No. 11-5683

In The
Supreme Court of the United States

EDWARD DORSEY, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

JONATHAN E. HAWLEY
Chief Federal Public Defender

DANIEL T. HANSMEIER
Counsel of Record
Staff Attorney
FEDERAL PUBLIC DEFENDER'S OFFICE
CENTRAL DISTRICT OF ILLINOIS
600 E. Adams Street, 2nd Floor
Springfield, Illinois 62701
Phone: (217) 492-5070
Email: daniel_hansmeier@fd.org
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Mr. Dorsey (joined by the government) urges this Court to vacate the sentence imposed in this case and to remand the case for resentencing under the Fair Sentencing Act because the Act applies to all individuals sentenced after its enactment. Amicus, at this Court's request, has filed a brief ("Amicus Br.") in support of the Seventh Circuit's contrary decision below. 11/29/2011 Order. Amicus relies on the saving statute, 1 U.S.C. § 109, to assert that pre-enactment offenders, like Mr. Dorsey, must be sentenced under an unfair sentencing scheme, even when that unfair scheme was no longer in effect on the date of sentencing.

Citing cases from this Court, as well as dictionary definitions, amicus asserts that a penalty is "incurred" under the saving statute when a criminal offense is committed. Amicus Br. 31-35. This Court's precedents, however, do not support amicus's position. This Court has addressed the meaning of the word "incurred" in the saving statute only once, in *Hertz v. Woodman*, 218 U.S. 205 (1910), and that decision contradicts amicus's position. The other cases cited by amicus have nothing to do with the interpretation of the word "incurred."

The dictionary definitions cited by amicus also do nothing to advance his position. Read correctly, in the past tense, and in light of basic principles of grammar, the definitions confirm that a mandatory minimum penalty is not incurred at the moment an individual commits a crime, but rather when the

penalty is imposed. Amicus's response further ignores Congress's treatment of mandatory minimum penalties in 21 U.S.C. § 841(b) as sentencing factors, rather than elements of the offense. Moreover, if amicus's reading is correct, Congress regularly enacts statutes with surplusage, a conclusion that conflicts with one of this Court's fundamental rules of statutory construction.

Amicus also asserts that Congress's use of the word "amended" in Section 2 of the Fair Sentencing Act is irrelevant because the word "repeal" includes implied repeals. This argument does nothing to overcome the undeniable fact that, as a pure textual matter, the "amended" Fair Sentencing Act falls outside of the "repeal" of a statute referenced in the saving statute. Moreover, the history and purpose of the saving statute confirm that it should not reach ameliorative amendments, and this Court can so hold without overruling any of its precedents.

I. A Mandatory Minimum Penalty Is Not "Incurred" At The Time A Criminal Offense Is Committed.

A. Under this Court's precedent, a mandatory minimum penalty is not "incurred" when a criminal offense is committed.

This Court has only once before addressed the meaning of "incurred" in the saving statute. In *Hertz*, this Court held that a liability was "incurred" "when no other fact or event was essential to [its] *imposition*."

218 U.S. at 220 (emphasis added). In that case, this meant that the inheritance tax at issue was "incurred" at death, rather than at the time the decedent signed the will. Amicus does not dispute that *Hertz* is relevant to the resolution of this case. Instead, amicus asserts that *Hertz* actually supports *his* position because, "[o]nce Petitioners committed each element of an offense subject to the then-applicable mandatory minimum, 'no other fact or event' was necessary for a mandatory-minimum sentence under then-existing law." Amicus Br. 34. Amicus rejects the proposition that "each step in the prosecutorial process" is essential to the imposition of a criminal penalty in light of the second clause of the saving statute. *Id.* at 35.

Amicus's interpretation of *Hertz* is unpersuasive for two reasons. First, if amicus's interpretation were correct, liability in *Hertz* would have been incurred when the decedent signed the will, not when he died. The signing of the will is the act that properly compares with the commission of a criminal offense. At that point, the decedent would have understood that the inheritance tax would be incurred upon his death. Under amicus's logic, because the decedent signed the will while the inheritance tax was in effect, the beneficiaries incurred the tax. Yet, the signing of the will was insufficient in *Hertz* because the decedent's death was essential to the inheritance tax's "*imposition*." 218 U.S. at 220 (emphasis added). Without the decedent's death, the tax could not be *imposed*, and,

therefore, the liability was incurred only upon the decedent's death.

Similarly, "each step in the prosecutorial process," Amicus Br. 34, is necessary to a criminal penalty's imposition. Just as a decedent must die in order for liability to be "incurred" under an inheritance tax, so too must a criminal defendant be indicted, convicted, and sentenced for a penalty to be "incurred" under a criminal statute. Only then is no other fact or event essential to the criminal penalty's imposition. *Hertz*, 218 U.S. at 220.[1]

When one applies these principles to the federal sentencing process, as Congress has defined it, it is clear that a mandatory minimum criminal penalty in federal court is not incurred until sentencing. Dorsey Br. 29-35. Under current prevailing law, drug quantity for mandatory minimum purposes is a *sentencing* factor, found by a judge at *sentencing* by a preponderance of the evidence submitted at the *sentencing* hearing. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986); *see also* cases cited at Dorsey Br. 30 n.16. It need not be alleged in the indictment, nor proven at trial beyond a reasonable doubt. And so, amicus is incorrect that "no other fact is necessary," other than the commission of the criminal offense, for the mandatory minimum penalty to apply in this case.

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[1] Perhaps recognizing the futility of the endeavor, amicus does not argue that this reading of *Hertz* equates the terms "incur" and "impose." It does not. Dorsey Br. 32-33.

Second, amicus is incorrect that this interpretation of "incurred" would "completely garble the second clause of the [saving] statute." Amicus Br. 35. Mr. Dorsey's interpretation is consistent with the second clause's natural and rightful meaning: the preservation of penalties during the post-sentencing phase of a case. In contrast, amicus's argument appears to be based on the contrary, and unsound, premise: that the saving statute has no application to cases in post-sentencing stages. As this Court has recognized, however, the saving statute was a response to the common law rule of abatement, and that rule applied to "all prosecutions which had not reached final disposition in the highest court authorized to review them." *Bradley v. United States*, 410 U.S. 605, 608 (1973). As amicus himself concedes, "[c]riminal prosecutions are not final if direct review or certiorari remain available." Amicus Br. 48. Moreover, this Court has applied the saving statute to save repealed statutes in cases on collateral review. *See, e.g., Warden v. Marrero*, 417 U.S. 653, 655-56 (1974).

Thus, the second clause of the saving statute operates to save a repealed statute after the penalty has already been incurred – in post-sentencing stages, such as cases pending on appeal or on collateral review – as the lower courts have held with respect to the application of the Fair Sentencing Act to defendants already sentenced at the time of its enactment. *See United States v. Powell*, 652 F.3d 702, 710 (7th Cir. 2011) (collecting cases). Mr. Dorsey's position is

consistent with that line of cases, and it does nothing to "garble" the second clause of the saving statute.

Indeed, the second clause refers to sustaining a prosecution "for the *enforcement* of such penalty, forfeiture, or liability." 1 U.S.C. § 109 (emphasis added). Penalties are enforced only after they are imposed. One cannot enforce a penalty before a court imposes it, and hence, before a defendant has incurred it. If the phrase "penalty incurred" is properly interpreted to mean a penalty that has already been imposed, then the second clause means exactly what it says. The old law "shall be treated as still remaining in force for the purpose of sustaining any . . . prosecution for the enforcement" of the penalty already incurred. 1 U.S.C. § 109.[2]

Amicus also contends that the decisions in *United States v. Reisinger*, 128 U.S. 398 (1888), and *Great Northern Ry. Co. v. United States*, 208 U.S. 452 (1908), confirm that a penalty is incurred when a criminal offense is committed because those cases involved defendants who were not yet indicted for the alleged criminal offenses when the applicable statutes were repealed. Amicus Br. 35. Yet, neither *Reisinger* nor *Great Northern Railway* interpreted the

[2] For instance, if a defendant was sentenced under an old law but, for whatever reason, was not taken into custody by the Bureau of Prisons until after the law was repealed, the second clause of the saving statute simply means that the government may lawfully take action to enforce the sentence even though the law under which it was incurred no longer exists.

word "incurred" in the saving statute. *Reisinger* dealt exclusively with the terms "penalty, forfeiture, or liability." 128 U.S. at 402 (noting "the only ground" at issue was whether the statute's reference to "penalty, forfeiture, or liability" included "crimes, and the punishments therefor."). The focus in *Great Northern Railway* was the reach of a specific saving clause in the new statute. 208 U.S. at 466-69 (interpreting the "crucial portion of the act, for the purposes of the present inquiry").

Amicus's reliance on inferences drawn from the underlying facts, rather than the relevant legal holdings, in *Reisinger* and *Great Northern Railway* assumes too much. It is common practice for this Court to decide only the case before it, and to leave broader issues for another day. "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *NASA v. Nelson*, 131 S.Ct. 746, 756 n.10 (2011) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (C.A.D.C. 1983) (Scalia, J.); *see also Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (noting that this Court "rel[ies] on the parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter of matters the parties present."). Because there was no issue regarding the meaning of the term "incurred" presented by the parties in *Reisinger* or *Great Northern Ry.*, those cases cannot bear the weight amicus hoists upon them. *Id.*; *see also Henderson ex rel.*

Henderson v. Shinseki, 131 S.Ct. 1197, 1202 (2011) ("[C]ourts are generally limited to addressing the claims and arguments advanced by the parties. Courts do not usually raise claims or arguments on their own.") (citation omitted).[3]

Moreover, unlike Mr. Dorsey, the defendants in *Reisinger*, 128 U.S. at 400, and *Great Northern Railway*, 208 U.S. at 466, sought abatement of their prosecutions. In effect, they sought to avoid the imposition of *liability*, rather than the imposition of a prior *penalty*. In contrast, Mr. Dorsey does not seek abatement of his prosecution.[4] The issue in this appeal, as amicus acknowledges, Amicus Br. 32, is when a *penalty* is incurred, and that is an issue that went unaddressed in *Reisinger* and *Great Northern Railway*. In the end, this Court's precedent confirms that

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[3] *Reisinger* and *Great Northern Railway* are good examples of this proposition. Had the parties in those cases focused not only on the word "incurred," but also on the word "sustaining" in the second clause of the saving statute, the cases arguably would have been decided differently, as the prosecutions had not yet been brought when the statutes at issue were repealed, leaving nothing to be "sustained."

[4] Mr. Dorsey could not seek abatement because the Fair Sentencing Act did not amend the substantive provision of the criminal statute at issue in this case, 21 U.S.C. § 841(a). That provision is identical today as it was when Mr. Dorsey committed the underlying criminal conduct. Rather, the Fair Sentencing Act amended only the *penalty* provisions in 21 U.S.C. § 841(b). § 2, 124 Stat. at 2372. Thus, the issue in this case differs entirely from the issues in *Reisinger* and *Great Northern Railway.*

a penalty is not incurred when an offense is committed, and this Court should reject amicus's argument to the contrary.

B. If Congress meant the saving statute to apply to all acts done, or offenses committed, prior to the repeal of a statute, it would have expressly said so in the statute's text.

With respect to the interpretation of the word "incurred," amicus advances only one theory: a penalty is "incurred" at the time an offense is committed. Amicus Br. 33-35. In doing so, however, amicus ignores the fact that such an interpretation would render superfluous the language in a number of statutes enacted around the time of the saving statute. Dorsey Br. 27-28. Amicus provides no explanation for why Congress, in 1870, would pass legislation referring to "an act done, right accrued, or penalty incurred," if a penalty is incurred when an act is done. An Act to reduce Internal Taxes, and for other Purposes, ch. 255, § 17, 16 Stat. 256, 261 (1870); *see also* statutes cited at Dorsey Br. 28 n.14.

Tellingly, amicus offers no response to this point. Nor would a response be consistent with this Court's precedent. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (noting this Court's "reluctan[ce] to treat statutory terms as surplusage"). The reality is that Congress knew how to refer to an "act done" or "offense committed," yet Congress said no such thing in the

text of the saving statute. Its failure to do so is direct textual evidence that it did not intend for the saving statute's application to turn on the date of the underlying conduct. Because the text of the saving statute does not support amicus's argument, it should be rejected.

C. In plain English, a criminal penalty is not "incurred" when an offense is committed.

Amicus also attempts to support his position with citations to two dictionary definitions, one from 1949, the other from 1785. Of course, the saving statute was passed in 1871, so these dictionary definitions are decades out of date. *See Carcieri v. Salazar*, 555 U.S. 379, 388 (2009) (looking to dictionary definitions at the time of the statute's enactment). The better definitions are those cited in Mr. Dorsey's brief. Dorsey Br. 25.

In any event, the definitions do little to advance amicus's tortured interpretation of "incurred." The first defines "incur" as to "become liable or subject to." Amicus Br. 33. The second similarly defines "incur" as "to become liable to a punishment or reprehension." *Id.* Both definitions, by their inclusion of the verb "become," confirm that the verb "incur" is not a typical action verb. Mr. Dorsey made this point in his Opening Brief, Dorsey Br. 25-26, 32-33, and amicus has offered no response to it. An individual has not incurred, or become subject to, a liability or a penalty,

or anything else, by an affirmative action; rather, an individual has incurred a liability, a penalty, or anything else when an action is taken upon him, or upon the happening of an event. *See, e.g., Hertz*, 218 U.S. at 220; *United States v. Cliatt*, 338 F.3d 1089, 1091-93 (9th Cir. 2003) (noting that an individual never incurred costs for medical care because she had no obligation to pay for it).

This is why, in *United States v. Follet*, 269 F.3d 996, 1000 (9th Cir. 2001), the Ninth Circuit held, "[a] cost for which the victim will never have to pay because the services will be provided directly by a governmental or charitable organization is not 'incurred' by the victim, even if that organization will incur costs for the benefit of the victim." "Ordinary citizens do not, for example, individually 'incur costs' for police or fire services, or for sending their children to their own communities' public school, even though those services and that education cost a great deal, since the citizens are not obligated to pay the government for its expenditures." *Id.* Similarly, in this case, the relevant event is the imposition of the penalty. Only when the court imposes the penalty has the defendant incurred it, because only then has the defendant become subject to the penalty. *Id.*

Moreover, amicus forgets that Congress drafted this portion of the saving statute in the *past tense*. In this light, these definitions hardly support amicus's position. One would not say that a criminal defendant "became liable or subject to" a penalty prior to its imposition. *See Barrett v. United States*, 423 U.S. 212,

216 (1976) (use of the past tense "denote[s] an act that has been completed."). It would be nonsensical to say that an individual became liable to a penalty if that individual were never prosecuted or if the penalty were never imposed.

Amicus also cites *United States v. Gonclaves*, 642 F.3d 245, 252 (1st Cir. 2011), in support of his position, but, like amicus, that case also relies incorrectly on *Reisinger* for the meaning of the word "incurred." *Gonclaves* further notes that defining "incurred" with respect to offense conduct "dovetails with ex post facto principles that allow the new statute to apply only to post-enactment conduct." 642 F.3d at 252. Yet, if the saving statute was meant to "dovetail" with ex post facto principles, then the saving statute has no application in this case, as the Fair Sentencing Act, which *lowered* the applicable mandatory minimum penalty in this case, is not an ex post facto law. *Dobbert v. Florida*, 432 U.S. 282, 294 (1977) ("It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law.").[5]

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[5] Amicus's fixation on the Fair Sentencing Act's increased fines is irrelevant in this case because no fine was imposed. Moreover, the enhancements to the Sentencing Guidelines under the Fair Sentencing Act raise no ex post facto concerns in the Court of Appeals in which this case originated. *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006). In any event, there is nothing that precludes the prospective application of ameliorative amendments, even where other portions of the same statute are inapplicable under ex post facto principles. *See, e.g., Weaver v. Graham*, 450 U.S. 24, 36 n.22 (1981) (noting, "only the *ex post*

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Amicus's final assertion, made without citation to any authority, is the apparent claim that Congress, rather than a court, imposes penalties, and that a court simply "verifies that the defendant has engaged in criminal wrongdoing and assesses the penalty." Amicus Br. 33-34. As this Court *just* emphasized, however, the task of sentencing traditionally resides in the Judicial Branch. *Setser v. United States*, 566 U.S. ___, 2012 WL 1019970 at *6 (2012) (noting our "tradition of judicial sentencing").

Courts do not mechanically "assess" penalties, they impose them (not Congress). And while the penalties are imposed for violations of the law, and not for "doing a poor job in court," Amicus Br. 34, this does not mean that the penalties are incurred any earlier than their imposition, and certainly not at the time the offense is committed. Indeed, in the federal system, sentencing factors are tied directly to the date of sentencing, and not to the date of the offense conduct, 18 U.S.C. § 3553(a)(4)(A)(ii), and that is true even for facts that trigger a statutory mandatory minimum sentence, *Harris v. United States*, 536 U.S. 545, 568 (2002), a fact amicus ignores.

In the end, as common sense dictates, and as the text of the saving statute confirms, a penalty is not incurred when a criminal offense is committed. If that

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facto portion of the new law is void as to petitioner, and therefore any severable provisions which are not *ex post facto* may still be applied to him.").

were the case, there are millions of incurred penalties hanging in space at this moment (as there are surely millions of crimes that have gone undetected), never to be heard of, let alone imposed by a court of law. Yet, when something, *anything*, is "incurred," it is not done in the abstract; it is a concrete reality.[6] Because amicus's interpretation of the saving statute "is sufficiently odd that Congress could not have intended it," Amicus Br. 47, this Court should reject it.

II. By Its Own Terms, The Saving Statute Applies To Repeals, Not Amendments.

The text of the saving statute is clear: it applies to the "repeal" of a statute. 1 U.S.C. § 109. The text of

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[6] As an example, consider this statement from an opinion just issued by this Court:

> The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution *to incur* the expense of conducting a new trial.

Lafler v. Cooper, 566 U.S. ___, 2012 WL 932019 at *11 (Mar. 21, 2012) (emphasis added). Clearly, the importance of this sentence is that expenses would be *incurred* only if a new trial were conducted. Under amicus's interpretation, however, the expenses would be incurred prior to the trial, and arguably as early as the commission of the criminal offense. After all, if penalties are incurred when an offense is committed, one might as well say that expenses related to the enforcement of those penalties are incurred then too. That is surely not the common usage of the word "incurred," and it is surely not how this Court just used it.

the Fair Sentencing Act is equally clear: it "amended" 21 U.S.C. § 841(b). § 2, 124 Stat. at 2372. Thus, as a textual matter, Congress's use of the term "amended" in the Fair Sentencing Act is direct evidence of its intent not to save the prior version of § 841(b) via the saving statute. If Congress wanted to invoke the saving statute, it would have "repealed," not "amended," § 841(b).

Amicus responds to this argument by criticizing Mr. Dorsey for "never get[ting] around to addressing the statutory text." Amicus Br. 25. Yet, Mr. Dorsey's argument begins, and should end, with the statutory text. Dorsey Br. 39-43. It is amicus who strays from the text of the statute by interpreting the word "repeal" to include amendments. Amicus Br. 19-23.

Indeed, as amicus points out, "it is always appropriate to assume that our elected representatives know the law." Amicus Br. 39 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979) (quotation and alterations omitted)). As such, even if the Fair Sentencing Act's amendments are considered implied repeals, that does nothing to negate Congress's use of the term "amended," rather than "repealed," in Section 2 of the Fair Sentencing Act. Rather, it proves Mr. Dorsey's point: Congress could have used the word "repealed"; its failure to do so indicates its intent not to invoke the saving statute to save the prior version of § 841(b). *See, e.g., Hui v. Castaneda*, 130 S.Ct. 1845, 1851 (2010) (recognizing comparison/contrast of different statutes as a valid tool in statutory interpretation). Similarly, Congress could have

referenced "repeal or amendment" in the saving statute, as other statutes passed around 1871 demonstrate that Congress knew how to do so if that was its intent. Dorsey Br. 40-41. Amicus offers no response to this point. As a textual matter, amicus's position finds no support, whether or not the amendments in this case are considered implied repeals.[7]

III. The Saving Statute Should Have No Application In Cases, Like This One, Involving The Prospective Application Of An Ameliorative Amendment.

A. This Court has never held that the saving statute bars the prospective application of an ameliorative amendment.

Amicus contends that this Court's decision in *Marrero*, 417 U.S. 653, is dispositive in his favor because *Marrero* held that the saving statute applies to ameliorative amendments. Amicus Br. 23-24. In doing so, amicus ignores the fact that *Marrero* involved a collateral attack on a sentence, and that the defendants in that case were sentenced before the applicable statute was repealed. 417 U.S. at 655-56. In

[7] Amicus's citation to the saving statute's use of the word "any" is also unpersuasive because it modifies "repeal," and this case does not involve a repeal. Amicus Br. 25. Moreover, as amicus concedes, this Court's decision in *United States v. Tynen*, 11 Wall. (78 U.S.) 88, 90-91, 95 (1870), was decided *after* the passage of the saving statute, yet this Court did not mention the saving statute in that case. Amicus Br. 26, 28.

contrast, this case is not a collateral attack – it is a direct appeal. And, Mr. Dorsey was sentenced after the amended statute went into effect. Amicus also ignores the fact that the statute at issue in *Marrero* contained a clause that saved the former statute for all violations committed prior to the statute's repeal. *Id.* at 656. In contrast, the Fair Sentencing Act did not save the former penalty provisions. 124 Stat. 2372.

In other words, while the holding in *Marrero* was correct – the specific clause in the repealed statute saved the statute, and the saving statute arguably did as well because the defendant was sentenced prior to repeal – that holding is not dispositive in this case. To the extent this Court discussed ameliorative amendments, it did so in a different context, and nothing precludes this Court from considering the saving statute's reach to an ameliorative amendment in the present context. This Court can do that without disturbing the holding in *Marrero*.

To be sure, Congress could have amended the saving statute had it thought this Court's decision in *Marrero* misinterpreted it. Amicus Br. 24. Considering that *Marrero* applied the saving statute in light of the specific saving clause in the repealed statute, however, Congress had no reason to respond to the decision in *Marrero*. While it is true that Congress has, on occasion, responded to a decision of this Court, it has done so when this Court reached the wrong conclusion (according to Congress, anyway). *See, e.g.,* William N. Eskridge, Jr., *The Case of the*

Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases, 88 Mich. L. Rev. 2450, 2455-2456 (Apr. 2001); Abner J. Mikva, *When Congress Overrules the Court*, 79 Cal. L. Rev. 729 (May 1991).[8]

Moreover, the fact that the statute at issue in *Marrero* had a specific saving clause undermines amicus's assertion that Congress views the statute as anything more than a general rule of construction. If Congress actually "legislate[s] against the backdrop" of the saving statute, as amicus asserts, Amicus Br. 24, then why would Congress ever include a specific saving clause in a repealing statute? Such clauses would always be superfluous in light of the saving statute. Amicus essentially makes this point himself. Amicus Br. 39-40, 53. Yet, he fails to acknowledge that it is not uncommon for Congress to include specific saving clauses in amending or repealing legislation.[9]

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[8] Amicus's "legislative inaction" argument is also unpersuasive for other reasons. *See, e.g.,* William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 Cal. L. Rev. 613, 670 (May 1991) (noting that "the gatekeepers may favor the decision and, as a consequence, may not introduce or may at least block overruling legislation. The gatekeepers, however, may have preferences different from those of the chamber median; therefore, the failure to act may be attributed to gatekeeper preference rather than the preference of Congress as a whole.").

[9] Congress currently includes saving clauses to save the effects of amended or repealed statutes. *See, e.g.,* Viral Hepatitis Testing Act of 2011, S. 1809, 112th Cong. § 3(d) (2011); Department of Homeland Security Authorization Act of 2011, S. 1546,

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Amicus cannot have it both ways: either Congress "legislate[s] against the backdrop" of the saving statute by remaining silent with respect to the reach of an amended or repealed statute, or it views the saving statute as a general rule of construction, and, thus, includes specific saving clauses when it wishes to save former legislation. History supports the latter determination.

Indeed, Congress's recent inclusion of saving clauses in *amending* statutes is consistent with Mr. Dorsey's position that the saving statute does not reach amendments, *see supra* n.4 (citing statutes), as is the inclusion of a saving clause in the precursor legislation to the Fair Sentencing Act, H.R. 265, 111th Cong. (2009). Government Br. 44-45. Of course, this saving clause was deleted from the Fair Sentencing Act, not only "implying that no such limitation was intended," *id.* 45, but *confirming* Congress's intent not to save the former unfair penalties for crack

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112th Cong. § 410(b) (2011); Southeast Hurricanes Small Business Disaster Relief Act of 2011, S. 653, 112th Cong. § 2(b) (2011); NSP Termination Act, H.R. 861, 112th Cong. § 3(b)(1) (2011). It has also used savings clauses in the past to save prosecutions under repealed or amended laws. *See, e.g.,* Immigration Act of 1990, Pub. L. No. 101-649, § 408(d), 104 Stat. 4978, 5047 (1990) (provisions of law repealed continued in force and effect for all prosecutions, acts, things, liabilities, obligations, or matters existing or done as of the effective date); Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1103(a), 84 Stat. 1236, 1294 (1970) (prosecutions for any violation prior to effective date not affected by repeals or abatements made by the law).

cocaine offenses. Nothing in this Court's precedent precludes this Court from reaching this correct conclusion, rather than amicus's "gratuitously silly" one. *United States v. Holcomb*, 657 F.3d 445, 463 (7th Cir. 2011) (Posner, J., dissenting); *see also Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011) (Easterbrook, C.J.) (holding that an inference from silence is "a logical error. Silence is just silence.").[10]

B. Ameliorative amendments did not "universally" abate prosecutions at common law.

According to amicus, abatement "applied universally to any repeal, . . . whether the repeal was ameliorative or otherwise." Amicus Br. 26. This is incorrect. At common law, both federal and state courts generally followed the principle that, "where a criminal statute is amended, lessening the punishment, a

[10] Equally unavailing is amicus's suggestion that Congress could have simply deleted the word "no" from H.R. 265, which would have then provided, "[t]here shall be retroactive application of any portion of this Act." Amicus Br. 53. Putting aside the grammatical problems with this solution, such an alteration would not have accomplished what Congress intended to accomplish with the Fair Sentencing Act – its application to all individuals sentenced after its enactment. The proposed solution would have extended its reach to *all* incarcerated individuals previously sentenced under 21 U.S.C. § 841(b) (not to mention 21 U.S.C. §§ 844 and 960). Yet, no party argues that Congress intended such a result.

defendant is entitled to the benefit of the new act, although the offense was committed prior thereto." *Moorehead v. Hunter*, 198 F.2d 52, 53 (10th Cir. 1952).[11] One such example comes from this Court: *Steamship Co. v. Jollife*, 2 Wall. (69 U.S.) 450, 458-59 (1864). There are others. *See, e.g., Com. v. Wyman*, 66 Mass. 237, 238-39 (1853), and cases cited at Dorsey Br. 51 n.26. Amicus ignores this Court's decision in *Jollife*, as well as the other cases that applied the common law rule discussed in *Moorehead*. Rather, amicus draws a "universal" rule from *six* cases. Amicus Br. 25-26. No such "universal" rule existed.

Amicus also focuses on this Court's use of the phrase "technical abatement." Amicus Br. 27-30. Citing a footnote in *Marrero*, amicus disagrees that this Court has used the term to reference an increase, rather than a decrease, in penalties, despite this Court's discussion in *Hamm v. City of Rock Hill*, 379 U.S. 306, 314 (1964) (referring to a "technical abatement" as one that involved "a substitution of a new statute with a greater schedule of penalties"). *Id.* at

[11] In a footnote, amicus attempts to discredit this statement from *Moorehead*, noting that the court acknowledged the rule "appl[ied] only where there was no general saving statute." Amicus Br. 27 n.4. But this does not undermine Mr. Dorsey's argument. The common law rule at issue *preceded* the enactment of the saving statute, and so of course it applied in the absence of a general saving statute. Moreover, amicus's further comments on what the *Moorehead* Court actually meant are pure speculation. *Moorehead* had to do with a "common law principle," not with legislation. 198 F.2d at 53.

27. Yet, others have understood *Hamm*'s discussion of "technical abatement" to refer to statutes that increase, not decrease, penalties. *See, e.g.,* S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 Am. J. Crim. L. 1, 31-32 (Fall 2009); John P. McKenzie, Comment, Hamm v. City of Rock Hill *and the Federal Saving Statute*, 54 Geo. L.J. 173, 173 n.3 (1965).

In any event, the scope of "technical abatement" is irrelevant in this case, as this case does not involve abatement, whether "technical" or not. Mr. Dorsey does not seek abatement at all. He merely seeks the application of an ameliorative amendment to a penalty provision that was in full force and effect at the time he was sentenced. And so, while this Court has found that abatement was the evil at which the saving statute was aimed to correct, this case has nothing to do with abatement, meaning that it should have nothing to do with the saving statute either. The prospective application of an ameliorative amendment is outside the reach of the saving statute's purpose, just as it is outside the scope of its text. *See generally* Amicus Br. of National Association of Criminal Defense Lawyers.

IV. The Fair Sentencing Act's Application In This Case Is Not A Retroactive Or "Partially-Retroactive" Exercise.

Finally, amicus assumes, without discussion, that the application of the Fair Sentencing Act in this case

would amount to a retroactive exercise because Mr. Dorsey committed the underlying criminal conduct prior to the Act's enactment. Amicus Br. 11. In doing so, amicus ignores two basic propositions: (1) "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment," *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244, 269 (1994); *see also Rep. of Austria v. Altmann*, 541 U.S. 677, 681, 697-98 (2004) (holding that the application of the Foreign Services Intelligence Act to pre-enactment conduct was not a retroactive exercise); and (2) a statute that does not create a "new disability," like Section 2 of the Fair Sentencing Act, is not a retroactive statute, *Vartelas v. Holder*, ___ U.S. ___, 2012 WL 1019971 at *6-7 (Mar. 28, 2012).

Indeed, amicus ignores Mr. Dorsey's entire argument on principles of retroactivity. Dorsey Br. 35-38. In the end, "the relevant retroactivity event is the sentencing date, not the date the offense was committed, because the application of a mandatory minimum is a sentencing factor, not an element of the offense. Accordingly, the application of the FSA is the *prospective* application of current law, not a *retroactive* exercise." *United States v. Holloman*, 765 F.Supp.2d 1087, 1090-91 (C.D. Ill. 2011) (Mills, J.).

Nor does it make sense to speak in terms of "partial retroactivity." Amicus Br. 9-10. The relevant retroactivity event is the date of sentencing. Application of the Fair Sentencing Act to all those sentenced after its enactment, while denying application

to those sentenced before its enactment, is neither a "retroactive" nor a "partial" exercise, and, therefore, it is certainly not a "partially retroactive" exercise. There is nothing retroactive about applying an amended penalty provision at a time in which that provision is in full force and effect. Because the Fair Sentencing Act amended § 841(b)'s penalty provisions, any discussion of retroactivity is misplaced because Mr. Dorsey was sentenced after the Act's enactment.

CONCLUSION

For the foregoing reasons, as well as those stated in the opening briefs of Mr. Dorsey, the government, and Petitioner Hill, the judgment of the court of appeals should be reversed and this case should be remanded for resentencing under the Fair Sentencing Act.

Respectfully submitted,

JONATHAN E. HAWLEY
Chief Federal Public Defender

DANIEL T. HANSMEIER
Counsel of Record
Staff Attorney
600 E. Adams Street, 2nd Floor
Springfield, Illinois 62701
Phone: (217) 492-5070
Email: daniel_hansmeier@fd.org

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