APPEAL NUMBER 10-4271

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee

V.

KENNETH JACKSON,
Appellant

REPLY BRIEF FOR APPELLANT

Appeal from Order Entered in the United States District Court
for the Eastern District of Pennsylvania, at Criminal Number 07-cr-00535-1, on
November 4, 2010, by The Honorable Stewart Dalzell

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ARGUMENT

The provisions of the Fair Sentencing Act of 2010 that raise the quantities of crack cocaine required to trigger mandatory-minimum penalties under 21 U.S.C. § 841(b) apply to defendants who are sentenced after the effective date of the Act but whose offense conduct occurred before the effective date.

The government argues that application of the Fair Sentencing Act of 2010 at post-enactment sentencings for pre-enactment conduct is irreconcilable with *United States v. Reevey*, 631 F.3d 110 (3d Cir. 2010), is prohibited by 1 U.S.C. § 109, and in any event was not intended by Congress. None of these arguments is persuasive. Rather, basic principles of statutory interpretation demonstrate that the FSA's ameliorative provisions apply at all sentencings after August 3, 2010, and certainly at all sentencings (like Mr. Jackson's) where the lower sentencing guidelines mandated by the FSA apply. The district court was wrong to think that the law requires a serious injustice to be done in this and many other future cases.

A. *Reevey* does not control, and in fact is consistent with the application of the FSA at all post-enactment sentencings.

Reevey held that the FSA does not apply to defendants who were sentenced before the Act's effective date. 631 F.3d at 114-15. The government argues that application of the FSA at *post*-enactment sentencings for pre-enactment conduct cannot be squared with *Reevey*—going so far as to say that "everything Jackson

argues . . . applies with equal force" to the *Reevey* situation, and that there is no "principled reason" to distinguish between pre- and post-FSA sentencings. Gov't Br. at 19-20.[1]

The government's argument from *Reevey* is perplexing, for the case plainly does not control here and a principled distinction, based on Congressional intent, is easily drawn between pre- and post-FSA sentencings. Whatever position one takes on whether § 109's express-statement requirement is binding, or whether Congress intended the FSA to apply to pre-enactment conduct (both legitimate points of disagreement, addressed in the remainder of this brief), it is no argument to say that *Reevey* controls either by its terms or in effect.

By its terms, of course, *Reevey* does not control—it expressly reserved the issue presented in this appeal. 631 F.3d at 115 n.5. More importantly, the government is mistaken in claiming that Mr. Jackson's argument is irreconcilable with the result in *Reevey*. It is important to understand Mr. Jackson's argument: § 109's express-statement requirement yields to the plain import of later legislation, and the plain import of the FSA—demonstrated principally by its

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[1] It is unclear whether the government is arguing that *Reevey* itself is dispositive, or that *Reevey* should be extended here. *Compare* Gov't Br. at 17 (acknowledging that *Reevey* leaves present question "unanswered") *with id.* at 9-10, 21 (arguing that Court need not reach the merits of Mr. Jackson's argument, as *Reevey* controls). As explained in text, neither contention has merit.

provisions for emergency Guidelines amendments and an impact study within five years—is that the new mandatory-minimum thresholds apply at all post-enactment sentencings.

The emergency aspect of the amendment authority and the five-year deadline for the impact study logically bear on whether Congress intended the new mandatory-minimum thresholds to apply at all *post*-enactment sentencings: these provisions demonstrate an urgency in conforming the Guidelines to the new thresholds, and an understanding that the FSA would be applied throughout the five-year period. *See* App't Br. at 22-28; *infra* at 10-11. These provisions are of no import, however, to defendants like those in *Reevey* who were sentenced *pre*-enactment. Just because Congress acted urgently to staunch the future flow of unjust and racially-tinged crack sentences does not mean that Congress was willing to reopen sentences that had already been imposed.

Thus, it is simply not true that "everything Jackson argues . . . applies with equal force" to defendants sentenced before the FSA's enactment. Gov't Br. at 19. *Reevey* is perfectly consistent with Mr. Jackson's position, as his arguments do not imply any Congressional intent to undo previously-imposed sentences. The genuine points of debate are therefore whether § 109 trumps the plain import of

later legislation, and whether the plain import of the FSA is that its ameliorative provisions apply at all post-enactment sentencings.

B. 1 U.S.C. § 109 provides a saving rule to be read together with all other indicators of Congressional intent, but it cannot impose a binding express-statement requirement on future legislative power.

The general saving statute, 1 U.S.C. § 109, is a saving rule to be read together with all other indicators of Congressional intent in passing a repealing law, but its express-statement requirement is not binding. That is true regardless of whether the repealing law contains its own, specific saving clause.[2]

1. *The Supreme Court long ago recognized the limits of § 109's express-statement requirement.*

Everyone agrees that the text of § 109 says that penalties incurred under repealed statutes are preserved unless the repealing law "expressly provide[s]" otherwise. In its first significant treatment of the statute, over 100 years ago, the Supreme Court established a fundamental point: the saving statute is an important rule of construction in interpreting repealing laws, but because an earlier Congress

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[2] Although the least of the parties' disputes, it should be noted that § 109 is properly referred to as a "saving" (as opposed to "savings") statute. *See* Black's Law Dictionary (6th ed. 1990). A saving statute preserves penalties, whereas a savings statute would relate to banking or financial matters. The distinction apparently has a linguistic grounding, as well. *See* Bryan A. Garner, A Dictionary of Modern Legal Usage (2d ed. 1995).

cannot bind a later Congress—only the Constitution can limit legislative power—the saving statute cannot impose any binding requirement. *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 465 (1908). *Accord Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659 n.10 (1974); *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring).

The government's portrayal of this long-standing rule as a novel and "unique" view held by Justice Scalia, Gov't Br. at 27, betrays a fundamental misunderstanding of Congress's power under the Constitution. As Justice Marshall made clear in 1810, one Congress cannot limit a future Congress's legislative power:

> [O]ne legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted.

Fletcher v. Peck, 6 Cranch 87, 135 (1810). *Accord Creque v. Luis*, 803 F.2d 92, 95 (3d Cir. 1986) ("[N]o one legislature can prevent amendments to its laws in the future."). The Court has never swayed from this bedrock principle. *See, e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 872-74 (2005) (plurality opinion) (discussing roots of principle in English law); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932); *Manigault v. Springs*, 199 U.S. 473, 486-87 (1905); *Newton v. Commissioners*, 100 U.S. 548, 559 (1880).

Manigault provides a good example. In 1893, the South Carolina legislature enacted a statute providing that no private bills may be introduced in (or passed by) the legislature unless the proposed beneficiary petitions for the bill and the public is notified. 199 U.S. at 486-87. Ten years later, without heeding the petition and notice requirements, the legislature passed a private bill permitting someone to dam the Kinloch creek. *Id.* at 473. An adversely impacted landowner sued, arguing *inter alia* that the private bill violated the 1893 statute. *Id.* at 486-87. The U.S. Supreme Court readily, and correctly, dismissed the argument:

> As [the 1893 statute] is not a constitutional provision, but a general law enacted by the legislature, it may be repealed, amended, or *disregarded* by the legislature which enacted it. This law . . . is not binding upon any subsequent legislature, nor does a noncompliance with it impair or nullify the provisions of an act passed without the requirement of such notice.

199 U.S. at 487 (emphasis added).

So the issue is a bit deeper than the government would have it—whether "expressly means expressly" in § 109. Gov't Br. at 21. "Expressly" may mean "expressly" or whatever else the government likes, but the point is that one of the most fundamental principles of legislative authority—recognized from the first days of the republic—deprives § 109 of the power to bind. The 41st Congress,

which enacted § 109, cannot dictate how the 111th Congress may manifest its intent to have the FSA apply at post-enactment sentencings.

2. *The presence or absence of a specific saving clause in the repealing law makes no difference in the analysis.*

The government tries to cabin the operation of this principle to situations "where there is tension between two different 'saving[] statutes,'" *i.e.*, between § 109 and a specific saving clause in the repealing law. Gov't Br. at 22-26. Under this theory, § 109 somehow gains the power to bind whenever there is no specific saving clause in the repealing law. That makes no sense, and is not the rule. The private bill in *Manigault* had no "dueling" public-notice provision, but that of course made no difference. The point, again, is that one Congress cannot hamstring a subsequent Congress with non-constitutional limitations on the legislative power. Nothing in the doctrinal or logical grounding of that principle turns on the content of the repealing law. Consequently, the analysis is the same regardless of whether or not the repealing law contains a specific saving clause.

That analysis is a familiar one: ordinary statutory interpretation. The overarching goal, as always, is to ascertain the intent of Congress, looking to the text of the statute, applicable canons of construction, and the statute's purpose and legislative history. *See, e.g.*, *Corley v. United States*, 129 S. Ct. 1558, 1566-70

(2009); *United States v. Introcaso*, 506 F.3d 260, 264-70 (3d Cir. 2007). Section 109 is no more than a specialized canon of construction that can, like other canons in other statutory-interpretation contexts, be trumped by evidence of contrary legislative intent:

> [T]he provisions of [Section 109] are to be treated as if incorporated in and as a part of subsequent enactments, and therefore *under the general principles of construction requiring, if possible, that effect be given to all parts of a law, [§ 109] must be enforced unless, either by express declaration or necessary implication, arising from the terms of the law as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of [§ 109]*.

Great Northern Ry. Co., 208 U.S. at 465 (emphasis added). It is the intent of Congress that ultimately controls in determining a statute's temporal reach, regardless of what general rules may apply. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837-38 (1990). The government's myopic focus on whether a repealing law contains its own saving clause ignores *Great Northern Ry.*'s mandate to consider the implications that "arise[] from the terms of the law as a whole." 208 U.S. at 465.

Thus, while the government is correct that the repealing laws in *Great Northern Ry.* and *Marrero* contained specific saving clauses, Gov't Br. at 22-26, it does not follow that implied repeals are limited to that circumstance. Nothing in the government's "thorough reading" of *Great Northern Ry*. and *Marrero* suggests

otherwise. *Id.*[3] In those cases, the specific saving clauses were important because that is how Congress manifested its intent in the repealing laws at issue—just as Sections 8 and 10 of the FSA are important here.[4] The absence of a saving clause in the FSA does not transform § 109 into a binding dictate, nor does it alter the basic methodology of statutory interpretation. Indeed, it would be bizarre if here, unlike in every other statutory-interpretation context, courts are to enforce an impotent restraint on future legislative power instead of determining the intent of Congress in enacting a repealing law.

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[3] Nor does anything in the two district court cases relied upon by the government, *United States v. Crews*, No. 06-418, 2010 WL 5178017 (W.D. Pa. Dec. 20, 2010) and *United States v. Dickey*, No. 09-34, 2011 WL 49585 (W.D. Pa. Jan. 4, 2011). The *Crews* and *Dickey* courts refused to consider Congressional intent in interpreting the FSA because they thought § 109's express-statement requirement is binding outside the dueling-saving-provision context (wrong, as explained in text) and because they viewed this Court's decision in *United States v. Jacobs*, 919 F.2d 10, 13 (3d Cir. 1990) as prohibiting such consideration (wrong, as explained in App't Br. at 21 n.8). 2010 WL 5178017, at *4-5; 2011 WL 49585, at *5-7.

[4] In *Great Northern Ry.*, the Court held that a specific saving clause that preserved prior penalties in certain "causes now pending in courts of the United States" did not imply that the prior penalties were extinguished with respect to pre-repeal conduct not yet indicted, and therefore did not conflict with the general saving statute. 208 U.S. at 316-17. In *Marrero*, there was no "dueling" between the saving provisions at all—the Court simply held that both the specific saving clause and § 109 preserved a prior prohibition of parole eligibility because parole is both part of the "prosecution" of the offense (the term used in the specific clause) and a "penalty" (the term used in § 109). 417 U.S. at 658, 663-64.

C. The fair implication and plain import of the FSA are that its mandatory-minimum thresholds apply at all post-enactment sentencings, regardless of when the offense conduct occurred.

In the end, the only doctrinally-sound government argument is that Congress did not intend the FSA's new mandatory-minimum thresholds to apply to pre-enactment conduct. Gov't Br. at 37-42. But here, the government is wrong as a factual matter. Indeed, the government's discussion of Congressional intent is so cursory and nonresponsive, it seems the government has misunderstood much of Mr. Jackson's argument.

1. *The government does not meaningfully address the emergency-amendment argument, and totally ignores the impact-study argument.*

The FSA's emergency Guidelines amendment provision (Section 8) provides the most obvious textual indication of Congress's intent to apply the FSA's mandatory-minimum thresholds at all post-enactment sentencings, even those involving pre-enactment conduct. *See* App't Br. at 22-27. The argument here is simple. Given that Congress deemed "conforming" Guidelines amendments necessary on an emergency basis to "achieve consistency with . . . *applicable* law," 124 Stat. 2372, 2374 (emphasis added), and given that the only defendants likely to be sentenced for many months after the FSA's enactment are those who offended pre-FSA, Congress must have intended the FSA's lower

mandatory-minimum thresholds to be the post-enactment "applicable law" for pre- and post-FSA offenders alike. Otherwise, why the rush in amending the Guidelines?

The government never meaningfully addresses this. The closest it comes to doing so is a conclusory statement that Section 8 does not address the application of the FSA to pre-enactment conduct, and a citation to a district court opinion calling the argument "convoluted." Gov't Br. at 38.

The other textual indication of Congressional intent is the requirement of an FSA impact study within five years (Section 10). *See* App't Br. at 27-28. Again, simple argument: why order the Sentencing Commission to study the FSA's impact in the years immediately following enactment if the Act's lower mandatory-minimum thresholds would not apply to many or most defendants during that time because they offended pre-enactment? Here, the government offers no response at all—it simply ignores the argument.

2. *The government misunderstands the odd-results argument.*

Under the government's theory, major crack traffickers being sentenced for pre-FSA conduct will get the benefit of an 18:1 crack/powder sentencing ratio while minor ones—such as Mr. Jackson—will not. That is because the ameliorative Guidelines amendments mandated on an emergency basis by the FSA

will determine the sentencing ranges of pre-FSA offenders whose Guidelines ranges fall *above* the old mandatory minimums, whereas the amendments will never impact those pre-FSA offenders whose Guidelines ranges fall *below* the old mandatory minimums. *See* App't Br. at 35-36.

The government mistakes this argument for a line-drawing complaint—that Mr. Jackson is being sentenced to the old mandatory minimum while "new offenders are receiving the benefit of the new provisions." Gov't Br. at 35-36. That is not the argument. The odd result is not that pre- and post-FSA offenders are treated differently, but rather that *pre*-FSA major offenders are treated better than *pre*-FSA minor offenders. That result is a consequence of the government's failure to recognize that it makes sense for Congress to have ameliorated the crack guidelines on an emergency basis only if Congress likewise intended the new mandatory-minimum thresholds to be applicable to the defendants sentenced under those ameliorated guidelines. *See* App't Br. at 22-28; *supra* at 10-11.

3. *The government similarly misunderstands the argument from the FSA's stated purpose and legislative history.*

The FSA's stated purpose and legislative history demonstrate that Congress acted *urgently* to change federal cocaine-sentencing law. That urgency suggests that Congress intended the Act's lower mandatory-minimum thresholds to apply at

all sentencings after enactment, regardless of when the offense conduct occurred. *See* App't Br. at 30-34.

Again, the government mistakes this for a line-drawing complaint, and devotes pages of its brief to the propositions that a line must always be drawn when an ameliorative sentencing law is passed, and that Congress is the line-drawer. Gov't Br. at 39-42 (discussing *Marrero* and *United States v. Caldwell*, 463 F.2d 590 (3d Cir. 1972)).

Of course Congress must draw a line, and some degree of unfairness will inevitably result.[5] But Mr. Jackson is not arguing that Congress's intent to ameliorate crack sentences means that Congress must have meant the changes to apply to everyone—that there can be no line between beneficiaries and those who miss out. The argument is over *where Congress drew the line*, not whether a line exists. The urgency apparent from the stated purpose of the FSA and its legislative history (as well as the emergency-amendment and impact-study provisions) demonstrate that Congress in this instance drew the line at enactment, with the new mandatory-minimum thresholds applying at all sentencings after August 3, 2010.

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[5] Even if an ameliorative sentencing law were to apply retroactively to those already sentenced, defendants who have already completed their sentences would unfairly be left on the other side of an applicability line.

D. The Seventh Circuit's recent decision in *United States v. Fisher* is unpersuasive.

Since the filing of Mr. Jackson's opening brief and the government's brief, one court of appeals has weighed in on the issue presented in this appeal. In *United States v. Fisher*, __ F.3d __, 2011 WL 832942, at *3 (7th Cir. Mar. 11, 2011), the Seventh Circuit held that the FSA does not apply at post-enactment sentencings for pre-enactment conduct. Notably, the court *did not* treat its prior decision in *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010) (the Seventh Circuit's equivalent of *Reevey*) as controlling, and *did not* dispute that penalties may be repealed by implication—thereby effectively rejecting the first two arguments the government makes here. 2011 WL 832942, at *2-3.

Instead, the court saw insufficient indication of Congressional intent to apply the FSA to pre-enactment conduct. 2011 WL 832942, at *2-3. The court reasoned that given the prominence of the crack/powder disparity issue, Congress would have "dropped a hint . . . somewhere in the FSA, perhaps in its charge to the Sentencing Commission," if it intended the FSA to apply to any pre-enactment conduct. *Id.* at *2.

As discussed above and in Mr. Jackson's opening brief, Sections 8 and 10 of the FSA (which contain the charge to the Sentencing Commission) provide

more than a hint in this regard—they demonstrate the plain import of the FSA as applying at all sentencings post-enactment. The Seventh Circuit briefly mentioned the emergency-amendment provision (Section 8), but did not address its implications in any significant way.[6] 2011 WL 832942, at *2. Neither the FSA's impact-study provision (Section 10) nor the odd results flowing from the government's interpretation of the Act was brought to the attention of the Seventh Circuit,[7] so the court did not address these strong indicators of Congressional intent at all. Given its cursory analysis and the limited scope of arguments presented to the court, *Fisher* is unpersuasive.

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[6] Indeed, the court addressed only a general argument that Section 8 suggests Congress wanted the FSA "[to] be as speedily and widely implemented as possible." 2011 WL 832942, at *2. Mr. Jackson's argument is much more specific: the emergency aspect of the Guidelines amendment authority makes no sense without application of the lower mandatory-minimum thresholds at all post-enactment sentencings, and in fact leads to odd and unjust results.

[7] *See* Brief of Appellant Dorsey in No. 10-3124, 2010 WL 6019679 (Dec. 3, 2010); Joint Reply Brief of Appellants Fisher and Dorsey in Nos. 10-2352 & 10-3124, 2010 WL 859446 (Jan. 18, 2011).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Mr. Jackson's opening brief, the judgment of the district court should be vacated and this case remanded for resentencing.

Respectfully submitted,

/s/ Brett G. Sweitzer

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CERTIFICATE OF BAR MEMBERSHIP

It is hereby certified that Brett G. Sweitzer is a member of the bar of the Court of Appeals for the Third Circuit.

/s/ Brett G. Sweitzer
BRETT G. SWEITZER

DATE: March 28, 2011

CERTIFICATION

I, Brett G. Sweitzer, Assistant Federal Defender, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that the electronic version of the attached reply brief sent by e-mail to the Court was automatically scanned by Symantec AntiVirus Corporate Edition, version 8.00, and found to contain no known viruses. I further certify that the text in the electronic copy of the reply brief is identical to the text in the paper copies of the reply brief filed with the Court.

/s/ Brett G. Sweitzer
BRETT G. SWEITZER

DATE: March 28, 2011

CERTIFICATE OF COMPLIANCE

I, Brett G. Sweitzer, Assistant Federal Defender, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that appellant's reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this reply brief contains 3,456 words, excluding the parts of the reply brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This reply brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this reply brief has been prepared in a proportionally spaced typeface using WordPerfect X4 word count software in font size 14, type style Times New Roman.

/s/ Brett G. Sweitzer
BRETT G. SWEITZER

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Dated: March 28, 2011

CERTIFICATE OF SERVICE

I, Brett G. Sweitzer, Assistant Federal Defender, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that I have filed this same day, both in electronic through the Third Circuit's Electronic Case Filing (ECF) system, and paper form, the *Reply Brief for Appellant* and served two (2) copies of the Reply Brief upon Assistant United States Attorney Joseph T. Labrum III, by first class U.S. mail to his office located at Suite 1250, 615 Chestnut Street, Philadelphia, Pennsylvania 19106.

/s/ Brett G. Sweitzer
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DATE: March 28, 2011