No. 09-7073

In The
Supreme Court of the United States

CARLOS RASHAD GOULD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

18 U.S.C. § 924(c)(1)(A) requires a 5-year minimum sentence for possessing a firearm in furtherance of a drug-trafficking or violent crime, to run consecutively and "in addition to" any sentence for that crime, "[e]xcept to the extent that a greater minimum sentence is otherwise provided by ... *any other provision of law*." 18 U.S.C. § 924(c)(1)(A) (emphasis added). The parties agree that the "except" clause's application turns on the meaning of "any other provision of law." As Petitioner showed (Pet. Br. 10-13), this interpretive question is answered by this Court's holding in *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009), that, based on the expansive meaning of "any," this phrase cannot be limited to a certain "class of provisions." Petitioner further showed that, based textually and contextually on the phrase's expansiveness and on section 924(c)(1)(A)'s focus on minimum sentences provided at sentencing, the "except" clause exempts a defendant from the consecutive, additional 5-year minimum sentence when *any* law for *any* count of conviction requires a greater minimum sentence at sentencing. Pet. Br. 7-18. This ensures that defendants who further drug-trafficking or violent crimes by possessing firearms will always serve at least 5 years, whether based on section 924(c)(1)(A) or any other provision of law.

Incredibly, the government's response fails to address *Beaty* at all, despite asking the Court to limit "any other provision of law" to a certain class of provisions: those for violating section 924(c). The

government's interpretation cannot be reconciled with this Court's decisions or the "except" clause's plain language, particular purpose, context, or drafting history.

ARGUMENT

I. PETITIONER'S INTERPRETATION OF THE "EXCEPT" CLAUSE, UNLIKE THE GOVERNMENT'S, REFLECTS 18 U.S.C. § 924(c)(1)(A)'S PLAIN TEXT.

According to the government, the "except" clause exempts defendants from section 924(c)(1)(A)'s sentence for possessing a firearm in furtherance of a drug-trafficking or violent crime only when "any other provision of law" requires a greater minimum sentence for the same offense. U.S. Br. 13. Under the government's cramped interpretation of "any other provision of law," only a greater minimum sentence for violating section 924(c) would ever trigger the "except" clause. The government has identified just one such law: 18 U.S.C. § 3559(c), which requires a life sentence for violating section 924(c) when, for example, a defendant has committed a "serious violent felony" twice before. *Id.* at 21. (The government notes that 18 U.S.C. § 924(j) provides penalties for violating section 924(c). *Id.* at 21 n.3. But section 924(j) cannot trigger the "except" clause because it does not require a minimum sentence greater than section 924(c)(1)(A) provides. *E.g.,* 18 U.S.C. § 924(j)(1).) The government's interpretation does not

reflect the "except" clause's plain meaning and should be rejected.

A. The government ignores the expansiveness of the phrase "any other provision of law."

The parties agree that the trigger for applying the "except" clause is the phrase "any other provision of law." The government interprets this phrase to mean not "any other provision of law" but "any other provision of law for violating section 924(c)." *See* U.S. Br. 13. This argument contravenes the holding in *Beaty* that the expansive phrase "any other provision of law" does not denote a certain "class of provisions." 129 S. Ct. at 2189. Petitioner's opening brief highlighted *Beaty*. Pet. Br. 4, 10-11. The government's brief, perplexingly, ignores it entirely. But *Beaty* makes clear that "any other provision of law" means just that – *any* provision of law, not a particular provision for a particular offense or just some (or almost no) provisions of law.

The government argues that Petitioner emphasizes the breadth of "any other provision of law" but does not interpret it to encompass state laws or laws that apply to counts of conviction in separate indictments or for which a defendant was previously sentenced. U.S. Br. 14, 23-24. According to the government, Petitioner interprets "any other provision of law" to mean a subset of laws, just like the government. *Id.* at 24. Unlike the government, however,

Petitioner does not interpret this phrase to mean a certain law concerning a certain offense – however ill-defined the government's limitation to a "section 924(c) offense" or "violation" may be. No such limitation can be found in this expansive phrase. Limiting it to a certain offense conflicts with its plain meaning, as the Court held in *Beaty*, and dooms the government's interpretation.

As explained in Petitioner's opening brief, other language within the "except" clause provides all the limitation Congress intended – and makes the clause's referent clear. Pet. Br. 13-15. The clause is triggered only by greater minimum sentences that apply to a defendant at sentencing, regardless of which "provision[s] of law" provide them.

Rather than consider section 924(c)(1)(A)'s entire text, as Petitioner does, the government criticizes Petitioner's textual analysis by relying on "common parlance" to argue that "a punishment 'is provided' by a statute even if that punishment does not apply at the sentencing of a particular defendant." U.S. Br. 33. But the government elsewhere disavows that interpretation of "is provided," under which any greater minimum sentence in the U.S. Code for violating section 924(c) would trigger the "except" clause, whether the sentence applied to the defendant or not. *Id.* at 25 n.4. If that interpretation were correct, the mere existence of section 3559(c)'s mandatory life sentence provision would always trigger the clause and preclude the imposition of any of section 924(c)(1)(A)'s sentences.

In fact, the government itself interprets the "except" clause's phrase "is otherwise provided" as Petitioner does: Only minimum sentences that apply to a defendant at sentencing will trigger the clause. *See id.* When a minimum sentence for any count of conviction *does* apply to a defendant and *is* greater than section 924(c)'s applicable minimum, the clause is triggered. This is the only interpretation that section 924(c)(1)(A)'s text supports.

B. The government's interpretation of the "except" clause relies on an inapplicable canon and an indefensible presumption.

The government offers only two textual arguments for its crabbed interpretation of the "except" clause. Neither holds up to scrutiny because the first relies on the inapplicable canon of *noscitur a sociis* and the second wrongly presumes that a word's meaning should always be limited to the subject matter of other words in the same sentence.

First, the government emphasizes that "any other provision of law" is one-half of the phrase "by this subsection or by any other provision of law." U.S. Br. 17-18. Because the narrow phrase "this subsection" refers to section 924(c), which concerns possessing, brandishing, or discharging a firearm in furtherance of a drug-trafficking or violent crime, the government argues that the broad phrase "any other provision of law" should be limited to laws concerning

that same conduct. *Id. Second*, the government relies on a *non sequitur* from *United States v. Villa*, 589 F.3d 1334 (10th Cir. 2009), *petition for cert. filed* (U.S. May 26, 2010) (No. 09-1445). U.S. Br. 18. The government argues there is no "'linguistic or contextual demarcation'" between the "except" clause and the specific types of conduct that section 924(c)(1)(A) criminalizes. *Id.* (quoting *Villa*, 589 F.3d at 1343). The government therefore concludes, like *Villa*, that only greater minimum sentences for "possessing, using, or carrying" a firearm in furtherance of a drug-trafficking or violent crime will trigger the "except" clause. *Id*.

The government bases its first argument on the general idea that a word should be "given more precise content by the neighboring words with which it is associated," relying on *United States v. Williams*, 553 U.S. 285 (2008), and *Dolan v. USPS*, 546 U.S. 481 (2006). U.S. Br. 17-18 (internal quotation marks omitted). This general idea is better known as the "canon of *noscitur a sociis*." *Williams*, 553 U.S. at 294.

In *Williams*, the Court construed not a two-part phrase such as "by this subsection or by any other provision of law" but a five-item list containing the verbs "advertises, promotes, presents, distributes, or solicits." *Id.* According to the Court, the verbs "promotes" and "presents" are "susceptible of multiple and wide-ranging meanings." *Id.* Applying *noscitur a sociis* to resolve this ambiguity, the Court held that "promotes" and "presents" have "a transactional connotation" like the list's other verbs. *Id.*

Similarly, in *Dolan*, the Court applied *noscitur a sociis* to the phrase "loss, miscarriage, or negligent transmission of letters or postal matter." *Dolan*, 546 U.S. at 485. The Court did so to resolve a facial ambiguity in the phrase "negligent transmission." *Id.* at 486. While that phrase "could embrace a wide range of negligent acts," the Court said, the terms "loss" and "miscarriage" refer to "failings in the postal obligation to deliver mail in a timely manner to the right address." *Id.* at 486-87. The Court concluded it would be "odd" if "negligent transmission," with those two terms preceding it, meant something entirely different. *Id.* at 487.

A canon's existence does not command its application. *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923). Petitioner has already explained why *noscitur a sociis* does not apply to "by this subsection or by any other provision of law." *See* Pet. Br. 25-28. Simply reciting the canon, without naming it, the government neither confronts Petitioner's arguments nor explains why the meaning of the unambiguous phrase "any other provision of law" should be significantly narrowed by its proximity to the phrase "this subsection." Rather, as predicted, the government mistakenly "assume[s] that pairing a broad statutory term with a narrow one shrinks the broad one." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 379 (2006).

The simple, expansive phrase "by this subsection or by any other provision of law" is nothing like the compound lists in *Williams* and *Dolan*. Those lists

contained not one but multiple terms preceding the term in question; and, when multiple terms in a list all point to one particular meaning, it would be odd for a subsequent term to have a different meaning. The two-part phrase "by this subsection or by any other provision of law," in comparison, is "too short to be particularly illuminating," and each part is "quite distinct from the other." *See Graham County Soil & Water Conservation Dist. v. United States*, 130 S. Ct. 1396, 1403 (2010). Unlike the ambiguous terms in *Williams* and *Dolan*, "any other provision of law" also is not susceptible to multiple meanings. *See Beaty*, 129 S. Ct. at 2189.

As for the government's second argument, its premise is sound so far as it goes, but its conclusion does not follow. The government does not explain why the absence of some "'linguistic or contextual demarcation'" compels the conclusion that "any other provision of law" is limited to laws concerning possessing, brandishing, or discharging a firearm in furtherance of a drug-trafficking or violent crime. U.S. Br. 18 (quoting *Villa*, 589 F.3d at 1343). The argument simply presumes that, because "any other provision of law" undeniably appears in section 924(c)(1)(A)'s single, fluid sentence, it must be limited to laws for violating section 924(c).

Were this presumption correct, words would always be limited in meaning to the subject matter of the sentences containing them. But they are not. The Court, at the government's urging, rejected this very sort of presumption in *United States v. Gonzales*, 520

U.S. 1 (1997). The issue there was whether section 924(c)'s phrase "any other term of imprisonment" means federal and state prison terms or only federal terms. *Id.* at 5. Advocating an expansive meaning, the government argued "the ordinary understanding of the inclusive word 'any' is broad." U.S. Br. 12, *Gonzales*, No. 95-1605 (internal citations and quotation marks omitted). It further argued the "term 'any' imports no restriction or limit[ation], and accordingly it ordinarily leaves no doubt as to the Congressional intention to include all members of the category identified by the enactment." *Id.* (internal citations and quotation marks omitted). The government thus disputed that "any other term of imprisonment" means federal prison terms simply because section 924(c) concerns federal sentencing. *Id.* at 14. The Court agreed and held that "any other term of imprisonment" means both federal and state prison terms. *Gonzale*s, 520 U.S. at 5.

Unlike Petitioner, therefore, the government lacks any sound or consistent textual basis for its interpretation of the "except" clause. Based on the most natural reading of the clause's entire text, the clause precludes section 924(c)(1)(A)'s sentence if one of the defendant's counts of conviction requires the district court to impose a greater minimum sentence under any federal statute applicable at sentencing. The clause is not triggered by state statutes' minimum sentences, which do not apply to a defendant at a federal sentencing.

Even if the Court were inclined to adopt some sort of narrowed construction of "any other provision of law" – which is not, contrary to the government's assertions (U.S. Br. 14-15), the sort of interpretation Petitioner primarily advocates – the government has not even presented the best one. As Petitioner has explained, section 924(c)(1)(A), as a whole and in context, would better yield the conclusion that "any other provision of law" at least refers to statutes providing a minimum sentence for predicate drug-trafficking or violent crimes. Pet. Br. 23-24. Here, the district court determined that 21 U.S.C. §§ 841(b)(1)(A) and 846 required a greater, 10-year minimum sentence for Petitioner's drug-trafficking crime. Under the "except" clause's most natural reading or the best alternative interpretation, that 10-year sentence triggered the "except" clause and exempted Petitioner from section 924(c)(1)(A)'s 5-year sentence.

II. SECTION 924(c)'S HISTORY AND SUPPOSED ANOMALIES DO NOT JUSTIFY THE GOVERNMENT'S INTERPRETATION.

Lacking a sound textual basis for its interpretation, the government turns to drafting history, legislative history, and threats of supposed anomalies. Based on section 924(c)'s general purpose, the government also essentially requests that all words and phrases in the statute be construed against defendants. These collateral attacks on section 924(c)(1)(A)'s plain meaning have no merit.

A. Section 924(c)'s drafting history supports Petitioner's interpretation, not the government's.

The government suggests that Congress amended section 924(c) to include the "except" clause primarily to account for section 3559(c)'s mandatory life sentence and secondarily as a "safety valve" in case a future Congress enacts a law impacting the sentence for a section 924(c) violation without saying it is doing so. *See* U.S. Br. 18-21. Although statutes impacting a section 924(c) count of conviction will (along with others) trigger the "except" clause, neither prong of this narrow justification plausibly explains Congress's purpose for adding it. The first envisions Congress's setting out primarily to harmonize section 924(c) with section 3559(c) even though those statutes had worked together for four years without this clause in place. The second presumes a future Congress's incompetence to legislate in the face of existing statutes.

According to the government, Congress added the "except" clause to provide an "instruction on how the amended Section 924(c) was intended to interact with other, existing provisions such as Section 3559(c)." *Id.* at 21. Regardless of whether Congress could have had section 3559(c) in mind when adding the "except" clause, this effort to support the government's interpretation falls flat.

Even before the "except" clause was added in November 1998, section 3559(c) required district

courts to impose a life sentence for section 924(c) violations by certain defendants. *See, e.g., United States v. Boone*, No. 97-4094, 1998 WL 398782, at *3 (4th Cir. July 9, 1998). Section 3559(c), enacted in 1994, has always mandated a life sentence for a "serious violent felony" committed by a defendant with at least two prior convictions for serious violent felonies. 18 U.S.C. § 3559(c)(1) (1994). And this sentence has always applied "[n]otwithstanding any other provision of law." *Id.* Likewise, section 3559(c) has always defined "serious violent felony" to include "firearms use," which "means an offense that has as its elements those described in section 924(c) or 929(a), if the firearm was brandished, discharged, or otherwise used as a weapon." § 3559(c)(2)(D), (F)(i). Congress updated this definition in 1998 to include "firearms possession (as described in section 924(c))." Pub. L. No. 105-386, 112 Stat. 3469 (1998). It did so in the same legislation in which it amended section 924(c) to add the "except" clause and to criminalize firearms possession in response to *Bailey v. United States*, 516 U.S. 137 (1995). *See id.*

"When Congress acts to amend a statute, [the Court] presume[s] it intends its amendment to have real and substantial effect" and "not just to state an already existing rule." *Stone v. INS*, 514 U.S. 386, 397 (1995). Congress presumably does not engage in "exercise[s] in futility" by amending statutes to make them do what they already did. *Pierce County v. Guillen*, 537 U.S. 129, 145 (2003).

Because courts were already required to sentence defendants with at least two prior convictions for serious violent felonies to life, "there would have been no reason for Congress to have" enacted the "except" clause in 1998 simply to effectuate that requirement – and certainly no basis to believe Congress had in mind *only* section 3559(c), among all existing statutes providing mandatory minimum sentences. *See Stone*, 514 U.S. at 397. The suggestion that the clause was added primarily to link section 924(c) with section 3559(c) "cannot be the proper understanding of the statute." *Pierce County*, 537 U.S. at 145. Even without the "except" clause, district courts would be required to substitute section 3559(c)'s life sentence for section 924(c)'s sentence for defendants with the requisite prior convictions who possessed, brandished, or discharged a firearm in furtherance of a drug-trafficking or violent crime. *See* 18 U.S.C. § 3559(c)(1) (mandating a life sentence "[n]otwithstanding any other provision of law"). And if the 1998 amendments were designed to account primarily for section 3559(c), Congress most plausibly would have drafted the "except" clause to refer specifically to a greater minimum sentence provided by "section 3559(c)," not generally to a greater minimum sentence provided by "any other provision of law." *Cf. Nijhawan v. Holder*, 129 S. Ct. 2294, 2301-02 (2009), *discussed in* Pet. Br. 22-23.

Faced with this, the government argues that Congress enacted the "except" clause not only to account for section 3559(c) but also as a "safety valve"

in case "future statutory provisions ... impose an even greater mandatory minimum consecutive sentence for a violation of § 924(c)." U.S. Br. 21 (internal quotation marks omitted). Petitioner has already highlighted this argument's multiple, fatal flaws. Pet. Br. 20-24. Section 3559(c)'s drafting history itself illustrates one of them.

The government never explains why Congress would (i) preemptively enact the broad phrase "any other provision of law" to protect against the chance that future legislation might provide a greater minimum sentence for violating section 924(c) rather than (ii) amend section 924(c) to refer specifically to the new statute when it is enacted. Pet. Br. 20-21. In fact, section 3559(c)'s drafting history suggests Congress would do the latter. When Congress amended section 924(c) to criminalize firearms possession, it also amended section 3559(c) to refer specifically to and include "firearms possession (as described in section 924(c))" – without any need for the "except" clause to link these statutes. Congress knows the relationship between statutes and will enact parallel amendments when necessary, rather than pass laws preemptively and blind to changes that a future Congress may or may not enact.

Congress did not add the "except" clause only or even primarily to account for section 3559(c)'s life sentence or other greater minimum sentences that could be enacted in the future. *Cf. Nijhawan*, 129 S. Ct. at 2301-02. Rather, Congress added the clause to moderate section 924(c)'s expansion in 1998 by

precluding the otherwise applicable section 924(c) sentence when "any other provision of law" will require a defendant to serve a greater minimum sentence. Pet. Br. 15-18. Only this interpretation gives the clause "real and substantial effect." *See Stone*, 514 U.S. at 397.

B. Section 924(c)'s general purpose does not conflict with Petitioner's interpretation of the "except" clause's particular purpose.

The government argues that "construing the 'except' clause to refer to higher mandatory minimum sentences for the Section 924(c) offense but not for other counts of conviction" furthers section 924(c)'s general purpose. U.S. Br. 27-28. According to the government, that purpose is to deter possessing or using a firearm in furtherance of a drug-trafficking or violent crime by imposing a hefty, additional sentence running consecutively to sentences for other offenses. *Id.* at 28-29. The government purports to find support for this position in section 924(c)(1)(A)'s text and legislative history.

As an initial matter, section 924(c) does not have the purpose of always requiring a consecutive, additional sentence. The government need not bring a charge for a predicate (or any other) offense when charging a defendant with a section 924(c) violation. Defendants can be – and are – charged with section 924(c) as a stand-alone offense. *E.g., United States v.*

Hunter, 887 F.2d 1001, 1003 (9th Cir. 1989). In those cases, assuming no other count of conviction, there is no other sentence to which a section 924(c) sentence can be added or run consecutively.

At any rate, the government is, in essence, seeking a rule of construction requiring that all of section 924(c)(1)(A)'s words and phrases be construed against defendants to require the most severe sentence possible. But "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). While section 924(c)(1)(A) generally requires courts to impose additional, consecutive sentences, the "except" clause limits the scope of section 924(c)'s general requirements. "[N]o legislation pursues its purposes at all costs." *Id.* at 525. By enacting the "except" clause, Congress guaranteed that section 924(c) does not pursue maximal punishment "at all costs."

The relevant inquiry is not the general purpose of section 924(c), under which defendants are frequently sentenced, but the particular purpose of the "except" clause. The government argues the "except" clause was designed to establish a link between section 3559(c) and section 924(c) and to protect against the possibility of future, greater minimum sentences. As Petitioner explained above, neither purported purpose can fully or adequately explain the "except" clause's enactment.

The only clear purpose is this: The "except" clause ensures that defendants who further drug-trafficking or violent crimes by possessing firearms will be imprisoned for at least 5 years no matter what else they are charged with. Pet. Br. 16-18. The clause's text, including the broad meaning of "any other provision of law," makes clear that this purpose is served when a defendant is subject to a minimum sentence of more than 5 years for any count of conviction.

Petitioner's interpretation hardly leaves defendants with minor sentences. With just one exception, when a greater minimum sentence triggers the "except" clause, a defendant will be sentenced to at least 10 years' imprisonment. To trigger the clause, a count of conviction must carry a minimum sentence (and many offenses do not), and that sentence must be "greater" than the otherwise applicable minimum sentence provided by section 924(c)(1)(A). Section 924(c)(1)(A)'s lowest minimum sentence is 5 years for possession. Thus, only a minimum sentence that is greater than 5 years could possibly trigger the clause. Except for section 924(c)(1)(A)'s 7-year mandatory minimum sentence for brandishing, every mandatory minimum sentence in the U.S. Code that is greater than 5 years requires 10 or more years' imprisonment. *See* U.S. Sentencing Comm'n, *Overview of Statutory Mandatory Minimum Sentencing* App. A (2009), *available at* http:www.ussc.gov/MANMIN/man_min.pdf; Families Against Mandatory Minimums, *Federal Mandatory Minimums* (last updated

Feb. 23, 2010), http://www.famm.org/Repository/Files/FEDERAL%20MANDATORY%20MINIMUMS%202.23.10.doc.

In disputing the "except" clause's clear purpose, the government argues that Congress would have made section 924(c)'s sentences run concurrently, not consecutively, to sentences for other offenses if it intended to ensure a certain number of years' imprisonment for all of a defendant's crimes. U.S. Br. 35. This overlooks that, by design, section 924(c) requires a consecutive sentence *except* when another provision of law requires a greater *minimum* sentence for another count of conviction (or when a defendant is only convicted under section 924(c)). In all other circumstances, Congress intended that a defendant receive a consecutive sentence. That could not be achieved if section 924(c)'s sentences always ran concurrently. Petitioner's interpretation, unlike the government's counterfactual scenario, meshes with this statutory design (as well as with section 924(c)(1)(D)(ii)'s operation, *see* Pet. Br. 33-34).

Finally, in relying on section 924(c)'s legislative history (*see* U.S. Br. 47-48), the government ignores that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). "Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting [Congress's] understanding of otherwise ambiguous terms." *Id.*

Here, the statutory text is not ambiguous, and, in any event, the legislative history on which the government relies does not support its interpretation. The cited history concerns section 924(c)'s general purpose, not the "except" clause's particular purpose. The government has not presented any legislative history about the "except" clause itself. "Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best of circumstances." *United States v. Locke*, 471 U.S. 84, 95-96 (1985) (internal quotation marks omitted). Where legislative history does not even speak to the statutory language at issue, it is a misstep to be avoided entirely.

C. Petitioner's interpretation would not result in anomalies.

The government wrongly argues that Petitioner's interpretation would result in three supposed anomalies: (i) some defendants would receive a conviction without a sentence; (ii) some defendants would receive lesser sentences than more culpable defendants; and (iii) the government would have discretion to determine the sentence for a section 924(c) offense. U.S. Br. 39-47. In fact, none of these is an anomaly that would result from Petitioner's interpretation.

First, a conviction without a sentence is not unheard of. Defendants often receive convictions but no sentences for lesser-included offenses. Section 924(c) itself provides an example, directly contrary to

the government's assertion that "a Section 924(c) conviction for which the defendant receives no sentence whatsoever" "is highly anomalous." U.S. Br. 40. When a defendant is convicted of violating section 924(c)(1)(A), the defendant could also be convicted of violating section 924(c)(1)(B) if the firearm was a machinegun or one of a number of particular weapons. 18 U.S.C. § 924(c)(1)(B); *see generally United States v. O'Brien*, 130 S. Ct. 2169 (2010). The section 924(c)(1)(A) conviction in that scenario should "receive[ ] no sentence whatsoever." As a practical matter, moreover, defendants often serve concurrent sentences for multiple convictions, which effectively impose only the longest sentence and leave the other convictions unsentenced.

Second, as Petitioner has explained, the hypothetical comparing one certain defendant to another, less culpable defendant does not illustrate an actual sentencing outcome. Pet. Br. 31-32. It compares the *minimum* sentences the defendants would face, not a determinate or maximum term to which each may be sentenced by statute or under the U.S. Sentencing Guidelines. *Id.*; *see* U.S. Br. 40-41. To account for the firearms use, the district court could increase the sentence the more culpable defendant received for the underlying drug crime. Pet. Br. 29-32. The district court could apply an enhancement recommended by the Guidelines for firearms use in connection with a drug crime or could depart upward from the recommended sentencing range. *Id.* at 30. Before the Court's decision in *United States v. Booker*, 543 U.S.

220 (2005), the Guidelines would require the district court in the government's hypothetical to enhance the sentence for the firearms use. Pet. Br. 30-31. And, of course, upward departures were permitted even before *Booker*. *United States v. Granderson*, 511 U.S. 39, 49 n.7 (1994).

Attempting to downplay the district court's ability in the hypothetical to increase the more culpable defendant's sentence for the drug crime, the government argues that mandatory sentences "are designed specifically to limit a judge's sentencing discretion." U.S. Br. 44. That is only half-right – and it misses the point. Mandatory minimum sentences limit a district court's discretion to go *down*, not *up*. *See generally McMillan v. Pennsylvania*, 477 U.S. 79, 81-82 (1986).

The government also tries to downplay the Guidelines' role in its hypothetical. It argues that section 924(c)(1)(A)'s sentences apply despite any statutory enhancement for a drug-trafficking or violent crime. U.S. Br. 28, 45-46. According to the government, if Congress rejected the view that a predicate offense's statutory enhancements provide sufficient punishment for violating section 924(c), it follows that "Congress did not consider firearm-related Guidelines enhancements to be an adequate substitute" for the statute's minimum penalties. *Id.* at 45. This argument misconstrues the role of Guidelines' enhancements. They are not substitutes for section 924(c)'s sentences. Rather, they apply only if – based, for example, on the operation of section

924(c)(1)(A) itself – those sentences do *not* apply. *E.g.*, U.S. Sentencing Guidelines § 2K2.4 cmt. n.4 (2009). The "substitute" for a section 924(c) sentence is the greater minimum sentence provided by another provision of law. Section 924(c)(1)(A)'s enacted text makes clear that Congress considered that greater minimum sentence to generally be sufficient punishment.

Third, the government relies on *Deal v. United States*, 508 U.S. 129 (1993), which is inapposite to the issue now before the Court. There, the Court addressed a prior version of section 924(c), which provided that "in the case of [a] second or subsequent conviction" for using or carrying a firearm in furtherance of a violent crime, a defendant "shall be sentenced to imprisonment for twenty years." *Deal*, 508 U.S. at 130. This was a mandatory sentence, not a mandatory *minimum* sentence.

At issue in *Deal* was whether "conviction" refers to "the finding of guilt by a judge or jury" or "the entry of a final judgment of conviction." *Id.* at 132. Applying the statute's plain text, the Court held that "conviction" refers to the finding of guilt. *Id.* at 132-33. The Court added that interpreting "conviction" contrary to this plain meaning as "the entry of a final judgment of conviction" would make the mandatory sentence's applicability turn on whether a prosecutor charged and tried a defendant in separate prosecutions or under a multicount indictment. *Id.* at 133-34. Under that interpretation, trying a defendant in separate prosecutions would trigger the 20-year

sentence by resulting in multiple "convictions," while trying a defendant under a multicount indictment would result in one "conviction" and not require that sentence. *Id.* This troubled the Court because it would "confer the extraordinary new power to determine the punishment for a charged offense by simply modifying the manner of charging." *Id.* at 134 n.2 (emphasis removed).

Here, however, Petitioner's interpretation would not give the government the power to determine punishment. Unlike the mandatory sentence in *Deal*, section 924(c)(1)(A)'s sentences are only mandatory minimums. The district court decides the actual sentencing outcome. It may impose a sentence above the minimum when section 924(c)(1)(A)'s sentence applies or increase another count of conviction's sentence when section 924(c)(1)(A)'s sentence does not apply. The government can at most influence the sentence. By comparison, in *Deal*'s scenario, because the 20-year mandatory sentence *was the sentence*, the prosecutor's charging decisions would determine whether a defendant would be guaranteed to receive 20 years. Further, while the government asserts that Petitioner's interpretation would give prosecutors too much discretion, the government ignores that deciding whether to charge section 924(c) is one of the ultimate and most frequent exercises of prosecutorial discretion – often fixing a substantial floor (but not ceiling) on the defendant's total sentence – and could sometimes be abused. *See United States v. Sterling*, 555 F.3d 452, 454 (5th Cir. 2009).

Regardless, hypothesized anomalies cannot override the "except" clause's plain meaning. Notably, the government does not contend that these supposed anomalies constitute absurdities. *See* U.S. Br. 43; *Clinton v. City of New York*, 524 U.S. 417, 429 (1998). Even in *Deal*, the Court identified an anomaly to support, not controvert, a term's plain meaning. If any anomalies existed here, they would be "the product of the law Congress has written." *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2199-2200 (2010). As the Court recently explained, "[i]t is not for [the Court] to rewrite the statute so that it covers only what [the Court] think[s] is necessary to achieve what [the Court] think[s] Congress really intended." *Id.* at 2200. "[I]t is not [the Court's] task to assess the consequences of each [interpretation] and adopt the one that produces the least mischief." *Id.* The Court's "charge is to give effect to the law Congress enacted." *Id.* "If that effect was unintended, it is a problem for Congress, not one that federal courts can fix." *Id.*

D. The Court did not address, much less decide, the "except" clause's meaning in *United States v. O'Brien*.

The government suggests that the issue presented in this case was actually decided last term in *O'Brien*. The government quotes statements from *O'Brien* about substantive changes to section 924(c) by the 1998 amendments that also added the "except" clause. U.S. Br. 47-48. According to *O'Brien*, Congress made "two substantive changes" but otherwise "left

the substance of the statute unchanged." *O'Brien*, 130 S. Ct. at 2179. The Court did not list the "except" clause as one of those two changes. *See id.* at 2179. Exploiting this, the government suggests the Court has already rejected the view that the "except" clause substantively changed section 924(c).

But *O'Brien* did not even concern this clause. The issue there was whether, after the 1998 amendments to section 924(c), possession of a machinegun is a sentencing factor or an element of an offense. *Id.* at 2172. At no point did the Court address the "except" clause or have reason to do so: The petitioner did not present it as an issue, and the parties and *amici curiae* did not brief why it was added. *See, e.g.*, U.S. Br. 16 n.3, *O'Brien*, No. 08-1569 (noting the "except" clause's meaning was the subject of other cases).

"Appellate courts generally do not reach out to decide issues not raised by the appellant." *Cone v. Bell*, 129 S. Ct. 1769, 1790 (2009). "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions ... are not binding in future cases that directly raise the questions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted). *O'Brien*'s statements about section 924(c)'s substantive changes, therefore, do not resolve or even bear on the "except" clause's proper interpretation. *Id.*; *see also Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478 (2006). As Petitioner has demonstrated in this case,

which squarely presents the issue, the "except" clause substantively changed section 924(c).

III. THE COURT SHOULD, AT THE VERY LEAST, ADOPT PETITIONER'S INTERPRETATION BASED ON THE RULE OF LENITY.

The "except" clause's plain language provides that section 924(c)(1)(A)'s 5-year minimum sentence does not apply when "any other provision of law" requires a greater minimum sentence for any count of conviction at sentencing. Even if the plain language did not compel this interpretation, it would at least be reasonable and should be adopted under the rule of lenity. Pet. Br. 36-40. The government responds that this rule does not apply because the clause is not grievously ambiguous. U.S. Br. 48-50. According to the government, the text, context, purpose, and history all indicate the 5-year sentence will apply unless another law requires a greater minimum sentence for violating section 924(c). *Id.* at 49.

This ignores the Court's recent application of the rule of lenity based on simple "'ambiguity.'" *Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)). In any event, the "except" clause's meaning is clear – just not in the way the government suggests. Further, as shown above, the text, context, purpose, and history, considered together or alone, provide no indication the government's interpretation is correct.

And, even if that interpretation were "reasonable," which it is not, it would not be the only "unambiguously correct" interpretation. *Granderson*, 511 U.S. at 54.

Petitioner's interpretation should, at the very least, prevail under the rule of lenity.

CONCLUSION

The Court should reverse the Fifth Circuit's judgment and remand for further proceedings.

Respectfully submitted,

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