No. 23-531

IN THE

Supreme Court of the United States

TIMOTHY IVORY CARPENTER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, CATO INSTITUTE, AND DUE PROCESS INSTITUTE IN SUPPORT OF PETITIONER

Emma Andersson
Counsel of Record
Nathan Freed Wessler
Evelyn Danforth-Scott
Yasmin Cader
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004
(212) 549-2500
eandersson@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th St., NW
Washington, D.C. 20005

Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm St.
San Francisco, CA 94111

Daniel S. Korobkin
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Ave.
Detroit, MI 48201

Clark M. Neily III
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001

Shana-Tara O'Toole
DUE PROCESS INSTITUTE
700 Pennsylvania Ave. SE, Suite 560
Washington, DC 20003

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The Circuit Split Implicates an Issue of Exceptional Importance to Individuals Facing Resentencing Under a Regime that Congress Rejected as Unjustly Harsh. 6

A. Correctly applying the First Step Act is extraordinarily important in light of the magnitude of sentencing reductions for certain federal firearm convictions. 7

B. The question presented also implicates application of Congress's major sentencing reductions for certain controlled substance offenses. 12

II. The Sixth Circuit's Rule Serves No Purpose Because Applying the First Step Act at Plenary Resentencing Does Not Burden Courts or Undermine the Interest in Finality of Sentences. 16

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Barefoot v. Estelle,
463 U.S. 880 (1983) 16

Bradley v. School Board of City of Richmond,
416 U.S. 696 (1974) 20

Calderon v. Thompson,
523 U.S. 538 (1998) 16

Concepcion v. United States,
597 U.S. 481 (2022) 17, 19

Deal v. United States,
508 U.S. 129 (1993) 7

Dorsey v. United States,
567 U.S. 260 (2012) 15, 19, 20

Hamm v. City of Rock Hill,
379 U.S. 306 (1964) 19

Mackey v. United States,
401 U.S. 667 (1971) 16, 17

Pepper v. United States,
562 U.S. 476 (2011) 5, 17, 18, 20

Rosales-Mireles v. United States,
138 S. Ct. 1897 (2018) 19

Teague v. Lane,
489 U.S. 288 (1989) 17

United States v. Angelos,
345 F. Supp. 2d 1227 (D. Utah 2004) 8

United States v. Bethea,
54 F.4th 826 (4th Cir. 2022)............................... 14

United States v. Bethea,
841 F. App'x 544 (4th Cir. 2021) 6, 19

United States v. Bryson,
229 F.3d 425 (2d Cir. 2000)................................ 18

United States v. Burke,
863 F.3d 1355 (11th Cir. 2017) 17

United States v. Davis,
785 F.3d 498 (11th Cir. 2015) 9

United States v. Duffey,
No. 3:08-CR-167-B (W.D. Tex.
Mar. 14, 2022)... 11

United States v. Ezell,
265 F. App'x 70 (3d Cir. 2008).............................. 9

United States v. Ezell,
417 F. Supp. 2d 667 (E.D. Pa. 2006)..................... 9

United States v. Hebert,
131 F.3d 514 (5th Cir. 1997) 9

United States v. Howell,
No. CR 17-260-2, 2022 WL 484895
(W.D. Pa. Feb. 15, 2022)..................................... 11

United States v. Hungerford,
465 F.3d 1113 (9th Cir. 2006)............................... 9

United States v. Hunter,
770 F.3d 740 (8th Cir. 2014) 9

United States v. Jackson,
995 F.3d 522 (6th Cir. 2021) 6

United States v. McFalls,
675 F.3d 599 (6th Cir. 2012) 17

United States v. Merrell,
37 F.4th 571 (9th Cir. 2022)............................ 6, 19

United States v. Mitchell,
38 F.4th 382 (3d Cir. 2022) 6, 11

United States v. Rivera-Ruperto,
852 F.3d 1 (1st Cir. 2017) 8, 9

United States v. Roberson,
573 F. Supp. 2d 1040 (N.D. Ill. 2008) 9

United States v. Smith,
756 F.3d 1179 (10th Cir. 2014) 8

United States v. Uriarte,
975 F.3d 596 (7th Cir. 2020) 20

United States v. Young,
960 F. Supp. 2d 881 (N.D. Iowa 2013).......... 12, 13

Welch v. United States,
578 U.S. 120 (2016) 4, 16

STATUTES

18 U.S.C. § 924(c)............................7, 8, 11, 13, 14, 20

18 U.S.C. § 3553(a) 5, 15, 18

18 U.S.C. § 3742(g) 5, 18

21 U.S.C. § 841.. 12, 13

21 U.S.C. § 851.. 12, 13, 14

LEGISLATIVE MATERIALS

164 Cong. Rec. H10346-04, 10362
(daily ed. Dec. 20, 2018) (statement of
Rep. Nadler).. 10

164 Cong. Rec. S7648, S7650
(daily ed. Dec. 17, 2018) (statement of
Sen. Grassley)... 6, 10

164 Cong. Rec. S7737, S7749
(daily ed. Dec. 18, 2018) (statement of
Sen. Leahy) 10

164 Cong. Rec. S7753, S7781
(daily ed. Dec. 18, 2018) (statement of
Sen. Cruz) 21

164 Cong. Rec. S7753-01, S7774
(daily ed. Dec. 18, 2018) (statement of
Rep. Nadler).. 10

Fair Sentencing Act of 2010,
Pub. L. No. 111-220, 124 Stat. 2372 15

First Step Act,
Pub. L. No. 115-391, 132 Stat. 5194
(Dec. 21, 2018) 3, 4, 7, 12, 13, 15

OTHER AUTHORITIES

Black's Law Dictionary
(11th ed. 2019) 20

Judge Paul Cassell,
Statement on Behalf of Judicial Conference of U.S. from U.S. District Judge Paul Cassell before House Judiciary Comm. Subcomm. on Crime, Terrorism, & Homeland Sec., 19 Fed. Sent. R. 344, 344
(2007) 3

Remarks by President Trump at Signing
Ceremony for S. 756, the First Step Act
of 2018 (Dec. 21, 2018) 10

Sentencing Transcript,
United States v. Bethea, No. 3:14-CR-430
(Aug. 21, 2015 D.S.C.) (ECF No. 829)................ 14

INTEREST OF AMICI CURIAE[1]

The **American Civil Liberties Union** is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The **ACLU of Michigan** is a state affiliate of the national ACLU. Since its founding more than 100 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as amicus curiae, including in cases involving federal sentencing law. *See, e.g.*, *Concepcion v. United States*, 597 U.S. 481 (2022); *Dorsey v. United States*, 567 U.S. 260 (2012); *Kimbrough v. United States*, 552 U.S. 85 (2007).

The **Cato Institute** is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal

---

[1] The parties have been notified of amici's intent to file this brief. No party has authored this brief in whole or in part, and no one other than amici, their members, and their counsel have paid for the preparation or submission of this brief. Counsel for amici ACLU and ACLU of Michigan previously represented Petitioner in his earlier appeal to this Court concerning application of the Fourth Amendment to law enforcement's warrantless search of his historical cell phone location information. That representation ended after this Court issued an opinion on that issue in 2018. *See Carpenter v. United States*, 585 U.S. __, 138 S. Ct. 2206 (2018).

justice system, and accountability for law enforcement.

Due Process Institute is a nonprofit, bipartisan, public interest organization that works to honor, preserve, and restore procedural fairness in the U.S. criminal legal system. Founded in 2018, it is guided by a bipartisan Board of Directors and supported by bipartisan staff. Due Process Institute creates and supports achievable bipartisan solutions for challenging criminal legal policy concerns through advocacy, litigation, and education.

SUMMARY OF ARGUMENT

1. When Congress overwhelmingly passed the First Step Act of 2018,[2] it provided that the Act's ameliorative changes to two provisions of federal sentencing law "shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." First Step Act, §§ 401(c), 403(b), Pub. L. No. 115-391, 132 Stat. 5194, 5221–22 (2018). As the Petition explains, the circuits are split on interpretation of this language as applied to defendants who were originally sentenced before the effective date of the Act, but whose sentences were vacated and remanded for resentencing after the Act's effective date.

That split is reason enough to grant review, but review is also called for because the question presented is of exceptional importance to defendants facing resentencing, and to the courts that must resentence them. As a representative of the Judicial Conference of the United States once explained, the mandatory minimums in effect prior to the First Step Act resulted in sentences that were "irrational," "unduly harsh," "cruel and unusual, unwise and unjust." Judge Paul Cassell, *Statement on Behalf of Judicial Conf. of U.S. from U.S. District Judge Paul Cassell before House Judiciary Comm. Subcomm. on Crime, Terrorism, & Homeland Sec.*, 19 Fed. Sent. R. 344, 344 (2007). The First Step Act made momentous changes to two federal sentencing schemes—for certain firearm and controlled substances offenses—

[2] The vote was 87-12 in the Senate, and 358-36 in the House.

to end these grossly overlong and disproportionate mandatory sentences.

If the First Step Act applies at resentencing, it can make a tremendous difference in a defendant's sentence. For Petitioner, for example, applying the First Step Act at resentencing would result in an 80-year reduction in his mandatory minimum, from 105 years to 25. The impact in other cases is similarly stark, reducing sentences by dozens of years, or replacing mandatory life-without-parole sentences with survivable—and markedly more proportional—terms of years.

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

2. The rule adopted by the Sixth Circuit below is not only contrary to the language of the statute, but is also irrational. As the Petition explains, the plain language of the First Step Act dictates that it applies when a defendant is before a district court for sentencing, whether for an original sentence or for resentencing after a general vacatur and remand by the court of appeals. That makes sense, because in both circumstances there is no interest in finality weighing against the imposition of a sentence based on current law.

As this Court has explained, when deciding how to apply changes in criminal law, courts must balance the interest in finality in criminal cases against the "imperative to ensure the criminal punishment is imposed only when authorized by law." *Welch v.*

United States, 578 U.S. 120, 131 (2016). This balancing often weighs against reopening final sentences, because of the institutional costs of undermining the finality of sentences that were legal at the time they were imposed.

When a sentence has already been vacated, however, there is no interest in finality to maintain. Vacatur and remand for plenary resentencing "wipe[s] the slate clean," *Pepper v. United States*, 562 U.S. 476, 507 (2011), and requires the district court to sentence the defendant anew, including freshly calculating the sentence and holding a new sentencing hearing at which the court explains its sentence by reference to the sentencing factors set out by Congress. *See* 18 U.S.C. §§ 3553(a), 3742(g). Because the defendant is *already* back before the court for resentencing, there is no cost to applying current law as set out in the First Step Act.

In addition, there is an important interest in giving due weight to Congress's intent to correct an unfair sentencing regime that had resulted in absurdly long mandatory sentences. Arbitrarily requiring courts to apply a now-rejected sentencing scheme when freshly resentencing defendants after Congress provided for lesser sentences simply makes no sense.

ARGUMENT

I. The Circuit Split Implicates an Issue of Exceptional Importance to Individuals Facing Resentencing Under a Regime that Congress Rejected as Unjustly Harsh.

This case presents an important question of federal law that has divided courts of appeals, and that will determine whether individuals must be resentenced under a draconian scheme that Congress has rejected. This Court should grant review.

As Petitioner explains, Pet. 8–11, the circuits are split on the question whether the First Step Act applies at plenary resentencing of a defendant who was originally sentenced *before* the Act's effective date, but whose sentence is vacated and remanded for resentencing *after* the Act's effective date. *Compare United States v. Mitchell*, 38 F.4th 382, 386–89 (3d Cir. 2022) (First Step Act applies), *and United States v. Merrell*, 37 F.4th 571, 575–78 (9th Cir. 2022) (same), *with United States v. Jackson*, 995 F.3d 522, 525–26 (6th Cir. 2021) (First Step Act does not apply), *and* App. 4a–5a (panel bound by *Jackson*). *See also United States v. Bethea*, 841 F. App'x 544, 548–53 (4th Cir. 2021) (unpublished) (First Step Act applies).

That split raises a question of extraordinary importance to individuals who find themselves before a district judge for resentencing under a regime that Congress definitively repudiated as "unjustly harsh." 164 Cong. Rec. S7648, S7650 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley).

A. Correctly applying the First Step Act is extraordinarily important in light of the magnitude of sentencing reductions for certain federal firearm convictions.

In the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (the "First Step Act" or the "Act"), Congress significantly altered how mandatory minimum penalties attach to repeat violations of 18 U.S.C. § 924(c), a federal firearms offense. This section makes it a crime to use or carry a firearm during and in relation to, or in furtherance of, a crime of violence or drug trafficking offense. A first conviction results in a mandatory minimum of at least five years, and each subsequent conviction requires a 25-year minimum sentence. *Id.* § 924(c)(1)(A)–(B). The sentences "shall [not] run concurrently with any other term of imprisonment," so sentences for multiple § 924(c) counts must be stacked to run consecutively. *Id.* § 924(c)(1)(D)(ii).

Prior to the First Step Act, this Court interpreted the 25-year mandatory minimums for subsequent convictions to apply even to additional § 924(c) convictions obtained through the same prosecution as the defendant's first § 924(c) conviction. *Deal v. United States*, 508 U.S. 129, 134–35 (1993). Thus, for example, a first-time offender convicted of three § 924(c) possession counts in a single indictment based on a single nucleus of facts would be sentenced to a mandatory 55 years for the firearms counts—on top of the sentence for the underlying crime of violence or drug trafficking.

In the First Step Act, Congress clarified that instead of treating § 924(c) convictions in a single proceeding as automatically qualifying a defendant as a repeat offender subject to consecutive 25-year mandatory minimums for each additional count, a prior conviction must have become "final" before a second violation is subject to these greatly enhanced minimum penalties. First Step Act § 403(a), codified at 18 U.S.C. § 924(c)(1)(C).

The First Step Act's clarification of § 924(c) followed years of criticism of the application of the stacking 25-year mandatory minimums to first-time offenders as "unjust, cruel, and even irrational." *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) (criticizing 55-year mandatory-minimum sentence required by the pre-First Step Act rule). Under the pre-First Step Act interpretation of § 924(c), courts were required to sentence defendants to "prison term[s] of many decades"; in cases with multiple § 924(c) counts, sentences were often "certain to outlast the defendant's life and the lives of every person now walking the planet." *United States v. Smith*, 756 F.3d 1179, 1181 (10th Cir. 2014) (Gorsuch, J.). Often, the so-called enhancements imposed under § 924(c) vastly outstripped a defendant's underlying substantive liability.

For example, one first-time offender convicted of conspiracy and attempt offenses and six § 924(c) counts received a sentence of 161 years and 10 months, of which 130 years stemmed from the § 924(c) convictions. *United States v. Rivera-Ruperto*, 852 F.3d 1 (1st Cir. 2017). This sentence is substantially longer than what someone would be sentenced to under federal law for hijacking an airplane,

detonating a bomb in a public place, attacking a person of color with racial animus and the intent to kill, or committing second-degree murder or rape. *Id.* at 31 (Torruella, J., dissenting). *See also United States v. Hungerford*, 465 F.3d 1113, 1119 (9th Cir. 2006) (Reinhardt, J., concurring) (affirming a prison sentence of over 159 years—155 years of which were for seven § 924(c) convictions arising from the same underlying crimes—for a "52 year-old mentally disturbed woman with no prior criminal record," who helped facilitate a series of robberies but who "never touched [the] gun" carried by her co-defendant); *United States v. Ezell*, 417 F. Supp. 2d 667, 671 (E.D. Pa. 2006) (reluctantly applying mandatory 132-year sentence for six § 924(c) counts); *United States v. Davis*, 785 F.3d 498, 500 & n.2 (11th Cir. 2015) (en banc) (reviewing 161-year sentence, 157 years of which was attributable to seven § 924(c) counts).

Judges understandably bridled at this regime, decrying extremely long mandatory sentences as "unduly harsh," *Ezell*, 417 F. Supp. 2d at 669, *aff'd*, 265 F. App'x 70 (3d Cir. 2008), "unjust and unreasonable," *United States v. Roberson*, 573 F. Supp. 2d 1040, 1047 (N.D. Ill. 2008), "draconian," *United States v. Hebert*, 131 F.3d 514, 526 (5th Cir. 1997) (DeMoss, J., dissenting in part), and "not commensurate with the crime." *United States v. Hunter*, 770 F.3d 740, 747 (8th Cir. 2014) (Bright, J., concurring).

Congress took these concerns to heart, and enacted in the First Step Act a provision to "help[] ensure that sentencing enhancements for repeat offenses apply only to true repeat offenders . . . . [by] clarif[ying] that sentencing enhancements cannot

unfairly be ‘stacked,’ for example, by applying to conduct within the same indictment.” 164 Cong. Rec. S7753-01, S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Cardin); *see also* 164 Cong. Rec. H10346-04, 10362 (daily ed. Dec. 20, 2018) (statement of Rep. Nadler) (trumpeting Act’s provision “stopping the unfair ‘stacking’ of mandatory sentencing enhancements for certain repeat firearms offenders”); 164 Cong. Rec. S7648, S7650 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley) (to remedy “unfairness in how these mandatory minimum sentences are sometimes applied,” “the legislation clarifies that enhanced penalties for using a firearm during a crime of violence or drug crime should be reserved for repeat offenders of such crimes”). Congress voted overwhelmingly in favor of the First Step Act, and President Trump signed it in late 2018. *See* 164 Cong. Rec. S7737, S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy) (noting that support for the First Step Act was “not just bipartisan; it [was] nearly nonpartisan”); Remarks by President Trump at Signing Ceremony for S. 756, the First Step Act of 2018 (Dec. 21, 2018) (describing Act as “an incredible moment” for “criminal justice reform”).

The question in this appeal involves application of Congress’s resounding rejection of the 25-year-minimum stacking provision for first-time offenders. It asks whether an individual who was initially sentenced under the pre-First Step Act regime may benefit from the statute’s ameliorative sentencing rules if his sentence is vacated and he is resentenced after the effective date of the Act. *See* Pet. 16–25 (explaining why plain language of the Act applies in this situation).

The impact of applying the Act in such circumstances can be huge. Here, it "would reduce [Petitioner's] mandatory-minimum sentence on his § 924(c) convictions by 80 years (from 105 years to 25)." App. 3a. That is the difference between being sentenced to die in prison, and serving a long but survivable sentence—in Mr. Carpenter's case, contemplating release around the age of 60.[3]

Other examples are similarly stark. In a case now pending in the Fifth Circuit, applying the First Step Act at resentencing would replace a 105-year sentence for five § 924(c) counts with a sentence of 25 years. *United States v. Duffey*, No. 3:08-CR-167-B (W.D. Tex. Mar. 14, 2022) (ECF No. 742), *appeal pending*, No. 22-10265 (5th Cir.). Even for vacated sentences with just two or three § 924(c) counts, the effect of applying the First Step Act at resentencing is significant. *See, e.g.*, *Mitchell*, 38 F.4th at 386 ("Mitchell received a mandatory-minimum sentence of fifty-five years' imprisonment for his three § 924(c) offenses rather than a sentence of fifteen years' imprisonment for these offenses pursuant to the provisions of the Act."); *United States v. Howell*, No. CR 17-260-2, 2022 WL 484895, at *2 (W.D. Pa. Feb. 15, 2022) ("The implications of this Court's decision on this issue will significantly impact the sentencing ranges of Defendant, with a delta of approximately 25 years in his potential sentence.").

---

[3] The district court sentenced Petitioner to 11.25 years on the other counts of conviction. App. 2a. When combined with a post-First Step Act mandatory minimum of 25 years for the § 924(c) counts, Petitioner's likely sentence would total approximately 36 years.

B. The question presented also implicates application of Congress's major sentencing reductions for certain controlled substance offenses.

The question presented also has broader implications. Section 401 of the First Step Act changed the penalty scheme for certain controlled substance offenses in 21 U.S.C. § 841 that apply when a prosecutor seeks enhancements for prior convictions under 21 U.S.C. § 851.[4] Because its "applicability to pending cases" provision, *see* First Step Act § 401(c), is identical to that in Section 403, resolving the question presented here will equally provide clarity for people being resentenced under that companion provision of the Act.

Before the First Step Act, prior convictions for a "felony drug offense" exposed a defendant convicted under § 841(b)(1)(A) or (b)(1)(B) to enhanced penalties, and "[t[his sweeping definition include[d] many state drug convictions that the various states define under state law as misdemeanors." *United States v. Young*, 960 F. Supp. 2d 881, 885 (N.D. Iowa 2013). In addition, "[u]nlike criminal history scoring under the Federal Sentencing Guidelines, no conviction [was] too old to be used as an enhancement." *Id.* Under this system, "many § 851 enhancements involve[d] only relatively minor state drug offenses," and "[m]any

---

[4] A person convicted of violating 21 U.S.C. § 841 (b)(1)(A) or (b)(1)(B) is ordinarily subject to a mandatory minimum of either 10 or 5 years, respectively, but these mandatory minimums are increased where a defendant was previously convicted of an offense that fits within specified categories of offenses, if the prosecutor first files an "information with the court … stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1).

predicate prior offenses [were] also decades old, where the defendant never served so much as one day in jail, and often paid only a small fine." *Id.*

Someone convicted of a drug offense under 21 U.S.C. § 841(b)(1)(A) is ordinarily subject to a 10-year mandatory minimum sentence. But, before the First Step Act, if a defendant had one § 851 qualifying prior conviction that the prosecutor chose to invoke, that minimum sentence would double to 20 years; with two § 851 qualifying prior convictions the minimum sentence became life without parole.

Here, too, Congress rejected its prior approach as unduly harsh. Section 401 of the First Step Act both reduced the scope of convictions that qualify for § 851 enhancements and reduced the applicable mandatory minimum sentences in quantity-based drug cases. The Act replaced "felony drug offense" with "serious drug felony." First Step Act § 401(a)(2)(B). Under the revised statute, a prior drug conviction qualifies for § 851 enhancements only if (1) it was an offense described in 18 U.S.C. § 924(e)(2) (that is, a drug *trafficking* offense), (2) the defendant served a term of more than 12 months' imprisonment for that offense, and (3) the offender was released within 15 years of the instant offense. First Step Act § 401(a)(1). The Act also now permits § 851 enhancements based on one or more prior convictions for a "serious violent felony." § 401(a)(2)(B). Congress also reduced the applicable mandatory minimums in § 841(b)(1)(A) cases from 20 years to 15 years for one qualifying prior offense, and from life to 25 years for two prior qualifying offenses. § 401(a)(2)(A).

As with the ameliorative § 924(c) amendments, the § 851 amendments can make a huge difference in

years behind bars. In one case in South Carolina, for example, the district court initially gave the defendant a statutorily mandated life sentence under the pre-First Step Act version of § 851, lamenting that it was "one of the saddest cases I've had in a long time," but that "my hands are tied." Aug. 21, 2015, Sentencing Tr. at 12, 18, *United States v. Bethea*, No. 3:14-CR-430 (D.S.C.) (ECF No. 829). In 2019 (after enactment of the First Step Act), the court vacated the sentence to resolve an ineffective-assistance-of-counsel claim. After the Fourth Circuit held that the First Step Act should apply at resentencing, the district court resentenced the defendant to a within-Guidelines sentence of 15 years and eight months. *United States v. Bethea*, 54 F.4th 826, 830 (4th Cir. 2022).

Similarly, someone sentenced under the old scheme whose two prior convictions do not qualify for § 851 enhancement under the revised statute would go from a mandatory minimum sentence of life without parole to a 10-year mandatory minimum sentence. A 25-year-old with two qualifying prior convictions that still qualify under the Act would serve 25 years rather than an effective life-without-parole sentence.

* * *

In both the § 924(c) and § 851 contexts, lower courts have noted the unfairness of the pre-First Step Act regime and are now struggling with the question presented in this petition—whether Congress meant for a group of defendants to be carved out from the First Step Act's reform. This Court has previously recognized as cert-worthy a similar situation where, as here, "[t]he Courts of Appeals have come to

different conclusions as to whether [an ameliorative sentencing law's] more lenient mandatory minimums apply to offenders whose unlawful conduct took place before, but whose sentencing took place after, the date that Act took effect." *Dorsey v. United States*, 567 U.S. 260, 272 (2012).[5] As before, the disparity in pre-Act and post-Act sentences is significant, *id.* at 269–71, and lower courts are struggling to implement Congress's effort to end an unfair sentencing regime. As Judge Kethledge observed in his opinion for the Sixth Circuit panel below, a rule requiring imposition of the pre-First Step Act mandatory minimums means that the court's obligation to "'impose a sentence sufficient, but not greater than necessary, to comply with' the purposes of sentencing" "rings hollow." App. 5a (quoting 18 U.S.C. § 3553(a)). This Court should grant review to resolve the circuit split, and provide guidance to lower courts struggling to honor the letter and intent of the First Step Act at plenary resentencings.

---

[5] The operative language governing applicability of the Fair Sentencing Act (at issue in *Dorsey*) and the First Step Act differs. *Compare* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (silent on applicability to pending cases), *with* First Step Act § 403(b) ("This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment."). *Dorsey* thus does not govern the merits analysis in this case.

II. The Sixth Circuit's Rule Serves No Purpose Because Applying the First Step Act at Plenary Resentencing Does Not Burden Courts or Undermine the Interest in Finality of Sentences.

In addition to misreading the statutory text, *see* Pet. 16–27, the Sixth Circuit's result is irrational because defendants in Petitioner's position will be sentenced anew in any event. Congress would have had no reason to deny defendants like Petitioner the benefit of the First Step Act's ameliorative scheme at those resentencings.

Whenever the criminal law changes, it is necessary to "balance . . . first, the need for finality in criminal cases, and second, the countervailing imperative to ensure the criminal punishment is imposed only when authorized by law." *Welch v. United States*, 578 U.S. 120, 131 (2016). The "presumption of finality," *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), that attaches to final criminal convictions and sentences has been justified by the need to avoid the "significant costs," inefficiency, and uncertainty that would be wrought by perpetual re-litigation of decided issues. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). As Justice Harlan put it, "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in the judgment).

Finality interests are at their zenith when applying new rules would require reopening final judgments and "force" the Government "to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing . . . standards." *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion). But once a court of appeals vacates a criminal sentence and remands for resentencing, any interest in finality of the prior sentence has by definition evaporated. Vacatur "wipe[s] the slate clean," requiring the trial court to sentence the defendant anew. *Pepper v. United States*, 562 U.S. 476, 507 (2011). And once a defendant is before the court for plenary resentencing, there is no cost to applying the current law, and "little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in the judgment).

With a general remand for resentencing, the district court must proceed "as if no initial sentencing ever occurred." *United States v. Burke*, 863 F.3d 1355, 1359 (11th Cir. 2017). *Accord United States v. McFalls*, 675 F.3d 599, 604 (6th Cir. 2012) ("A general remand permits the district court to redo the entire sentencing process[.]"). In keeping with the nature of a de novo proceeding, "when a defendant's sentence is set aside on appeal, the district court at resentencing can (and in many cases, must) consider the defendant's conduct and changes in the Federal Sentencing Guidelines since the original sentencing." *Concepcion v. United States*, 597 U.S. 481, 486 (2022). The district court will consider arguments already rejected, and even evidence of new conduct—such as post-sentencing rehabilitation—that was not before the court in the first instance. *Pepper*, 562 U.S. at 481.

Just as at an initial sentencing, at a plenary resentencing on remand the district court must exercise its discretion in setting an appropriate sentence, considering "the fullest information possible concerning the defendant's life and characteristics." *Id.* at 480. "[B]oth at a defendant's initial sentencing and at any subsequent resentencing after a sentence has been set aside on appeal," the court must determine a sentence "based on appropriate consideration of all of the factors listed in [18 U.S.C.] § 3553(a)." *Id.* at 490. That de novo assessment of statutory factors is mandated by Congress. 18 U.S.C. § 3742(g) ("A district court to which a case is remanded . . . shall resentence a defendant in accordance with section 3553."). Among the factors required to be considered under § 3553 are "the kinds of sentences available" (including statutory minimums and maximums) and the applicable "sentencing range." 18 U.S.C. § 3553(a)(3)–(4).

Given the district court's "duty . . . to sentence the defendant as he stands before the court on the date of sentencing," *Pepper*, 562 U.S. at 492 (quoting *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000) (per curiam)), there is no finality interest at stake at resentencing. As demonstrated in this case, resentencing involves preparation and consideration of an updated presentence report, *see* Resentencing Tr. 3, ECF No. 616, submission of new sentencing memoranda from the government and the defense, *see* ECF Nos. 589 & 600, and holding a new sentencing hearing at which the court hears argument and announces a new sentence justified with reference to the § 3553 factors. *See* ECF No. 616. At resentencing, "district courts bear the standard obligation to explain their decisions and demonstrate that they considered

the parties' nonfrivolous arguments." *Concepcion*, 597 U.S. at 484.

At plenary resentencing, the finality of a prior sentence has already been finally disturbed. When the defendant's prior sentence is vacated by the court of appeals because of some procedural or substantive defect with the sentence, "it is not the [First Step Act] that reopens their sentence." *Merrell*, 37 F.4th at 577 n.7 (quoting *Bethea*, 841 F. App'x at 550) (alteration in original). Because the sentence is already vacated and plenary resentencing already in motion, there is no additional cost to the court or the government in ensuring that "[a]ny new sentence imposed after enactment must comply with the [First Step Act's] requirements." *Id.* (alteration in original).

On the other hand, there is a weighty interest in avoiding imposition "upon the pre-Act offender a pre-Act sentence at a time after Congress had specifically found" that "such a sentence was unfairly long." *Dorsey*, 567 U.S. at 277. "[T]he public legitimacy of our justice system relies on [sentencing] procedures that are neutral, accurate, consistent, trustworthy, and fair." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (internal quotation marks and citation omitted). "[U]nnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings." *Id.*; *cf. Hamm v. City of Rock Hill*, 379 U.S. 306, 313 (1964) ("imputing to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive."). Because "[p]re-Act offenders whose sentences have been vacated are similarly situated to individuals who have never been sentenced" there is

no sense in "inflict[ing] on them the exact harsh and expensive mandatory minimum sentences that § 403 restricts and reduces. That result would be fundamentally at odds with the First Step Act's ameliorative nature." *United States v. Uriarte*, 975 F.3d 596, 603 (7th Cir. 2020) (en banc).[6]

Congress would have no reason to require courts resentencing a defendant anew to arbitrarily apply a repealed law no longer in effect. *Cf. Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974)

---

[6] The background principle respecting finality of sentences addresses the "difficult line-drawing in applying the [sentencing] reduction" to differently situated defendants. *Uriarte*, 975 F.3d at 610 (Barrett, J., dissenting). A defendant whose prior sentence was vacated and new sentence imposed *prior* to the effective date of the Act must contend with the government's interest in finality of that sentence. An otherwise similarly situated defendant resentenced *after* the effective date of the Act does not, because there is no final judgment in place at the time of resentencing and thus no constraint on the court's obligation to impose a new, fair sentence at that proceeding. This Court, of course, "assume[s] that Congress was aware of" relevant "background sentencing principle[s]." *Dorsey*, 567 U.S. at 275. That includes the principle that that a general remand for resentencing "wipe[s] the slate clean," *Pepper*, 562 U.S. at 507, thus nullifying the finality of any prior sentence. *Accord* Black's Law Dictionary (11th ed. 2019) (defining "vacate" as "[t]o nullify or cancel; make void.").

Similarly, applying § 403 to post-Act resentencing does not call into question pre-Act § 924(c) sentences in other contexts, where the finality interests may be operative. This Court need only recognize that in a *pending* case where a prior sentence has *already been vacated*, a defendant should be resentenced under the First Step Act's clarification of § 924(c), not under a law that Congress has since rejected. Nothing about that decision will require reopening a single past case, or vacating a single otherwise-valid sentence.

(reciting "the principle that a court is to apply the law in effect at the time it renders its decision"). Put simply, there is no finality interest in a vacated sentence. The sentence is null and void. Applying the law in place at the time of sentencing, the reduced mandatory minimums in the First Step Act, effectuates Congress's intent in enacting "a major bill that moves in the direction of justice." 164 Cong. Rec. S7753, S7781 (daily ed. Dec. 18, 2018) (statement of Sen. Cruz).

CONCLUSION

For the foregoing reasons, Mr. Carpenter's petition for a writ of certiorari should be granted.

DATED: Dec. 18, 2023

Respectfully submitted,

/s/ Emma Andersson
Emma Andersson
Counsel of Record
Nathan Freed Wessler
Evelyn Danforth-Scott
Yasmin Cader
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004
(212) 549-2500
eandersson@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th St., NW
Washington, D.C. 20005

Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm St.
San Francisco, CA 94111

Daniel S. Korobkin
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Ave.
Detroit, MI 48201

Clark M. Neily III
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001

Shana-Tara O'Toole
DUE PROCESS INSTITUTE
700 Pennsylvania Ave.
SE, Suite 560
Washington, DC 20003