

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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.)

Pages: 1 through 101
Place: Washington, D.C.
Date: January 13, 2025

HERITAGE REPORTING CORPORATION
Official Reporters
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TONY R. HEWITT,)

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- - - - -

Washington, D.C.

Monday, January 13, 2025

The above-entitled matter came on for oral
argument before the Supreme Court of the United
States at 10:04 a.m.

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6 of the Respondent in support of the Petitioners.
7 MICHAEL H. MCGINLEY, ESQUIRE, Washington, D.C.;
8 Court-appointed amicus curiae in support of the
9 judgment below.
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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Kimberly.

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

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

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

In enacting this override, Congress had to balance two countervailing values: first, justice in sentencing, and, second, finality of judgments. Congress struck the balance in 403(b) by making 403(a) retroactively applicable to offenders whose conduct predated 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 -- it's a
8 better argument -- there is a better argument
9 for pre-Act vacatur as opposed to post-Act
10 vacatur?

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

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

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

25 MR. KIMBERLY: Well, Your Honor, I --

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

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

20 CHIEF JUSTICE ROBERTS: Well, this
21 is -- I mean, it is a fortuitous windfall for
22 your client, right? The -- the sentence was
23 vacated for reasons having nothing to do with
24 the pertinent sentence that's at issue here. Is
25 that right? They're totally unrelated 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 know, consider, for example,
6 this -- this hypothetical: An award will be --
7 an awards ceremony will be held for anyone who
8 has been awarded a medal as of January 1st. And
9 now imagine that Jones was awarded a medal
10 before January 1st but that after January 1st
11 and before the awards ceremony, the award was
12 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 everyone but not if you've been sentenced.
9 Or it could be -- you know, they could draw
10 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. That would have been very

1 easy to write.

2 MR. KIMBERLY: As would the inverse,
3 Your Honor.

4 JUSTICE KAVANAUGH: Yeah.

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

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

15 JUSTICE ALITO: Mr. Kimberly, have you
16 been employed by Mayer Brown?

17 MR. KIMBERLY: Yes, I have.

18 JUSTICE ALITO: Well -- but you're not
19 anymore?

20 MR. KIMBERLY: Correct.

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

24 MR. KIMBERLY: Well, I -- I think
25 the -- the natural way to describe the fact that

1 I've been employed by one firm before being
2 employed by another firm is to use the past
3 perfect.

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

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

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

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

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

22 So, here, it would be the imposition
23 of a sentence before December 21st, 2018. In
24 Your Honor's hypothetical, there's no other past
25 event to which my prior employment is

1 antecedent.

2 JUSTICE ALITO: Did the trial judge
3 have an obligation to vacate these sentences?

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

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

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

22 MR. KIMBERLY: Your Honor, I don't
23 think it follows necessarily that the imposition
24 of a new sentence would necessarily be more
25 severe.

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

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

7 JUSTICE ALITO: What's the reason for
8 that convention?

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

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Anything further?

19 JUSTICE THOMAS: No.

20 CHIEF JUSTICE ROBERTS: Justice Alito?

21 JUSTICE ALITO: What do you make of
22 the fact that the Solicitor General does not
23 defend the -- your argument that the vacatur of
24 a sentence means that the sentence was void ab
25 initio for all purposes?

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

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

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

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

22 JUSTICE ALITO: All right. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: We -- the

1 questioning started in part with the
2 arbitrariness of this point. In fact, the First
3 Step Act, in its retroactivity, is arbitrary --

4 MR. KIMBERLY: That's right.

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

8 MR. KIMBERLY: That's correct, Your
9 Honor.

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

19 MR. KIMBERLY: That's correct. The
20 date of finality of the sentence doesn't turn on
21 the date of the conduct.

22 JUSTICE SOTOMAYOR: The part of this
23 conversation that hasn't been discussed is the
24 fortuity to the defendant, but I thought that
25 one of the motivating facts for this change was

1 not the effect on defendants but the effect on
2 courts, meaning that there was an outcry -- I
3 think many, many decisions by judges --
4 complaining that their hands were tied in an
5 unfair way in calculating a proper sentence
6 because prosecutors held the decision of whether
7 to charge multiple crimes or a single crime.

8 So, if in a jurisdiction where
9 multiple crimes were charged as having been
10 committed after one incident, they were stacked
11 indefinite -- they were stacked. In other
12 jurisdictions, where multiple incidents were
13 charged as one crime, they weren't stacked.
14 Correct?

15 MR. KIMBERLY: That's correct, Your
16 Honor.

17 JUSTICE SOTOMAYOR: And so that us
18 ruling in favor of the argument raised by amicus
19 would go back to tying the hands of district
20 courts, correct?

21 MR. KIMBERLY: That's right, Your
22 Honor.

23 JUSTICE SOTOMAYOR: And answering or
24 responding to Justice Alito's point, that is one
25 of the reasons to vacate the entire sentence,

1 isn't it?

2 MR. KIMBERLY: It's certainly a
3 consideration that a judge could take into
4 account.

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

11 MR. KIMBERLY: That's correct.

12 JUSTICE SOTOMAYOR: Thank you,
13 counsel.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

21 So my intuition about the statutory
22 language is that it just was not meant with this
23 case in mind, that they -- that the drafters of
24 this language had front and center in their
25 heads the view that, you know, someday we're

1 going to pass this statute, and on that day,
2 there are going to be a bunch of people who have
3 committed crimes but who haven't been sentenced
4 yet, and we need a provision to take care of
5 those people.

6 And they weren't talk -- thinking
7 about resentencings, and they especially weren't
8 thinking about resentencings where the vacatur
9 happened after the date of enactment.

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

18 Now I'm not saying that they -- like,
19 obviously, the drafters of this statute -- we
20 know this because they filed an amicus brief.
21 You know -- you know, presented with this case,
22 they think it should come out the same way and
23 probably thought at the day they drafted this
24 statute it should come out the same way. But my
25 intuition is they wrote a provision without this

1 in their heads at all.

2 So what should I do with that if I
3 think that's right? And do you think I'm just
4 wrong about that?

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

14 So we know that Congress was concerned
15 to respect the finality of sentences that were
16 final and valid as of the date of enactment.

17 The -- the situation that we have here
18 falls into the other side, the other sort of
19 bucket of sentences -- of cases, those that are
20 pending, where finality interests simply don't
21 attach.

22 And I would tell you, even if we don't
23 have you just purely on the language, we've got
24 to have you instead on the background legal
25 convention that a vacatur undoes a sentence.

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

9 But this Court said in Lewis in
10 Footnote 5, rightly so, where I am certain that
11 if you're -- if you have been convicted, but
12 your conviction has been vacated, you may
13 lawfully possess a firearm.

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

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 JUSTICE KAVANAUGH: Just to follow up
19 on that, and I think that may -- Justice Kagan's
20 intuition kind of seems -- seems consistent with
21 what I think too about what was going on.

22 On the other hand, I guess, why
23 weren't they thinking about this is not a
24 unusual permutation to have a resentencing
25 proceeding?

1 MR. KIMBERLY: Well, I -- I'm not --
2 I -- I can't speak to why specifically they
3 weren't thinking about it. What I would say is
4 that background legal conventions exist to
5 answer precisely this question.

6 JUSTICE KAVANAUGH: Well, on that
7 point, there are a couple things that -- that go
8 the other way on that, and this is why I think
9 this is a really close case.

10 And so the things that go the other
11 way are the general federal provision that says
12 you don't apply statutes retroactively. And,
13 obviously, this does to some extent. But then
14 the corollary to that principle might be -- and
15 I know you can test this -- that you -- you
16 don't construe it more broadly than the text
17 goes in terms of the retroactivity of the
18 provision. And that would obviously hurt you
19 here, that background convention.

20 The other is the general principle
21 that the sentencing guidelines in effect at the
22 time of sentencing are -- are used even in a
23 resentencing provision sometimes.

24 MR. KIMBERLY: So I think both of
25 those considerations cut in our direction. As

1 to Section 109, this Court in Dorsey made very
2 clear that you don't need an express clear
3 statement overriding the general principle that
4 retroactivity is not the norm. All you need is
5 a fair implication.

6 And so there's no question that 403(a)
7 does apply retroactively. The question here is,
8 is there a fair implication that it applies not
9 only to cases where no sentence was initially
10 imposed but cases like this one?

11 And I would say that fair implication,
12 my friend on the other side's position is a
13 linguistic possibility at best. But ours is
14 also a linguistic possibility. And so, to break
15 that tie, I think you've got to look at context.

16 You -- you've got the linguistic
17 context with use of the present-perfect tense,
18 the statutory context, 3582(c), which uses the
19 "has been imposed" locution to refer to ongoing
20 valid sentences that can be modified.

21 You've got the legal context, which is
22 the background presumption that I mentioned.
23 You've got the historical context, which
24 indicates that Congress meant to clarify its
25 view -- the 115th Congress meant to clarify its

1 view that Deal was never rightly decided. So
2 why would Congress want it to continue to apply
3 to any new resentencings? You've got the
4 drafting history as part of the historical
5 context, and you've got the purpose context,
6 with you -- which you, Your Honor, in Harrington
7 against Purdue, said is an important part of the
8 consideration.

9 All of those favor Petitioner. None
10 favor the --

11 JUSTICE KAVANAUGH: That was -- that
12 was a dissent, but anyway.

13 (Laughter.)

14 JUSTICE KAVANAUGH: Thank you.

15 MR. KIMBERLY: Thank you.

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

19 I -- I think that the best argument is
20 the background legal principle argument, the
21 best argument for your side, not the best
22 argument overall, the best argument on your
23 side.

24 (Laughter.)

25 JUSTICE BARRETT: And I actually -- I

1 wonder if you could say a little bit about how
2 to think about this background legal convention
3 in this case as a matter of interpretation
4 because, I mean, I do think, you know, Judge
5 Bibas's opinion going through this is the best
6 one, you know, for -- for -- at least in the way
7 I would think about the case on the other side.

8 But, normally, when we look at those
9 background conventions, I mean, one context
10 would be, like, the old soil principle, and so
11 we would look at a word and say this is the old
12 soil principle and this is how it works.

13 Or we might say there are statutory
14 gaps, so we know, if Congress doesn't say
15 anything about a statute of limitations or if it
16 doesn't mention criminal defenses, we assume
17 they apply.

18 But this is really different because
19 the statute doesn't use the word "vacatur." And
20 it's not like it's coming in from the background
21 to fill in gaps in the same way we would think
22 of as a statute of limitations. So could you
23 say a little bit about that or how you might
24 think of that working? Because I think, just as
25 a matter of the theory of statutory

1 interpretation, it's not evident. I can't think
2 of another analogue, which is the thing that
3 gives me pause about that argument.

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

16 I think the -- the general -- here, I
17 think the idea that something has been imposed
18 connotes a -- an action by a court, and -- and
19 when a vacatur has the effect by a legal
20 fiction, which is -- you know, it's an
21 assumption in law that something that is true
22 is -- is false for some limited legal purpose.
23 When that -- when -- when what it is that's been
24 imposed is undone, it's a natural application of
25 that principle.

1 So I think, in this case, you get it
2 from the word "imposed." I think you get it
3 from the word "sentence." What was -- what was
4 done pre-enactment is neither of those things we
5 know by operation of this principle.

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson?

9 JUSTICE JACKSON: So I guess I'm a
10 little surprised at your response to Justice
11 Kagan, and I'm trying to see if I understand
12 your argument.

13 I think that if Congress was
14 singularly focused on finality, then I would
15 think that they would be relying or would have
16 relied exclusively on the background default
17 rule that courts apply the law in effect at the
18 time of sentencing -- excuse me, at the time of
19 the offense. That's the background principle.
20 And everybody would be out of luck. You just
21 look at the date of the enactment and anybody
22 who offended after that would get the benefit.

23 But, here, it appears as though
24 Congress was actually trying to target a
25 particular group and allow them to do something

1 other than the default, allow them to have the
2 benefit even though they had offended prior to
3 the Act. So that's the group of people that
4 Justice Kagan says we're focused on. And maybe
5 Congress wasn't really homing in on resentencing
6 versus sentencing.

7 But what I thought your argument was,
8 was that in focusing on that group of people,
9 Congress was drawing the line around whether you
10 had already been sentenced and you were serving
11 what was, in effect, a final sentence or you
12 still had to be sentenced for this offense.

13 And, if that's the line they're
14 drawing, partly in response to Justice
15 Kavanaugh, I guess the question becomes why
16 would Congress have wanted to further delineate
17 in the world of people who still have to be
18 sentenced between people who had previously been
19 sentenced and their sentence was vacated and
20 people who hadn't.

21 What I can't figure out is why it
22 makes sense to distinguish in the group of
23 people who still have to be sentenced for this
24 offense between those who previously had one and
25 those who didn't. So can you offer -- and I'll

1 certainly ask the other side this question, but
2 it seems to me that that's the key question that
3 we need to really ferret out when we're trying
4 to understand where the lines are being drawn in
5 this statute.

6 MR. KIMBERLY: And -- and, Your Honor,
7 I don't see any reason Congress would have
8 wanted to draw that line. I think the issue
9 is -- you know, this is sort of a -- a problem
10 that's underlying the questions in the briefing
11 that isn't really openly addressed until the
12 replies.

13 The question is: What is the time
14 perspective at which you're applying 403(b)? If
15 your -- the general rule, the -- the -- the
16 standard understanding, is that statutes are
17 written to be read and interpreted from the time
18 of their reading and application, not the time
19 of their adoption.

20 So, if you're sitting in the seat of a
21 sentencing judge applying this law at the time
22 that somebody is before you for a plenary
23 resentencing, you're asking the question: Okay,
24 this individual was sentenced before the Act,
25 but can I say today that he has been sentenced

1 as of December 21st, 2018, when, in fact, his
2 sentence has been vacated?

3 JUSTICE JACKSON: And my question, I
4 guess, is why would it have mattered from
5 Congress's --

6 MR. KIMBERLY: Well, exactly right.

7 JUSTICE JACKSON: -- perspective?
8 That's the key. So, fine. Even if the question
9 is, okay, he was sentenced back then, why would
10 Congress have said, and, therefore, while you're
11 sentencing him today, don't take the First Step
12 into account, whereas the next guy who walks in
13 who you're sentencing today would get the
14 benefit because he didn't get sentenced before?

15 MR. KIMBERLY: Right.

16 JUSTICE JACKSON: I don't understand
17 why that -- that line is there --

18 MR. KIMBERLY: I --

19 JUSTICE JACKSON: -- and what it's
20 doing.

21 MR. KIMBERLY: -- I don't understand
22 it either, Your Honor. And I think it's -- I
23 think it's negated by some of the broader
24 contexts, including the -- the headings of the
25 paragraphs at issue here.

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

5 There's no reason to think Congress
6 would have meant to distinguish between a
7 plenary sentencing, as to which there is no
8 finality, cost, following a vacatur that's a
9 resentencing or simply an initial sentencing.

10 JUSTICE JACKSON: Thank you.

11 MR. KIMBERLY: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Ms. Hansford.

15 ORAL ARGUMENT OF MASHA G. HANSFORD

16 ON BEHALF OF THE RESPONDENT

17 IN SUPPORT OF THE PETITIONERS

18 MS. HANSFORD: Mr. Chief Justice, and
19 may it please the Court:

20 Section 403 can reduce an offender's
21 sentence by decades. It applies where "a
22 sentence for the offense has not been imposed as
23 of the enactment date."

24 The reference to "a sentence imposed
25 on its own" creates an ambiguity: Does it cover

1 sentences that were imposed as a matter of
2 historical fact or sentences whose imposition
3 was not subsequently undone?

4 That ambiguity is familiar. When we
5 speak of medals received by an athlete or
6 articles published by a scholar or diagnoses
7 given by a doctor, sometimes we mean to include
8 medals that were stripped based on doping
9 allegations, articles retracted based on data
10 problems, and diagnoses corrected. And other
11 times we don't. The answer depends on context.

12 And two aspects of the context here
13 indicate that Congress meant to refer to
14 operative sentences, sentences that stuck.

15 First is the use of the
16 present-perfect tense. And, second, focusing on
17 the operative sentence perfectly reflects the
18 compromise Congress struck between fairness and
19 finality or breadth and finality, whereas
20 amicus's historic fact interpretation excludes
21 offenders based on a consideration that has, as
22 Justice Jackson just indicated, little
23 conceivable relevance.

24 I welcome the Court's questions.

25 JUSTICE THOMAS: What's the difference

1 between your argument and Petitioners' argument?

2 MS. HANSFORD: The -- the difference
3 is that we disagree that the background
4 principle resolves this case, and we disagree on
5 lenity. But, in terms of the best
6 interpretation of the statute, our argument is
7 the same.

8 JUSTICE KAGAN: Do you disagree on
9 those matters because you have a wealth of other
10 cases where those -- where, if you agreed on
11 those matters, it would come back to haunt you?

12 MS. HANSFORD: Yes, Justice Kagan.

13 (Laughter.)

14 MS. HANSFORD: So I -- I think the way
15 that Petitioner has kind of narrowed the
16 background principle is a little bit better for
17 us, but we're very concerned about the idea that
18 some kind of void ab initio principle would
19 suggest that a felon in possession statute, if
20 a -- a prior conviction is vacated after the
21 fact, or a SORNA conviction for failing to
22 register, if a conviction is vacated after the
23 fact, void ab initio would suggest it never
24 existed, and it would imperil those, false
25 statement convictions, immigration contexts.

1 There's a wealth of contexts where we
2 think kind of a robust view of that would create
3 all kinds of problems and goes against what the
4 Court has already decided in cases like Lewis.
5 And we don't think it's needed in this case
6 because we think just the term "sentence
7 imposed" on its own is ambiguous.

8 And I think we're willing to spot
9 Petitioner that maybe it's particularly
10 ambiguous when you're talking about a sentence
11 or a conviction because a vacated sentence is a
12 particularly void thing, but that's as far as
13 we're willing to go.

14 JUSTICE KAVANAUGH: I don't --

15 JUSTICE KAGAN: I mean, I do think
16 that you're giving away, as Justice Barrett
17 said, your best argument here as to this case.
18 And I -- I guess what I'm wondering is, is there
19 a version of the argument that Mr. Kimberly made
20 that you think would not come back to haunt you
21 in other cases but that could benefit your
22 reading here?

23 MS. HANSFORD: So two reactions to
24 that, Justice Kagan.

25 First, I think the version that would

1 not come back to haunt us is just a recognition
2 that on its own, a reference to a sentence, a
3 sentence imposed, does have some ambiguity and
4 you do need to look to other contextual tools to
5 resolve that ambiguity. And so I think that
6 that's the thrust of Petitioners' argument, and
7 I think we're comfortable with that to that
8 extent.

9 I do think that is sufficient for us
10 to win this case. I don't think you need
11 something more robust than that. And I think
12 that the contextual considerations are
13 incredibly strong.

14 So I -- I -- I think that the line
15 that is crystal-clear that Congress was drawing
16 here is between breadth, giving this
17 transformative modification of the prior
18 sentencing penalty that makes a difference for
19 each of Petitioners of 80 years, it decided to
20 apply it broadly.

21 How do we know that? It departed from
22 the traditional rule that pre-Act offenders
23 don't benefit.

24 And that is the key rule and I think
25 the most fair way to minimize disparities.

1 After all, pre-Act offenders are on notice when
2 they offend of this really harsh stacking
3 regime, and yet, still Congress wanted these
4 people to benefit, but it drew the line.

5 And I think exactly what Congress was
6 thinking about, to go back to your question to
7 Petitioners' counsel, is the principle that
8 Congress was trying to reflect is it did not
9 want Section 403 to be the tool for reopening
10 otherwise final sentences. Congress went back
11 and forth in the various drafts on how much to
12 impair finality, and it decided not to.

13 And I think that's the precise
14 compromise Congress struck. And I think our
15 interpretation tracks that compromise perfectly,
16 whereas amicus's interpretation, it narrows the
17 universe but in a kind of arbitrary way based on
18 something that doesn't have any conceivable
19 relevance, what the initial sentence was.

20 And just to go back to what Congress
21 was thinking, I think you might be right,
22 Justice Kagan, that it wasn't considering this
23 particular scenario, but I think that what it
24 was thinking is this finality consideration of
25 how do we capture sentences without hurting

1 finality.

2 And I think the best indication of
3 that is that Congress -- the -- the language
4 here perfectly mirrors the language of 3582(c),
5 which is the provision that defines the
6 imposition -- or that defines the finality
7 concerns that attach to a criminal sentence, and
8 that provision says the court may not modify a
9 term of imprisonment once it has been imposed.

10 So I think what happened here is
11 Congress pulled open that provision and said:
12 Oh, we don't want to do that. Once it's been
13 imposed and finality attaches, we don't want to
14 capture it. And so it drafted this language in
15 precisely the way to dovetail with that
16 provision, and I think our interpretation --

17 JUSTICE KAVANAUGH: You --

18 MS. HANSFORD: -- respects that
19 judgment by Congress.

20 JUSTICE KAVANAUGH: -- you said that
21 it's ambiguous a few times. I guess I don't see
22 it on its face as ambiguous. It just says "has
23 been imposed." "Has a sentence been imposed?"
24 Yes.

25 The question to me really is how does

1 it apply to this circumstance that -- where
2 Congress might not have meant it to apply. But
3 I don't really see that as ambiguity as much as
4 maybe context informing how to -- how broadly to
5 read it.

6 MS. HANSFORD: We disagree with that,
7 Justice Kavanaugh. So, if I ask, "How many
8 articles did she publish as of 2022?" -- to take
9 it outside the sentencing context -- you might
10 be meaning to include in that articles that she
11 published that were subsequently retracted or
12 you might not be.

13 And I think the way that we would
14 address that is we would -- we would say: What
15 are you wondering about? Are you wondering
16 about the strength of the early body of her
17 work? In which case it suggests that articles
18 retracted based on data problems are not the
19 kinds of things you're asking about.

20 JUSTICE KAVANAUGH: To me, it's more
21 like a literal -- and maybe this is what you're
22 saying -- a literalism versus how an ordinary
23 reader would understand it in context. Maybe
24 that's not -- maybe this is too theoretical.

25 MS. HANSFORD: I --

1 JUSTICE KAVANAUGH: But the point --
2 the reason why I'm concerned about this case --
3 and the government's obviously been on both
4 sides of this, so I feel good about that in
5 terms of my own thinking -- is there are still
6 disparities, like really, really big
7 disparities, and really big unfairness even
8 under your reading, which, usually, when we say,
9 well, the literal reading can't be right, it's
10 because the non-literal reading makes more sense
11 in context. And, here, there are still going to
12 be big-time disparities.

13 MS. HANSFORD: So a few reactions to
14 that.

15 The first is that I do think the
16 disparities are worse on amicus's reading,
17 but -- and -- and -- and then -- and then I'll
18 get to a couple of other thoughts.

19 I think the --

20 JUSTICE SOTOMAYOR: Explain that.

21 MS. HANSFORD: I think the disparities
22 are worse on amicus's reading because, if you
23 have two co-defendants who offend at the same
24 time, but one is rushed into a plea that's
25 involuntary or that's inadequately counseled,

1 before the enactment day of sentence, before the
2 enactment date is then -- then has the sentence
3 go up on appeal, the court of appeals throws it
4 out. The co-defendant goes back down.

5 But now, because there's this initial
6 completely unlawful sentence, he is stuck with
7 the application of the old, outdated, unjust,
8 unduly expensive regime, whereas his
9 co-defendant, who wasn't rushed in that way,
10 gets to benefit.

11 And I don't think that makes any
12 sense, but I also think that if we're thinking
13 about fairness, the -- the -- the best principle
14 is this time of offense principle, and the fact
15 that Congress is departing from that suggests
16 that Congress wants to go more broadly than
17 that. And I think that the next most relevant
18 principle is finality.

19 And -- and I think that if you --
20 under any reading, including amicus's, people
21 who are more dilatory, who evade arrest, who ask
22 for continuances, do still get to benefit from
23 the First Step Act's enactment if their sentence
24 is a post-enactment sentence. And that's
25 precisely because I don't think what Congress is

1 trying to do --

2 JUSTICE KAVANAUGH: But the -- the --

3 MS. HANSFORD: -- is minimize

4 disparities.

5 JUSTICE KAVANAUGH: You used the --

6 sorry to prolong this, but the bank robber --

7 MS. HANSFORD: Yeah.

8 JUSTICE KAVANAUGH: -- who has the --

9 the conspiracy charge tacked on gets the benefit

10 of Davis and, therefore, gets the benefit of

11 what you're offering here. The bank robber who

12 didn't have a conspiracy charge tacked on does

13 not even though they might have participated in

14 the same bank robbery.

15 MS. HANSFORD: Yes. Correct. And

16 that gets to the Chief Justice's initial

17 question about the windfall as well. I think

18 those two people are fundamentally differently

19 situated because one has a final sentence

20 imposed. So there's a profound cost to

21 reopening that sentence to give him the benefit

22 of this new scheme, whereas the person whose

23 sentence was vacated for whatever reason,

24 regardless of his merit or how good his crime

25 was, he does not have a final sentence, so there

1 isn't that same cost to impose.

2 And that's exactly why an individual
3 who is on the lam and delayed his initial
4 sentencing until after the enactment gets to
5 benefit as well. I think the principal
6 distinction is based on who has the final
7 sentence. And if there's no final sentence,
8 there's really no downside. There's no cost.

9 And I think that the only way that
10 amicus's view reduces any disparities is in --
11 by narrowing the class of offenders in this
12 arbitrary way.

13 JUSTICE ALITO: As I understand your
14 question -- your answer, it has nothing to do
15 with fairness to these two defendants. It has
16 to do with the burden on the court.

17 MS. HANSFORD: I think it does have to
18 do with the -- the -- Congress's view that the
19 old regime was an unfair one and also did not
20 give district courts sufficient discretion.

21 JUSTICE ALITO: Well, you have --

22 MS. HANSFORD: But I don't think it
23 has to --

24 JUSTICE ALITO: In Justice Kavanaugh's
25 example, you have a defendant who is -- sentence

1 has invalid sentences on -- on -- on a couple of
2 counts, valid sentences on other counts. You
3 say that person gets the benefit of the First
4 Step Act. But, if you have an identical -- a
5 person who's identical except there were no
6 invalid sentences, then that person doesn't get
7 the benefit of the First Step Act.

8 I don't see why that is fair and why
9 treating the -- the former person more favorably
10 than the latter is supported by fairness. Your
11 argument, as I understood it, was, well, it's a
12 big burden for the court to have to reconsider
13 cases that were completely sentenced and there
14 was nothing wrong.

15 MS. HANSFORD: I think there's no
16 reason to ask the court to apply a discarded
17 sentencing scheme at a post-enactment Act
18 resentencing because I think those individuals
19 whose sentences were vacated for any reason no
20 longer have an imposed sentence. There's no
21 longer a finality cost. In Pepper, this Court
22 says that the differences in procedural
23 opportunities that result because some have
24 their sentences vacated are not a kind of
25 unwarranted disparity. And I think that fits

1 perfectly the situation here.

2 But I think that your intuition,
3 Justice Alito, would support Congress's drafting
4 the statute in a different way and not -- and
5 not applying it to any pre-Act offenders at all.
6 Why apply it to any pre-Act offenders? Because
7 that's how important Congress thought it was.

8 And the operative sentence
9 interpretation tracks that finality cost
10 perfectly. It means that Section 403 does not
11 allow reopening of otherwise final sentences,
12 but it also allows a court to impose this new
13 updated scheme that reflects Congress's updated
14 judgment about what is fair and makes a huge
15 difference to individuals whenever it can do so
16 without harming the critical principle of the
17 finality of sentences.

18 JUSTICE GORSUCH: Ms. -- Ms. Hansford,
19 I just want to see if I understand how you've
20 squared your view with -- with Petitioners on
21 what's void and voidable.

22 As I understand it, you're -- and I
23 just want to see if I've got it, okay -- that
24 you would say that the felon in possession and
25 the SORNA cases are different because those

1 statutes ask about a status in a time past and
2 prior to the vacatur of the sentence, of the
3 conviction.

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

7 MS. HANSFORD: That -- that -- that --
8 that's -- that's really close. I would say that
9 for the 9 --

10 JUSTICE GORSUCH: Well, I'm glad I'm
11 in the neighborhood.

12 (Laughter.)

13 MS. HANSFORD: Yeah. And -- and I
14 don't know if this is -- if this is important,
15 but I'll just put this caveat out there. I
16 think that the -- the 922(g) asks for a
17 conviction at the present time, and the relevant
18 present --

19 JUSTICE GORSUCH: Yes. The relevant
20 time --

21 MS. HANSFORD: -- is the time of the
22 conduct when the penalty attaches.

23 JUSTICE GORSUCH: That -- that's the
24 time with respect to those. Here, the time is
25 the present at the moment of sentencing.

1 MS. HANSFORD: Exactly.

2 JUSTICE GORSUCH: Okay.

3 MS. HANSFORD: That's exactly right,
4 Justice Gorsuch.

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

10 MS. HANSFORD: With -- without, I
11 think the maximum is still life --

12 JUSTICE GORSUCH: Yeah.

13 MS. HANSFORD: -- for the various
14 offenses. So I -- the minimum goes from 130 to
15 135 years based on Petitioner to -- to 50 to 55
16 years based on Petitioner. That's the minimum.
17 Of course, the district court can go above that.

18 And I think that also helps go to the
19 exchange I was having --

20 JUSTICE GORSUCH: We all wind up in
21 the same place anyway.

22 MS. HANSFORD: The -- the sentences
23 are still extremely, extremely harsh, reflecting
24 the severity of their crimes, but --

25 JUSTICE GORSUCH: And the district

1 judge on -- on resentencing could issue the same
2 sentence he issued before.

3 MS. HANSFORD: Absolutely.

4 JUSTICE GORSUCH: All right.

5 MS. HANSFORD: And this was a
6 provision that was trying to give district
7 courts discretion, and that's part of the reason
8 that Congress was applying it as broadly as it
9 could with them.

10 JUSTICE ALITO: Do you have any idea
11 how many cases fall into the category that's
12 involved here?

13 MS. HANSFORD: Yes. So the -- the
14 current universe of cases, there are 16
15 offenders that we're aware of who have already
16 benefited from this interpretation. And then
17 there are eight additional ones that we're aware
18 of who -- whose -- for whom this question is
19 open.

20 Now I do want to note that the
21 universe could increase anytime this Court
22 issues a decision that affects the validity of
23 924(c) sentences. Additional individuals might
24 be able to get into court on a 2255. So
25 Petitioners actually ended up getting in court

1 after -- into court after this Court's decision
2 in Davis.

3 So I think it's a small universe, but
4 it's not a closed universe. So I do want to --
5 to -- to caveat that.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas?

9 Justice Alito?

10 JUSTICE ALITO: The sense -- you talk
11 about void ab initio, but in what sense were
12 these -- the sentences on these counts void ab
13 initio? There was nothing wrong with them when
14 they were imposed. There was nothing wrong with
15 them at the time when they were vacated. There
16 was nothing wrong with them when -- at the time
17 when the sentence was imposed later.

18 They were vacated based on a -- a
19 practice that is not required.

20 MS. HANSFORD: We completely agree
21 with that, Justice Alito. We don't think these
22 were void ab initio. We think these were
23 perfectly valid. But we think the relevant
24 question is whether it's a historical sentence
25 or an operative sentence. And we think that

1 these are not operative sentences because they
2 were vacated, and that means there's no finality
3 consideration that attaches to them.

4 But we don't think there was anything
5 wrong with the sentences inherently.

6 JUSTICE ALITO: And what is your
7 understanding of the basis for this -- this
8 practice of vacating all the sentences on all
9 counts if the sentence on one or more counts
10 must be vacated?

11 MS. HANSFORD: The idea is that a
12 district court should be able -- because a
13 district court's understanding of the sentence
14 it's imposing on other counts may affect its
15 judgment of the appropriate sentence on this
16 count, its weighing of the 3553(a) factors, the
17 district court should be able to, when sentences
18 are vacated, reweigh the sentencing package as a
19 whole.

20 And, of course, that is a
21 discretionary judgment and -- but that is a
22 judgment that courts of appeals often make or
23 district courts often make when vacating some
24 counts.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: I'm looking at the
3 wealth -- I was looking at the wealth of
4 statutes that both -- everybody here cited about
5 when Congress was applying the purported
6 background principle of retroactivity or not,
7 and the principle I came to in reading
8 everything is taken from *Minerva* -- *Minerva*
9 *Surgical*, where we said Congress "legislates
10 against the background of common law
11 adjudicatory principles," but it does not expect
12 those principles to apply "when a statutory
13 purpose to the contrary is evident." Correct?

14 MS. HANSFORD: Yes, I -- I do think
15 this is a case where --

16 JUSTICE SOTOMAYOR: All right. So now
17 what you're saying to me, I thought, was a
18 statutory purpose is evident to the contrary --
19 or not to the contrary, is evident here because,
20 first, they use the present-perfect tense. Is
21 that -- my judgment, is that correct?

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

25 JUSTICE SOTOMAYOR: What's the second?

1 MS. HANSFORD: -- and the purpose
2 is -- is reflected in the text that Congress
3 used, the fact that the text mirrors 3582(c) and
4 how the various provisions strike the finality
5 balance. So I think there are all kinds of
6 textual indicia here about what Congress's
7 purposes was.

8 JUSTICE SOTOMAYOR: No, I was -- I was
9 dealing -- one of the main purposes that the
10 other -- the amici and most of the decisions
11 that have relied have taken a contrary position
12 has been on the use of this -- of the word
13 "sentence imposed."

14 So I went back to why you think there
15 was an ambiguity, and I found it, which is I
16 looked at every single dictionary, and every
17 dictionary that uses "sentence imposed" or
18 "conviction imposed" -- Black's Law Dictionary,
19 Webster's, American Heritage, and the Oxford
20 English Dictionary -- does exactly what you say.
21 It says it can mean a historical date or it can
22 mean continuing validity.

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

25 MS. HANSFORD: I --

1 JUSTICE SOTOMAYOR: Because it's
2 ambiguous on its face?

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

6 And I think that there is a grammar
7 mistake that amicus's view ascribes to Congress
8 because the -- the present-perfect tense cannot
9 be used when the "now" component of the period
10 is excluded.

11 And so you can say: He has played
12 hundreds of rounds of golf. But you would say:
13 He had played hundreds of rounds of golf until a
14 recent knee surgery forced him to the sidelines.

15 And I think that's precisely the
16 mistake that amicus has Congress making. And I
17 think having Congress both make a mistake of
18 grammar and draw this kind of arbitrary line, I
19 think that's -- that's a worse interpretation
20 than ours, which has Congress not make a mistake
21 of grammar, use tenses precisely, and also have
22 a purpose that's coherent.

23 JUSTICE SOTOMAYOR: So, for your
24 purposes or -- I -- I went back to
25 dictionaries -- to the Chicago Manual of Style

1 and to the Cambridge Grammar of the English
2 Language, and both of them make it very clear
3 that present-perfect tense "denotes an act,
4 state, or condition that is now completed and
5 continues up to the present." Correct?

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

7 JUSTICE SOTOMAYOR: And you used the
8 past tense. In fact, what was striking to me is
9 all of the opinions that support amici,
10 including that of the Seventh Circuit, had to
11 change the present-perfect tense to say "had
12 been sentenced," correct?

13 MS. HANSFORD: Yes, that's right,
14 because you would say -- you could say, "A
15 sentence was imposed on Jones," if you're
16 referring to the past. But you would say, "A
17 sentence had been imposed on Jones but was
18 vacated."

19 You could not say, "A sentence has
20 been imposed on Jones but has been vacated."
21 That makes a grammar mistake that Huddleston and
22 Pullum, for example, describe.

23 JUSTICE SOTOMAYOR: All right. Thank
24 you, counsel.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 Justice Gorsuch?

2 JUSTICE KAVANAUGH: On the closed
3 universe that you mentioned, is it closed as to
4 Davis claims? You had a caveat, and I wanted
5 to -- just on the caveat, is it closed as to
6 Davis claims?

7 MS. HANSFORD: Yes, I think it's
8 closed as to Davis claims because of the
9 one-year period and the 2255.

10 So, if there's a future decision of
11 this Court, which, of course, the government
12 hopes there will not be, that is shedding light
13 on predicates in 924(c). And, of course, it's
14 the same language in 401, so it could come up in
15 that context as well.

16 But we do think that the universe is
17 going to be very, very small. Even if there is
18 another decision of that sort, which could, if
19 it's a constitutional decision, create a new
20 one-year period for 2255 decisions, we still
21 think it would be on the order of a couple of
22 dozen offenders. We think the universe is very
23 small here.

24 JUSTICE KAVANAUGH: Then, on Justice
25 Sotomayor's question, I just want to make sure.

1 The purpose derived from the text, I don't think
2 you got to the second point, which is that
3 there's fairness and finality, and we've asked
4 you, and I was asking you, fairness -- there's
5 still going to be unfairness.

6 I think what you are saying, but
7 correct me if I'm wrong, is Congress was
8 concerned about fairness and correcting
9 unfairness up to the point where it would
10 infringe on finality?

11 MS. HANSFORD: That's exactly right,
12 Justice Kavanaugh. I think -- I think that's
13 what Congress was thinking here.

14 And -- and I think it's really
15 inexplicable otherwise how -- why it would draw
16 this particular line. I think, if it just
17 wanted to minimize disparities, it would stick
18 with a time-of-offense line.

19 And so I think, if you look at the
20 whole universe of disparities, we think we have
21 fewer disparities, but we also think we have the
22 more principled set of disparities where the
23 differences are based on offenders who have
24 different finality considerations, which this
25 Court has recognized is significant and not

1 arbitrary.

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

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 Justice Jackson?

9 Thank you, counsel.

10 Mr. McGinley.

11 ORAL ARGUMENT OF MICHAEL H. MCGINLEY,

12 COURT-APPOINTED AMICUS CURIAE

13 IN SUPPORT OF THE JUDGMENT BELOW

14 MR. MCGINLEY: Mr. Chief Justice, and
15 may it please the Court:

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

23 Petitioners each indisputably received
24 a sentence before the date of enactment. It
25 makes no difference that their sentences were

1 later vacated after that date for unrelated
2 reasons.

3 This is the most natural common-sense
4 understanding of the statute's text read as a
5 whole. Indeed, Congress's use of the indefinite
6 article "a" captures any sentence that has been
7 imposed before enactment, even those that are
8 later vacated.

9 Section 403(b) does not refer to "the
10 final sentence" or "a sentence that has not
11 later been vacated." It refers to "a sentence."

12 The statute's use of the
13 present-perfect tense has not been imposed, also
14 confirms this reading. The present-perfect
15 tense denotes an act, state, or condition that
16 is either completed or continues to the present.
17 Here, the former meaning is more fitting.

18 Imposing a sentence is a discrete
19 historical event that occurs when the sentence
20 is pronounced in open court. And Congress drew
21 the dividing line as of the date of enactment.

22 Petitioners and the government would
23 nullify this statutory phrase by arguing that a
24 sentence must remain in place until the present
25 day. That is not what Congress said.

1 If Congress had wished to adopt that
2 approach, it could have said that Section 403(a)
3 applies to a sentence imposed after the date of
4 enactment. But, under the actual statutory
5 text, Petitioners do not qualify. And if there
6 were any ambiguity, the federal savings statute
7 would preclude retroactive effect here.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: What -- assuming that
10 I agree that there is a background vacatur rule,
11 what role does it play in your analysis?

12 MR. MCGINLEY: So the Court has said
13 repeatedly that a background vacatur rule cannot
14 override clear statutory text. And so, here,
15 the statutory text is whether a sentence has
16 been imposed.

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

24 And so repeat -- repeat -- sorry, Your
25 Honor.

1 JUSTICE SOTOMAYOR: No.

2 MR. MCGINLEY: Repeatedly, the Court
3 has said that a background principle can't
4 override the plain text. We think the plain
5 text is clearly in our favor here.

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

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

25 So, if every dictionary says that's

1 ambiguous, that's where the government starts,
2 then you have to look to other contextual clues
3 to support your view. Tell me what they are.

4 MR. MCGINLEY: I have three contextual
5 clues for you, Your Honor.

6 JUSTICE SOTOMAYOR: Outside of that
7 one, because "sentence imposed" is ambiguous.

8 MR. MCGINLEY: So --

9 JUSTICE SOTOMAYOR: Because it -- it
10 could mean one of two things. You have to look
11 at the context.

12 MR. MCGINLEY: Sure.

13 JUSTICE SOTOMAYOR: What's the context
14 here?

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

24 JUSTICE SOTOMAYOR: But there -- but
25 that's for purposes of appeal and for -- not

1 for -- not for all interpreted purposes.

2 MR. MCGINLEY: So let me give you a
3 few more, Your Honor.

4 So then the second contextual clue I
5 would point you to is, in this particular
6 statute, it says "as of the date of enactment."
7 That is telling you whether or not -- the
8 analysis is whether or not this historical event
9 has happened or even if the -- if you wish to
10 adopt the condition language, it's still --

11 JUSTICE SOTOMAYOR: So why use the
12 present-perfect tense? Why not use the past
13 tense, which is the cleanest way to do do it?

14 MR. MCGINLEY: Because it makes --

15 JUSTICE SOTOMAYOR: Was --

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

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

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

22 So the third one in that context is
23 "as of the date of enactment" tells you what is
24 the now in that -- in that construction of the
25 sentence. You say "As of the date of enactment,

1 has a sentence been imposed."

2 JUSTICE SOTOMAYOR: Now at the date
3 that a sentence is being imposed?

4 MR. MCGINLEY: No, Your Honor. The --
5 the statutory phrase is "as of the date of
6 enactment."

7 And the last thing I'll say, my fourth
8 point, is, if you think this is ambiguous, then
9 109 governs and it precludes retroactive relief.

10 JUSTICE GORSUCH: Mr. McGinley --

11 JUSTICE SOTOMAYOR: And then -- I'm
12 sorry.

13 JUSTICE GORSUCH: I'm sorry. No,
14 please.

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

23 MR. MCGINLEY: So what Dorsey says is
24 that there has to be a clear indication that
25 Congress intended to do this. And what -- what

1 that clearly means --

2 JUSTICE SOTOMAYOR: They meant some
3 retroactivity.

4 MR. MCGINLEY: Sure. But the question
5 is always how much retroactivity, and that's how
6 Dorsey addressed the question. Dorsey asked
7 whether the particular people in that setting,
8 the petitioners there, who had not yet received
9 an initial sentence, I want to be clear, whether
10 they qualified for retroactive relief.

11 And then Dorsey looked to the way that
12 the Fair Sentencing Act very explicitly
13 interacted with the Sentencing Reform Act and
14 with the guidelines and said that for those
15 particular set of people, there was
16 retroactivity.

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

24 Those seem meaningfully different
25 here, or maybe, because there's no valid

1 sentence at the relevant time here, which is
2 resentencing. Why should we give weight to
3 those --

4 MR. MCGINLEY: So --

5 JUSTICE GORSUCH: -- cases then?

6 MR. MCGINLEY: -- with all respect, I
7 think the relevant time according to the
8 statutory language is as of the date of
9 enactment.

10 JUSTICE GORSUCH: I thought that's
11 what you were going to say.

12 MR. MCGINLEY: Yeah.

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

22 MR. MCGINLEY: So the same way that
23 Pepper spoke about a sentence that had been
24 imposed before.

25 JUSTICE GORSUCH: Ah, exactly, "had."

1 Not "has." I can't see a judge, after a vacated
2 sentence, saying that a sentence has been
3 imposed for the very offense that he's about to
4 sentence for.

5 MR. MCGINLEY: So, just with respect,
6 Your Honor, I think, actually, there's a very
7 easy way. You can say: A sentence has been
8 imposed as of 2018. That sentence was later
9 vacated, and I now impose a new sentence.

10 JUSTICE GORSUCH: That's -- that's a
11 very strange locution, though, isn't it --

12 MR. MCGINLEY: I -- I --

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

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

21 JUSTICE GORSUCH: I mean, the whole
22 point of resentencing is that there is no
23 sentence. That's the only way in which a judge
24 can issue a sentence.

25 MR. MCGINLEY: Right. And I might

1 agree with you if this statute did not say "as
2 of the date of enactment." If this statute
3 instead said whether or not -- if -- if a
4 sentence has not been imposed up until the
5 present day, I still think that the --

6 JUSTICE GORSUCH: Do you agree that --

7 MR. MCGINLEY: -- the historical
8 reading is correct, but --

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

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

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

24 I mean, they -- the other side has a
25 pretty clear, principled distinction. They say

1 that Congress is drawing a line between those
2 who have yet to be sentenced and those who
3 have -- are serving final sentences in the sense
4 that they would need to be reopened in order to
5 take advantage of the First Step Act.

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

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

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

23 JUSTICE JACKSON: But why is that
24 the -- I don't understand why that -- if you
25 think about what Congress was doing to carve out

1 these people and give them the benefit, why
2 would it matter that they initially received
3 their sentence? "Initial" is not in the
4 statute. And I don't understand why that would
5 be a factor. What difference does it make?

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

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

21 But I went back and looked, and
22 when -- in 1994, when Congress created the
23 safety valve, they actually used precisely this
24 language. And I can give you the citation,
25 which is Public Law 103-322, Section 80001(c),

1 where Congress said that the safety valve would
2 apply to "all sentences imposed on or after 10
3 days after enactment." That means that all --

4 JUSTICE JACKSON: Yeah, but that --
5 but there --

6 MR. MCGINLEY: -- future -- I'm sorry.
7 I didn't mean to --

8 JUSTICE JACKSON: Go ahead. That
9 means that -- I'm sorry.

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

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

23 Congress is then carving out, giving
24 the benefit to people who are yet to be
25 sentenced. They have not been sentenced as of

1 the date of the enactment of this statute.
2 That's the work, I think, of "as of the date of
3 this enactment." Your sentencing is coming even
4 though you previously offend -- you -- you
5 previously committed the offense.

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

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

16 MR. MCGINLEY: No, I can give you two
17 answers to that --

18 JUSTICE JACKSON: Okay.

19 MR. MCGINLEY: -- at least.

20 JUSTICE JACKSON: Okay.

21 MR. MCGINLEY: The first goes to
22 Justice Kavanaugh's example, and I think --
23 where you could have people who committed less
24 crimes. We say this in the brief. Let me give
25 you -- even just on the facts of this case,

1 imagine one of these three defendants had not
2 engaged in the conspiracy, okay?

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

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

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

25 Start with that premise --

1 MR. MCGINLEY: Sure.

2 JUSTICE JACKSON: -- and tell me how
3 these people whose sentences have been vacated
4 and still have to be sentenced are any
5 different.

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

12 JUSTICE JACKSON: Yes.

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

23 I also would --

24 JUSTICE KAGAN: Mr. McGinley --

25 MR. MCGINLEY: Yeah.

1 JUSTICE KAGAN: I'm sorry.

2 MR. MCGINLEY: Go ahead, Your Honor.

3 JUSTICE KAGAN: I -- I want to ask you
4 about this brief we have from four members of
5 Congress. So Senators Durbin, Grassley, Booker,
6 Lee, these are not guys who link arms very
7 often.

8 (Laughter.)

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

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

1 wondering whether we, like, don't really have to
2 give this more respect than maybe we usually do.

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

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

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

1 We also understand that there are
2 finality interests involved, but where we can
3 prevent this practice without interfering with
4 finality interests, that's what we want to do.
5 And that's the whole purport of this 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 don't think they
13 fit that. I -- what I will tell you, though, is
14 if that's what Congress had intended to do, if
15 that's what those four drafters had intended to
16 do, there's a very simple way they could have
17 done it. They did it in 402(b). They could
18 have constructed the sentence to say that 403(a)
19 applies to any sentence imposed after the date
20 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 your point
8 about treating similarly situated people the
9 same, I think both sides fail on that in this
10 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 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 -- 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 missing my point, which is our
11 reading does nothing to finality. What does to
12 finality or what undoes to finality is
13 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: Why does that
19 matter to finality? Meaning nothing about this
20 law is changing the finality of the conviction
21 qua the crime. It was Davis that did that.
22 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 understand,

1 Your Honor. And I -- maybe I should clarify.

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

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

12 MR. MCGINLEY: That's correct.

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

15 MR. MCGINLEY: Thanks.

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

1 imposed as of the date of enactment, which is
2 the statute that we have here.

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

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

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

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

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

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

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

15 MR. MCGINLEY: Sure. So, I mean, I
16 think the government concedes that in 922(g) and
17 in the predecessor felon in possession
18 statute --

19 JUSTICE JACKSON: Those are status --
20 those are status. They're different.

21 MR. MCGINLEY: But I think, on the
22 government's view of what it means for a
23 sentence to be imposed, it's the status here as
24 well. And status at the time of enactment of
25 this statute was that they had a sentence

1 imposed.

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

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

11 MR. MCGINLEY: Well, for the same
12 reason that in 3742(g)(1), Congress said that
13 when a sentence is vacated on appeal and you are
14 resentenced under the guidelines, the guidelines
15 that exist -- that were in effect at the time of
16 your initial sentencing apply.

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

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

23 MR. MCGINLEY: So, in that context,
24 it's -- it's guidelines, right?

25 So I want to be clear. 3742(g)(1) is

1 about the guidelines. And, there, if there is a
2 retroactive change to the guidelines after a
3 sentence is vacated on appeal, that retroactive
4 change does not apply.

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

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

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

17 MR. MCGINLEY: So --

18 JUSTICE JACKSON: -- that we don't
19 want that to apply.

20 MR. MCGINLEY: So we agree that for
21 people who have not yet received any sentence,
22 109 is satisfied. But the question here is
23 whether the different set of people who were --
24 who did receive a sentence before date of
25 enactment but later had it vacated, whether they

1 qualify. 109 tells you that if there's any
2 ambiguity, you have to go against retroactivity.

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

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

12 MR. MCGINLEY: I think the Chicago
13 Manual of Style says it either can be that or
14 something that has been completed.

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

21 MR. MCGINLEY: I think, if you have a
22 date reference, as you do here, then I think it
23 is a very normal construction to say that
24 something --

25 JUSTICE GORSUCH: Okay.

1 MR. MCGINLEY: -- has been done as of
2 a certain date.

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

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

6 JUSTICE GORSUCH: Okay. If it's
7 possible, you don't -- I just want to go back to
8 3582(c) because you don't address it in your
9 brief directly. And 3582(c) uses the
10 present-perfect tense, "has been imposed."

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

17 MR. MCGINLEY: Yes, although,
18 obviously, the -- the statutory --

19 JUSTICE GORSUCH: But you're asking --
20 you're asking us to interpret the words
21 differently.

22 MR. MCGINLEY: No, Your Honor. What
23 we're saying is those are two different
24 statutory provisions with different surrounding
25 words, different constructions addressing

1 different circumstances.

2 JUSTICE GORSUCH: Talking about
3 whether a statute has been imposed is pretty
4 darn similar.

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

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

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

21 JUSTICE GORSUCH: Ah, but once it's
22 vacated -- once it's vacated, I can do something
23 with it. If it hasn't been vacated, I can't do
24 something --

25 MR. MCGINLEY: Well, no, because

1 you --

2 JUSTICE GORSUCH: -- with it, right?

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

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

11 MR. MCGINLEY: I don't want to quarrel
12 with you here, I -- but I do think --

13 JUSTICE GORSUCH: Quarrel away.

14 MR. MCGINLEY: -- but I do think --

15 (Laughter.)

16 MR. MCGINLEY: I do enjoy it, but I do
17 think --

18 JUSTICE GORSUCH: I know you do.

19 (Laughter.)

20 MR. MCGINLEY: I -- I do think that
21 under either reading of the present-perfect
22 tense, 3582(c) still works because what it's
23 saying is that once it's been imposed, you can't
24 modify it, which could also mean that before
25 it's been imposed, you could modify it. And so

1 the judge could -- maybe there was a colloquy
2 and the judge thought he was -- he or she was
3 going to impose a certain sentence, changed his
4 or her mind, and that's perfectly fine before
5 the imposition, which, as I said, was a
6 historical act. 3553(c) makes that clear.

7 I'd also point you to Judge
8 Kethledge's opinion in the -- in the Carpenter
9 case below, which I think does a really nice job
10 of articulating that principle.

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

19 I guess there's a small point that you
20 had there that there would be more for the
21 sentencing judge to do, I suppose, if the other
22 side prevailed, but it's going to be reopened
23 either -- I mean, there's going to be a new
24 sentencing proceeding either way.

25 MR. MCGINLEY: So I want to make sure

1 I don't -- I don't give away too much. Maybe
2 I'd say it's a small "f" finality concern
3 because, yes, there's going to have to be some
4 form of new sentence imposed, although I will go
5 back to Justice Alito's point that it's not
6 required that a sentence -- that a judge vacate
7 and --

8 JUSTICE KAVANAUGH: Right.

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

15 CHIEF JUSTICE ROBERTS: Certainly.

16 MR. MCGINLEY: Some judges might say,
17 well, I'm not going to vacate for plenary
18 resentencing because that means that these
19 people will get the benefit of 403(a), and,
20 instead, I'll just correct the sentence, as they
21 could have done here, whereas other judges might
22 open for plenary resentencing, then you have a
23 whole 'nother similarly situated anomaly.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 Justice Alito?

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

6 (Laughter.)

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

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

20 But there are -- I could give you a
21 thousand examples of situations in which
22 present-perfect tense is used to refer to an
23 event that doesn't have continuing -- that does
24 not continue up to the present.

25 Were you ever employed as a

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

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

13 Would you agree with all that?

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

18 JUSTICE ALITO: So why would the past
19 event have a -- have relevance in this
20 situation? I -- I could see it where the
21 past -- where the -- the sentence was vacated
22 because it was invalid.

23 But I find it harder to understand why
24 that would be relevant, why a present effect
25 would be -- why the -- why it would be relevant

1 when the sentence was never invalid?

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

11 JUSTICE ALITO: Thank you.

12 JUSTICE KAGAN: But your --

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

15 Justice Kagan?

16 JUSTICE KAGAN: But -- but -- but --
17 but your understanding of the statute would
18 apply just as well to people whose sentences
19 were invalid?

20 MR. MCGINLEY: That is correct, Your
21 Honor, but I think under what Justice Alito is
22 asking --

23 JUSTICE KAGAN: Yeah, it's just
24 that --

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

1 JUSTICE KAGAN: I guess what I'm sort
2 of suggesting is that that's an orthogonal
3 point. Your --

4 MR. MCGINLEY: Perhaps.

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

10 What purpose are you going to give me
11 that -- that would satisfy his view of how to
12 figure this contextual question out?

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

20 We're not saying that that's always
21 the best policy decision that Congress should
22 make, but it is a policy decision Congress has
23 made before, and we say it's a policy decision
24 that it made here.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 Justice Barrett?

3 JUSTICE BARRETT: No.

4 CHIEF JUSTICE ROBERTS: Justice --

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

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

19 JUSTICE JACKSON: The old regime --

20 MR. MCGINLEY: -- the old regime.

21 JUSTICE JACKSON: -- that we're not
22 used to applying because we're ordinarily in the
23 flow of just doing the regular First Step Act
24 analysis.

25 MR. MCGINLEY: Well, perhaps, except I

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

10 JUSTICE JACKSON: Thank you.

11 MR. MCGINLEY: So -- thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 MR. MCGINLEY: Thank you.

15 CHIEF JUSTICE ROBERTS: Rebuttal,
16 Mr. Kimberly?

17 REBUTTAL ARGUMENT OF MICHAEL B. KIMBERLY
18 ON BEHALF OF THE PETITIONERS

19 MR. KIMBERLY: Thank you, Mr. Chief
20 Justice. A few brief points.

21 As Justice Sotomayor's colloquy laid
22 out, the word "imposed" can mean either a
23 singular past event that happened at some
24 discrete point in the past, or it can mean sort
25 of an ongoing application.

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

7 Now, Justice Barrett, you asked what
8 kind -- earlier, of me, you asked what kinds of
9 background conventions apply in -- in this sort
10 of not immediately textual interpretive way, and
11 I mentioned statutes of limitations are presumed
12 to incorporate equitable tolling.

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

20 Bond itself, which is this Court's
21 most recent application of this principle,
22 concerned the notion that Congress is presumed
23 to respect basic federalism principles.

24 All of this indicates that really the
25 background legal principle that a vacatur treats

1 a sentence as though it never was imposed is a
2 rule that Congress would have understood to
3 apply when it referred to a sentence that has
4 been imposed.

5 Now amicus says that background legal
6 principles can't override text. But that gets
7 matters backward. Our view is that this
8 background legal principle sheds light on the
9 text. It tells you how to interpret it.

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

18 And I think equitable tolling is a
19 good example of this. When equitable tolling
20 applies, the clock doesn't literally stop. We
21 know time doesn't actually stop. It's a legal
22 fiction, and it's a legal fiction that is
23 presumed to be incorporated into Congress's
24 enactments. And the same is true here.

25 Now, if the Court were to say

1 otherwise, I worry about the -- the trouble that
2 it will cause throughout the remainder of the
3 Court's criminal cases.

4 922(g)(1) uses straightforward
5 language that refers to a past event. It says:
6 "It shall be unlawful for any person who has
7 been convicted in any court of a felony to
8 possess a firearm."

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

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. McGinley, this Court appointed you
19 to brief and argue this case as an amicus curiae
20 in support of the judgment below. You have ably
21 discharged that responsibility, for which we are
22 grateful.

23 The case is submitted.

24 (Whereupon, at 11:35 a.m., the case
25 was submitted.)

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