ever employed as a
5 dishwasher? Yes, somebody who washed dishes in
6 college would answer yes. Were you ever a
7 member of the Communist Party? Have you ever
8 been a student at X college? On and on and on.
9 Have you ever been employed by a particular law
10 firm? So it all depends on the context.

11 So what is it about the context -- and
12 it -- and it seems to me that the relevant
13 question is whether, for the purpose in
14 question, the purpose at issue, does the past
15 event -- does it matter whether the past event
16 has a present effect?

17 Would you agree with all that?

18 MR. MCGINLEY: I would agree with all
19 that. And could -- and could I say one more
20 thing, Your Honor? I think that "as of the date
21 of enactment" is critical in that sense.

22 JUSTICE ALITO: So why would the past
23 event have a -- have relevance in this
24 situation? I -- I could see it where the
25 past -- where the -- the sentence was vacated

1 because it was invalid.

2 But I find it harder to understand why
3 that would be relevant, why a present effect
4 would be -- why the -- why it would be relevant
5 when the sentence was never invalid?

6 MR. MCGINLEY: I agree with that, Your
7 Honor. And I'd point you, in addition to the
8 "as of" language, of course, the statute says
9 that it's a sentence for the offense. And so
10 it's specific to the offense at issue. Here,
11 the offense at issue were the 924(c) violations
12 related to the bank robbery. The -- no one has
13 ever suggested that those were invalid when they
14 were entered in 2010 or in 2012.

15 JUSTICE ALITO: Thank you.

16 JUSTICE KAGAN: But your --

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 Justice Kagan?

20 JUSTICE KAGAN: But -- but -- but --
21 but your understanding of the statute would
22 apply just as well to people whose sentences
23 were invalid?

24 MR. MCGINLEY: That is correct, Your
25 Honor, but I think under what Justice Alito is

1 asking --

2 JUSTICE KAGAN: Yeah, it's just
3 that --

4 MR. MCGINLEY: -- makes it -- yeah.

5 JUSTICE KAGAN: I -- I guess what I'm
6 sort of suggesting is that that's an orthogonal
7 point. Your --

8 MR. MCGINLEY: Perhaps.

9 JUSTICE KAGAN: So -- so I'll just ask
10 Justice Alito's questions with that sort of
11 taken out of the picture. Like, let's just
12 pretend that this sentence was invalid in the
13 first place.

14 What purpose are you going to give me
15 that -- that would satisfy his view of how to
16 figure this contextual question out?

17 MR. MCGINLEY: Sure. It's the same
18 purpose that underlies 3742(g)(1), right,
19 because, in 3742(g)(1), Congress is accepting
20 that the sentence at issue was vacated for some
21 legal flaw, yet when it goes back down, the
22 judge is supposed to apply the guidelines that
23 existed at the time of the initial sentencing.

24 We're not saying that that's always
25 the best policy decision that Congress should

1 make, but it is a policy decision Congress has
2 made before, and we say it's a policy decision
3 that it made here.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch?

6 Justice Kavanaugh --

7 Justice Barrett?

8 JUSTICE BARRETT: No.

9 CHIEF JUSTICE ROBERTS: Justice --

10 JUSTICE JACKSON: Can I just get your
11 reaction to one quick thought on
12 administrability? Why wouldn't it be harder for
13 a judge, a district judge who day to day is
14 applying the First Step Act to new offenders who
15 come before them, to do something different with
16 respect to this person who's coming back? It
17 seems to me administrability cuts against you.

18 MR. MCGINLEY: I don't think that's
19 right, Your Honor, I think for two reasons.
20 One, under the historical fact analysis, it's a
21 very simple analysis. You ask, has a sentence
22 been imposed before December 21st, 2018? If the
23 answer is yes, then you apply the --

24 JUSTICE JACKSON: The old regime --

25 MR. MCGINLEY: -- the old regime.

1 JUSTICE JACKSON: -- that we're not
2 used to applying because we -- we're ordinarily
3 in the flow of just doing the regular First --
4 Step Act analysis.

5 MR. MCGINLEY: Well, perhaps, except I
6 do think, with respect to this regime, most
7 judges are familiar with it. I also think that
8 with respect to administrability, it's -- it's
9 also a question of was Congress trying to define
10 a set that could be knowable or at -- at least
11 defined as of the date that it enacted it, which
12 I think is why they used the word "as of the
13 date of enactment." It's why you find similar
14 constructions in statute of limitations.

15 JUSTICE JACKSON: Thank you.

16 MR. MCGINLEY: So -- thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 MR. MCGINLEY: Thank you.

20 CHIEF JUSTICE ROBERTS: Rebuttal,
21 Mr. Kimberly?

22 REBUTTAL ARGUMENT OF MICHAEL B. KIMBERLY
23 ON BEHALF OF THE PETITIONERS

24 MR. KIMBERLY: Thank you, Mr. Chief
25 Justice. A few brief points.

1 As Justice Sotomayor's colloquy laid
2 out, the word "imposed" can mean either a
3 singular past event that happened at some
4 discrete point in the past, or it can mean sort
5 of an ongoing application.

6 Here, Congress didn't say initial
7 sentence and it didn't say final sentence, so
8 we've got an uncertainty about which it meant.
9 And so, to break that sort of linguistic tie, if
10 you will, I think it makes sense, as we've said,
11 to refer to background legal conventions.

12 Now, Justice Barrett, you asked what
13 kind -- earlier, of me, you asked what kinds of
14 background conventions apply in -- in this sort
15 of not immediately textual interpretive way, and
16 I mentioned statutes of limitations are presumed
17 to incorporate equitable tolling.

18 Another example from Your Honor's
19 opinion was that the substantive criminal laws
20 are presumed to include culpable mental states.
21 That's also not an interpretation directly of
22 the language. It's simply a background
23 principle with which Congress is presumed to
24 comply.

25 Bond itself, which is this Court's

1 most recent application of this principle,
2 concerned the notion that Congress is presumed
3 to respect basic federalism principles.

4 All of this indicates that really the
5 background legal principle that a vacatur treats
6 a sentence as though it never was imposed is a
7 rule that Congress would have understood to
8 apply when it referred to a sentence that has
9 been imposed.

10 Now amicus says that background legal
11 principles can't override text. But that gets
12 matters backward. Our view is that this
13 background legal principle sheds light on the
14 text. It tells you how to interpret it.

15 But, even if I don't have you on that,
16 then, at the very least, what this principle
17 does is it overrides the facts of a particular
18 case. A vacatur is a -- it is an equitable
19 principle that brings to bear a legal fiction,
20 which is an assumption that some true fact is,
21 in fact, not true for some limited legal purpose
22 so as to accomplish justice.

23 And I think equitable tolling is a
24 good example of this. When equitable tolling
25 applies, the clock doesn't literally stop. We

1 know time doesn't actually stop. It's a legal
2 fiction, and it's a legal fiction that is
3 presumed to be incorporated into Congress's
4 enactments. And the same is true here.

5 Now, if the Court were to say
6 otherwise, I worry about the -- the trouble that
7 it will cause throughout the remainder of the
8 Court's criminal cases.

9 922(g)(1) uses straightforward
10 language that refers to a past event. It says:
11 "It shall be unlawful for any person who has
12 been convicted in any court of a felony to
13 possess a firearm."

14 That is a historical factual question.
15 Has someone been convicted? The -- a vacatur of
16 that conviction prior to the possession of a
17 firearm, by operation of law, undoes that fact.
18 We are asking only for application of that
19 settled principle in this case.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. McGinley, this Court appointed you
24 to brief and argue this case as an amicus curiae
25 in support of the judgment below. You have ably

1 discharged that responsibility, for which we are
2 grateful.

3 The case is submitted.

4 (Whereupon, at 11:35 a.m., the case
5 was submitted.)

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