No. 19-10233

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALAN L. MAPUATULI,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Hawaii, No. 1:12-cr-01301-DKW-1 (Judge Derrick Kahala Watson)

BRIEF FOR AMICI CURIAE UNITED STATES SENATORS RICHARD J. DURBIN, CHARLES E. GRASSLEY, AND CORY A. BOOKER IN SUPPORT OF DEFENDANT-APPELLANT AND VACATUR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

STATUTES AND RULES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

Amici are Members of the United States Senate who were the lead sponsors of the First Step Act of 2018, which they helped draft and voted to enact. In addition, amici were the principal drafters of Title IV of the Act, which includes the specific provision at issue in this appeal, Section 401. Amici have an interest in ensuring that the First Step Act's terms are interpreted and applied in a manner consistent with their intent.

SUMMARY OF ARGUMENT

In December 2018, a bipartisan majority of both Houses of Congress passed, and President Donald J. Trump signed into law, the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (the "First Step Act" or the "Act"). The Act is nothing short of historic, ushering in momentous correctional, sentencing, and criminal justice reforms. This appeal concerns one of the Act's critical sentencing reform provisions, Section 401, which modifies the circumstances in which certain mandatory-minimum sentencing enhancements apply and, where the enhancements do apply, reduces the mandatory minimum sentences themselves. The question before this Court is whether Section 401 applies where a prior

[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than amici or their counsel contributed money intended to fund preparing or submitting this brief.

sentence has been vacated and the case remanded for plenary resentencing. The answer, unequivocally, is yes.

In designing the First Step Act, Congress sought to ensure that individuals who committed an offense before the Act was enacted, but who are not subject to a sentence for that offense, would benefit from Section 401. That group, as Congress conceived of it, includes individuals facing an initial sentencing proceeding and individuals facing resentencing following vacatur of a prior sentence. Congress wrote the Act on the background of the well-established principle that vacatur nullifies a sentence, leaving the defendant in the same position as an individual who has never been sentenced. Intending to reach both categories of individuals, Congress provided that Section 401 would apply "to any offense that was committed before the date" the Act was enacted, "if a sentence for the offense has not been imposed as of such date of enactment." First Step Act § 401(c), 132 Stat. at 5221. Congress's words and purpose answer the question before this Court. A defendant whose sentence has been vacated stands in the same position as an individual on whom sentence has never been imposed. And there is no principled basis, much less a textual basis, on which to distinguish between those similarly situated groups of pre-Act offenders. Accordingly, the language Congress chose effectuates its intent to allow pre-Act offenders whose

sentences are vacated to benefit from the Act's ameliorative provisions at resentencing.

By contrast, the interpretation advanced by the Executive Branch and adopted by the district court in this case is contrary to Congress's language and intent. Reduced to its simplest form, that interpretation assumes that Congress intended to give legal effect to sentences that otherwise are void. That assumption finds no support in the statutory text, contradicts the fundamental considerations that motivated Congress to enact the First Step Act, and produces inequitable outcomes that undermine the fairness and legitimacy of our criminal justice system. That unquestionably is not what Congress intended.

For these reasons, amici respectfully submit that the district court's judgment should be vacated and the case remanded for resentencing in conformity with the First Step Act.

ARGUMENT

I. CONGRESS DESIGNED AND ENACTED THE FIRST STEP ACT TO ALLEVIATE THE UNFAIR EFFECTS OF CERTAIN MANDATORY MINIMUM SENTENCES

The First Step Act was the culmination of a years-long bipartisan effort to undertake much-needed correctional, sentencing, and criminal justice reform. The Act's supporters were part of an "extraordinary political coalition." 164 Cong. Rec. S7,627, S7,645 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin). Indeed, as one Senator remarked, support for the First Step Act was "not just bipartisan; it

[was] nearly nonpartisan." 164 Cong. Rec. S7,737, S7,749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy); *see also, e.g.*, *id.* at S7,778 (statement of Sen. Grassley) (observing that he did not know "whether we have had legislation like this before … whereby we have put together such diverse groups of people and organizations that support the bill"). In addition to Senators and Representatives on both sides of the aisle, the extraordinary political coalition included numerous other stakeholders, such as the Fraternal Order of Police, the American Correctional Association, the Association of Prosecuting Attorneys, the American Civil Liberties Union, and many other groups.

Though sentencing reform constitutes only one part of the First Step Act, it was critical to the Act's enactment. Indeed, many of the Act's supporters specifically highlighted its sentencing provisions when speaking in favor of the bill. Senator Durbin stressed the need to modify "inflexible mandatory minimum sentences" for nonviolent drug offenders, which have led to "an explosion in our Federal prisons" but failed to "deter drug use or drug crime." 164 Cong. Rec. S7,644. Senator Grassley also noted the importance of "address[ing] overly harsh and expensive mandatory minimums for certain nonviolent offenders." 164 Cong. Rec. S7,649. Similarly, in urging Congress to pass the First Step Act, President Trump underscored that reforming sentencing laws that "have created racially discriminatory outcomes and increased overcrowding and costs" was "a true first

step in creating a fairer justice system." *President Donald J. Trump Calls on Congress to Pass the FIRST STEP Act*, WhiteHouse.Gov (Nov. 14, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-calls-congress-pass-first-step-act/. And they were by no means the only ones to note the significance of those measures. *See, e.g.*, 164 Cong. Rec. S7,764 (statement of Sen. Booker) (describing sentencing reforms as "critical" to ensuring that the criminal justice system is "more fair" and "better reflect[s] our collective values and ideals"); *id.* at S7,781 (statement of Sen. Cruz) (describing the Act as "a major bill that moves in the direction of justice," in part because "[i]t lowers mandatory minimums for nonviolent drug offenders"); 164 Cong. Rec. H10,339, H10,361 (daily ed. Dec. 20, 2018) (statement of Rep. Goodlatte) ("[T]he bill reduces some of the harsher sentences for Federal drug offenders. … We want to punish repeat offenders, but we do not want our Federal prisons to become nursing homes."); *A Big Step Forward for Criminal Justice Reform*, Office of Sen. Mike Lee (Aug. 24, 2018), https://www.lee.senate.gov/public/index.cfm/2018/8/a-big-step-forward-for-criminal-justice-reform ("[T]he damage that draconian mandatory minimum sentences have done to families and communities has become just too apparent. The time for reform has come.").

It is not difficult to see why such reforms were necessary. The proper functioning of our criminal justice system depends in large part on its legitimacy,

fairness, and integrity. *Cf. Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908, 1910 (2018) (noting that "the public legitimacy of our justice system relies on [sentencing] procedures that are neutral, accurate, consistent, trustworthy, and fair," and that "a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings" (internal quotation marks omitted)). But, over the last several decades, it had become clear that "inflexible mandatory minimum sentences" that do not "allow judges to distinguish between drug kingpins … and lower level offenders" are not "fair," "smart," or "an effective way to keep us safe." 164 Cong. Rec. S7,644 (statement of Sen. Durbin); *see also, e.g.*, *id.* at S7,649 (statement of Sen. Grassley) (noting the "need to make sure that criminal sentences are tough enough to punish and deter, but not … unjustly harsh," and recognizing "unfairness in how … mandatory minimum sentences are sometimes applied"); 164 Cong. Rec. S7,762-63 (statement of Sen. Booker) ("[F]ailed policies … that created harsh sentencing, harsh mandatory minimum penalties" have "overwhelmingly" and "disproportionately" affected "people of color and low-income communities."); Keller, *Mike Lee: Mandatory Sentencing Forces You to Ask "Does This Punishment Fit the Crime?"*, The Hill (Nov. 27, 2018), https://thehill.com/homenews/senate/418413-mike-lee-mandatory-sentencing-forces-you-to-ask-does-this-punishment-fit-the (quoting Senator Lee as stating that "when we get into a situation where we're routinely

imposing[] 15, 20, 25, sometimes 55-year mandatory minimum sentences, you have to ask yourself the question, does the punishment fit the crime?"). The First Step Act "is a glowing recognition that one-size-fits-all sentencing is neither just nor effective" and "routinely results in low-level offenders spending far longer in prison than either public safety or common sense requires." 164 Cong. Rec. S7,749 (statement of Sen. Leahy). Put simply, the First Step Act's sentencing reforms were widely regarded as a critical step toward ensuring that our criminal justice system is, in fact, just.

And those reforms were considered by many to be part of an historic achievement: "the most significant criminal justice reform bill in a generation." 164 Cong. Rec. S7,649 (statement of Sen. Grassley); *see also, e.g.*, *id.* at S7,646 (statement of Sen. Durbin) (describing the Act as "one of the most historic changes in criminal justice legislation in our history"); 164 Cong. Rec. S7,765 (statement of Sen. Booker) ("I am proud to have been a part of what can be an historic step in the right direction."); 164 Cong. Rec. H10,364 (statement of Rep. Sensenbrenner) ("Congress has spent years talking about reducing crime, enacting fair sentencing laws, and restoring lives. Today, we are putting our words into action, and this is historic."); *Press Release: Sen. Lee Applauds Passage of the First Step Act*, Office of Sen. Mike Lee (Dec. 18, 2018),

https://www.lee.senate.gov/public/index.cfm/2018/12/sen-lee-applauds-passage-of-the-first-step-act (describing the Act's passage as "a huge win for America").

In light of the significant bipartisan effort to develop the First Step Act, it is no surprise that it was enacted by overwhelming bipartisan margins. The bill was introduced in the Senate in virtually its present form on December 13, 2018. After invoking cloture on December 17 by a vote of 82 to 12, *see* 164 Cong. Rec. S7,650, the Senate passed the First Step Act the following day by a vote of 87 to 12, *see* 164 Cong. Rec. S7,781. Two days later, the House passed the measure by a vote of 358 to 36. *See* 164 Cong. Rec. H10,430. Then, on December 21, President Trump signed the First Step Act into law, describing it as "an incredible moment" for "criminal justice reform." Remarks by President Trump at Signing Ceremony for S. 756, the "First Step Act of 2018" and H.R. 6964, the "Juvenile Justice Reform Act of 2018," 2018 WL 6715859, at *16 (Dec. 21, 2018).

The provision at the heart of this appeal, Section 401 of the First Step Act, bears the title "Reduce and Restrict Enhanced Sentencing for Prior Drug Felonies." First Step Act § 401, 132 Stat. at 5220. It accomplishes those goals in two ways. *First*, Section 401 limits the types of prior convictions that support the imposition of mandatory-minimum sentencing enhancements under the Controlled Substances Act, 21 U.S.C. § 801 *et seq*., and the Controlled Substances Import and Export Act, 21 U.S.C. § 951 *et seq*. Section 401 amends the Controlled Substances Act by

adding a definition for the term "serious drug felony." First Step Act § 401(a)(1), 132 Stat. at 5220. A "serious drug felony" is one of a set of specified offenses for which (1) "the offender served a term of imprisonment of more than 12 months" and (2) "the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense." *Id.*[2] Those temporal limitations reflect Congress's judgment that certain convictions—those warranting only a brief period of incarceration, and those that are decades old—may have little bearing on an individual's current circumstances and do not justify the imposition of severe mandatory minimum sentences.

Second, where mandatory-minimum sentencing enhancements do apply, Section 401 reduces the applicable mandatory minimum sentence. It decreases the mandatory minimum sentence for individuals with one qualifying prior conviction from twenty years' imprisonment to fifteen, *see* First Step Act § 401(a)(2)(A)(i), (b)(1), 132 Stat. at 5220-21, and the mandatory minimum sentence for individuals with two or more qualifying prior convictions—the so-called "three-strikes" rule—from life imprisonment to twenty-five years, *see id.* § 401(a)(2)(A)(ii), 132 Stat. at 5220.

[2] Section 401 also adds to the Controlled Substances Act a new definition for the term "serious violent felony." First Step Act § 401(a)(1), 132 Stat. at 5220. A "serious violent felony" is one of a set of specified offenses "for which the offender served a term of imprisonment of more than 12 months." *Id.*

Although Congress did not intend that Section 401 serve as a vehicle for reopening or vacating sentences, Congress determined that the Act's much-needed reforms should apply to pre-Act offenders not subject to a sentence for their offenses. Specifically, Congress provided in Section 401(c) that "the amendments made by [Section 401] shall apply to any offense that was committed before the date of enactment of [the First Step Act], if a sentence for the offense has not been imposed as of such date of enactment." *Id.* § 401(c), 132 Stat. at 5221.[3]

II. THE TEXT OF SECTION 401 REFLECTS THE SETTLED PRINCIPLE THAT VACATUR NULLIFIES A SENTENCE IN ITS ENTIRETY, SUCH THAT THE ACT APPLIES TO A SUBSEQUENT RESENTENCING

"The starting point in discerning congressional intent is the existing statutory text." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). Where "the words of a statute are unambiguous," the "judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (internal quotation marks omitted). Of course, as numerous courts have recognized, Congress does not draft statutes in a vacuum. *See, e.g.*, *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684

[3] Section 403 of the Act, which is not at issue in this appeal, contains an identical applicability provision. *See* First Step Act § 403(b), 132 Stat. at 5222. This Court's interpretation of Section 401(c) most likely will inform any future interpretation of Section 403(b).

(9th Cir. 2006) ("Congress is aware of the legal context in which it is legislating."). Thus, because "Congress is … presumed to know existing law pertinent to any new legislation it enacts," *United States v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991), well-established legal principles necessarily inform the interpretive task. Congress not only is aware of that general presumption; it routinely relies on it when drafting legislation. And it did just that in tailoring the language of Section 401 to achieve its desired ends.

Congress intended for Section 401 to apply to pre-Act offenders who are not subject to a sentence for their offenses, including those individuals whose original sentences are vacated as unlawful for other reasons. In selecting text to meet this objective, Congress relied on the settled principle that "when a criminal sentence is vacated, it becomes void in its entirety," *United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996), such that "the defendant is placed in the same position ***as if he had never been sentenced***," *United States v. Maldonado*, 996 F.2d 598, 599 (2d Cir. 1993) (emphasis added); *see also, e.g.*, *Pepper v. United States*, 562 U.S. 476, 507 (2011) (vacatur of a sentence "wiped the slate clean"); *United States v. Mobley*, 833 F.3d 797, 802 (7th Cir. 2016) ("When we vacate a sentence and order a full remand, the defendant has a 'clean slate'—that is, ***there is no sentence*** until the district court imposes a new one." (emphasis added)); *United States v. Maxwell*, 590 F.3d 585, 589 (8th Cir. 2010) (vacated sentences "were invalidated,

nullified, or made void"); *United States v. Muhammad*, 478 F.3d 247, 250 (4th Cir. 2007) (vacatur of a sentence means that "prior sentencing proceedings were nullified"); *United States v. Grant*, 397 F.3d 1330, 1334 (11th Cir. 2005) ("An original sentence is wiped away by a vacatur."); *United States v. Moree*, 928 F.2d 654, 656 (5th Cir. 1991) (vacatur of sentence "rendered … sentence null and void").

That principle has numerous applications and corollaries, perhaps the most important of which is that, when a sentence is vacated and a case remanded for resentencing, the district court must "sentence the defendant as he stands before the court on the day of sentencing." *United States v. Pete*, 819 F.3d 1121, 1130 (9th Cir. 2016); *see also, e.g.*, *United States v. Burke*, 863 F.3d 1355, 1359 (11th Cir. 2017) ("[A] district court conducts a resentencing as if no initial sentencing ever occurred."); *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[.]"). Thus, when conducting a resentencing, district courts must consider anew the sentencing "factors" set forth in 18 U.S.C. § 3553(a). *See Pepper*, 562 U.S. at 490 ("[D]istrict courts may impose sentences … based on appropriate consideration of all of the factors listed in § 3553(a) … . This sentencing framework applies both at a defendant's initial sentencing and at any subsequent resentencing after a sentence has been set aside on appeal."). That analysis requires courts to reassess, *inter*

alia, "the kinds of sentences available," 18 U.S.C. § 3553(a)(3), which "necessarily includes the statutory minimum and maximum ranges," *United States v. McCloud*, 730 F.3d 600, 610 (6th Cir. 2013) (Borman, J., concurring in part); *see also United States v. Carter*, 560 F.3d 1107, 1118 (9th Cir. 2009) (noting that district court recited "applicable mandatory statutory sentences" as part of analysis of "the kinds of sentences available"); *cf. United States v. Currie*, 739 F.3d 960, 966 (7th Cir. 2014) ("[T]he statutory minimum was necessarily one of the circumstances that the judge had to consider in ascertaining a reasonable sentence. Statutory minima and maxima have an obvious anchoring effect on the judge's determination of a reasonable sentence in the sense that they demarcate the range within which the judge may impose a sentence.") (internal citation omitted). District courts also may consider matters such as: (1) "the defendant's maturation and personal development," *Pete*, 819 F.3d at 1131; (2) evidence of rehabilitation, *Pepper*, 562 U.S. at 481 ("[W]hen a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation."); and (3) other matters not raised during the original sentencing proceeding, *United States v. Matthews*, 278 F.3d 880, 885-86 (9th Cir. 2002) ("On remand [for plenary resentencing], the district court generally should be free to

consider any matters relevant to sentencing, even those that may not have been raised at the first sentencing hearing.").[4]

The First Step Act was enacted on the background of, and is therefore consistent with, these settled principles, and consequently treats defendants whose prior sentences were vacated no differently from individuals being sentenced for the first time. Congress selected text that captures both groups: Section 401 applies to pre-Act offenders when "a sentence for the offense has not been imposed." First Step Act § 401(c), 132 Stat. at 5221. Interpreted in light of the prevailing background principles that Congress expected would control the statute's interpretation, that language necessarily encompasses pre-Act offenders whose sentences are vacated.

Had Congress intended to achieve a different outcome—had it intended to legislate contrary to settled law—this Court can be sure that Congress would have spoken with the utmost clarity. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) ("[W]e do not lightly assume that Congress has intended to depart from

[4] Indeed, on plenary resentencing, courts may even impose a more severe sentence if the circumstances warrant. *See, e.g.*, *United States v. Warda*, 285 F.3d 573, 580-81 (7th Cir. 2002) (affirming district court judgment imposing longer sentence because district court "re-sentenced [the defendant] … against a backdrop materially different from the one present" during the original sentencing hearing); *United States v. Rowe*, 268 F.3d 34, 40 (1st Cir. 2001) ("The new sentence, in the aggregate, may be more severe than the original sentence, as long as it is not vindictive.").

established principles."); *State Eng'r of State of Nev. v. South Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nev.*, 339 F.3d 804, 814 (9th Cir. 2003) ("Absent clearer indications, we cannot impute to Congress an intent to repeal, sub silentio, [a] deeply-rooted legal principle."). Indeed, Congress could have limited the application of Section 401 to pre-Act offenders facing an "initial" or "original" sentencing proceeding simply by adding to Section 401(c) words to that effect—*e.g.*, "if an original sentence for the offense was never imposed." But Congress did not include any such qualifying language. And the explanation for its absence is simple: Congress intended for Section 401 to apply to both pre-Act offenders who have never been sentenced *and* those whose sentences are vacated, as both stand before the district court in an identical posture.

Courts presume that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank*, 503 U.S. at 254. That presumption decides this case. Congress tailored the text of Section 401 to ensure that the statute it spent years developing reached its intended target—no more and certainly no less. The language Congress selected makes plain that Section 401 applies when a sentence is vacated and a case remanded for resentencing, just as Congress envisioned.

III. THE DISTRICT COURT'S INTERPRETATION IS CONTRARY TO CONGRESS'S PURPOSE IN ENACTING SECTION 401

The interpretation advanced by the Executive Branch and adopted by the district court—that Congress intended courts to ask only whether an individual once was sentenced as a matter of historical fact, without regard for whether that sentence was nullified—is inconsistent with congressional intent. Beyond being at odds with the statutory text, as explained above, such an interpretation requires this Court to attribute to Congress a baffling motive: to give legal effect to illegal sentences. Nothing in the statute's text supports an inference that Congress possessed such a motive, and amici are aware of no other legal or factual basis on which this Court could draw that inference. That is, of course, because Congress intended no such thing.

The considerations that animated the First Step Act's development and enactment undermine any suggestion that Congress intentionally excluded from Section 401's reach pre-Act offenders whose sentences are vacated. *Cf. Roschen v. Ward*, 279 U.S. 337, 339 (1929) (Holmes, J.) ("[T]here is no canon against using common sense in construing laws as saying what they obviously mean."); *United States v. Bhutani*, 266 F.3d 661, 666 (7th Cir. 2001) (When "construing a statute, courts ought not deprive it of the obvious meaning intended by Congress, nor abandon common sense."). Having observed over the course of several decades that certain federal sentencing laws resulted in "punishment[s]" that "do[] not fit

the crime," *A Big Step Forward for Criminal Justice Reform*, *supra*, Congress enacted the First Step Act to alleviate "overly harsh and expensive mandatory minimums," 164 Cong. Rec. S7,649 (statement of Sen. Grassley). And Section 401 specifically was designed to "reduce and restrict enhanced sentencing for prior drug felonies." First Step Act § 401, 132 Stat. at 5220. There is no reason to think that Congress excluded from its remedy pre-Act offenders facing plenary resentencing—who Congress understood to be similarly situated to individuals who have never been sentenced—and instead sought to inflict on them the exact harsh and expensive mandatory minimum sentences that Section 401 restricts and reduces. That result is fundamentally at odds with the First Step Act's ameliorative nature.

Finally, the district court's interpretation produces precisely the "kind of unfairness that modern sentencing statutes typically seek to combat." *Dorsey v. United States*, 567 U.S. 260, 277 (2012). Congress generally strives to avoid "radically different sentences" for individuals "who each engaged in the same criminal conduct … and were sentenced at the same time." *Id.* at 276-77; *cf.* 28 U.S.C. § 991(b)(1)(B) (creating United States Sentencing Commission to "establish sentencing policies and practices for the Federal criminal justice system that … provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar

records who have been found guilty of similar criminal conduct"). Declining to apply Section 401 to pre-Act offenders whose sentences are vacated produces just such outlandish results. As one district court has observed:

> To see the disparities at work, consider how an appeal in a relatively complex, multi-defendant case … can play out. One defendant pleads guilty. Another goes to trial. The first defendant is sentenced and appeals. The court of appeals vacates the sentence and remands for resentencing by which time the defendant who took the case to trial is awaiting sentencing. Congress passes the First Step Act at this point. The two defendants stand convicted of the same offenses and will stand before the same judge to be sentenced. If the First Step Act does not apply on remand for resentencing, one defendant will be subject to a 25-year mandatory minimum sentence; the defendant who went to trial will not.

United States v. Uriarte, No. 09-CR-332-03, 2019 WL 1858516, at *4 (N.D. Ill. Apr. 25, 2019) (holding that Section 403 of the First Step Act applies to pre-Act offenders whose sentences are vacated).[5]

* * *

[5] In the event this Court determines that Section 401 is ambiguous on this point (which amici respectfully believe it is not), the rule of lenity weighs in favor of amici's interpretation. *See LeCoe*, 936 F.2d at 402 ("The rule of lenity provides that ambiguity concerning the ambit of criminal statutes should be resolved in the favor of lenity.") (internal quotation marks omitted). Where, "after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute," *Chapman v. United States*, 500 U.S. 453, 463 (1991) (internal quotation marks, citations, and brackets omitted), "the rule of lenity tips the scales in favor of the defendant by requiring the court to impose the lesser of two penalties," *Sash v. Zenk*, 439 F.3d 61, 64 (2d Cir. 2006) (Sotomayor, J.) (internal quotation marks omitted). Here, amici's construction, which is most consistent with the statutory text and the considerations animating the First Step Act's development and enactment, is also the more lenient one.

In sum, Congress legislated deliberately and with care. Intending to reach all pre-Act offenders who stand before a federal district court for resentencing, and understanding that individuals whose sentences are vacated as unlawful are identical in all relevant respects to individuals who are being sentenced for the first time, Congress provided that Section 401 would apply "if a sentence for the offense has not been imposed." First Step Act § 401(c), 132 Stat. at 5221. That language is the product of thorough legal analysis, not careless drafting. And it supports only one conclusion: that courts resentencing pre-Act offenders must do so in conformity with Section 401.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's judgment and remand for plenary resentencing consistent with Section 401 of the First Step Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Circuit Rule 32.1(a).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 4,506 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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