No. 18-5384

IN THE

Supreme Court of the United States

WENDELL RIVERA-RUPERTO,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONER	1
I. THE QUESTIONS PRESENTED ARE IMPORTANT	1
A. The First Step Act Does Not Change the Importance of This Case	1
B. *Harmelin* Was Based on Federalism Principles	2
C. The Government Concedes There Is a Conflict Between the Circuits Over Sentence Manipulation	3
II. THIS CASE PRESENTS A CLEAN AND TIMELY VEHICLE	5
A. Mr. Rivera-Ruperto's Eighth Amendment Claim Presents a Simple and Straightforward Fact Pattern	5
B. The Government Intended to Manipulate Mr. Rivera-Ruperto's Sentence	6
III. THE DECISION BELOW IS WRONG	7
CONCLUSION	11

TABLE OF AUTHORITIES

CASES Page

Harmelin v. *Michigan*, 501 U.S. 957 (1991) 2, 3, 7, 8, 10
United States v. *Baber*, 161 F.3d 531 (8th Cir. 1998) 4
United States v. *McLean*, 199 F. Supp. 3d 926 (E.D. Pa. 2016) 4
United States v. *Montoya*, 62 F.3d 1 (1st Cir. 1995) 5
United States v. *Pedraza*, 27 F.3d 1515 (10th Cir. 1994) 4, 5
United States v. *Slatten*, 865 F.3d 767 (D.C. Cir. 2017), *cert. denied sub nom.*, *Slough* v. *United States*, 138 S.Ct. 1990 (2018) 8, 9

STATUTES

18 U.S.C. § 3624(b)(1) 7
21 U.S.C. § 841(b)(1)(A)(ii)(II) 6
First Step Act of 2018, Pub. L. No. 115-391 (Dec. 21, 2018) 1

COURT DOCUMENTS

Br. of the United States as Amicus Curiae Supporting Resp't, *Harmelin* v. *Michigan*, 501 U.S. 957 (1991) No. 89-7272, 1990 WL 10012671 2
Consolidated Br. of Appellee, *United States* v. *Rivera-Ruperto*, Nos. 12-2364, 12-2367 (1st Cir. Mar. 3, 2015) 6

TABLE OF AUTHORITIES—continued

Page

OTHER AUTHORITIES

Federal Weapons Prosecutions Rise for Third Consecutive Year, TRAC Reports, Inc. (Nov. 29, 2017), https://trac.syr.edu/tracreports/crim/492/ 2

Quick Facts: Section 924(c) Firearms Offenses, United States Sentencing Comm'n, https://www.ussc.gov/sites/default/files/pdf/research-and publications/quick-facts/Quick_Facts_Section_924c_Offenders.pdf 2

REPLY BRIEF FOR PETITIONER

The Government's opposition fails to address in any substantive fashion the concerns raised by both Mr. Rivera-Ruperto as well as the entirety of the active First Circuit judges when they urged this Court's review. The Government also brushes aside the importance of resolving the clear circuit split regarding sentence factor manipulation. Both questions presented are vitally important, and this case is the proper vehicle for resolving the questions presented.

I. THE QUESTIONS PRESENTED ARE IMPORTANT

A. The First Step Act Does Not Change the Importance of This Case

The Government wrongly concludes that "future defendants in petitioner's position will not be subject to mandatory consecutive sentences of at least 25 years" under the newly passed First Step Act of 2018 ("Act"), Pub. L. No. 115-391 (Dec. 21, 2018). Opp'n Br. 19. The Act does no such thing; rather, it amends § 924(c)(1)(a) such that the mandatory 25-year minimum sentence for a successive § 924(c) conviction does not apply until a prior conviction "has become final."[1] While the Act prevents prosecutors from obtaining mandatory consecutive sentences of 25 years *at one trial*, it does not prevent a prosecutor from exercising her discretion to charge defendants seriatim, the exact scenario Mr. Rivera-Ruperto found himself in.

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[1] "Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking 'second or subsequent conviction under this subsection' and inserting 'violation of this subsection that occurs after a prior conviction under this subsection has become final.'" Act § 403.

Furthermore, the Act will likely not change prosecutors' increasing use of § 924(c). From 2008–2017, prosecutors charged 2,549 individuals under § 924(c)(1)(a)(i). See, *Federal Weapons Prosecutions Rise for Third Consecutive Year*, TRAC Reports, Inc., tbl. 2 (Nov. 29, 2017), https://trac.syr.edu/trac reports/crim/492/. The number of offenders convicted of multiple counts of § 924(c) has been increasing—180 individuals were convicted of multiple counts in 2012 in comparison to 151 offenders in 2008. *Quick Facts: Section 924(c) Firearms Offenses*, United States Sentencing Comm'n, https://www.ussc.gov /sites/default/files/pdf/research-and-publications /quick-facts/Quick_Facts_Section_924c_Offenders.pdf (last accessed Jan. 26, 2019).

Rather than preventing sentences like Mr. Rivera-Ruperto's, the Act merely allows prosecutors to split up prosecutions into separate trials. It does not prevent offenders from facing draconian, effectively life-without-parole sentences under § 924(c).

B. *Harmelin* Was Based on Federalism Principles

1. The Government incorrectly asserts that the distinction between a federal prosecution and a state prosecution had "little relevance" to Justice Kennedy's opinion in *Harmelin*. Not only did the Government suggest the opposite in its amicus brief in *Harmelin*, see Br. of the United States as Amicus Curiae Supporting Resp't, *Harmelin* v. *Michigan*, 501 U.S. 957 (1991) No. 89-7272, 1990 WL 10012671 at *17–18, but Justice Kennedy specifically noted that one of the four principles which informed his conclusion was "the nature of our federal system." *Harmelin* v. *Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J. concurring). In explaining this principle, Justice Kennedy remarked that "marked divergences both in underly-

ing theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure. Our federal system recognizes the independent power of a State to articulate societal norms through criminal law." *Id.* at 999 (Kennedy, J. concurring) (internal citations and quotation marks omitted). As the First Circuit noted, quite distinct from the "bold experiment" that Michigan was attempting in crafting its new law, § 924(c)'s "dramatic sentencing consequences result in significant part from a judicial construction of a much debated statutory phrase—'second or subsequent'—that was the subject of seemingly little discussion in Congress." Pet. App. 22a.

2. The Government's citation to *Gore* v. *United States*, 357 U.S. 386 (1958), for the proposition that *Harmelin* was not concerned with federalism is without merit. Not only did *Gore* itself not involve the Eighth Amendment (*Gore* concerned an application of *Blockburger* v. *United States*, 284 U.S. 299 (1931)), but it was cited for the non-controversial proposition that courts should give deference to legislatures. *Harmelin*, 501 at 998–99 (Kennedy, J. concurring). *Gore* is not germane to the fact that "the nature of our federal system" was one of the four principles that ultimately informed Justice Kennedy's conclusion. *Id.* at 1001 (Kennedy, J. concurring).

C. The Government Concedes There Is a Conflict Between the Circuits Over Sentence Manipulation

The Government does not deny that there is a split among the circuits, Opp'n Br. 20–22, but contends that the Court need not concern itself with this split because the First Circuit is among those that acknowledge sentence manipulation as a possible mitigating factor. This obviates the real issue and the

question presented by this case—whether sentence manipulation is a valid mitigating factor, and, if so, what the proper standard is.

1. The conflict between the circuits on this question is apparent and undisputed by the Government. As one federal judge noted, the "diversity of opinion among the circuit courts [on sentence manipulation] has led one legal scholar to describe the current state of the law as a 'jumble of labels and definitions which lack any consistency in meaning or application' which results in 'unjustified national inconsistencies in defendants' ability to argue for a fair and appropriate sentence and in judges' ability to sentence accordingly.'" *United States* v. *McLean*, 199 F. Supp. 3d 926, 931 (E.D. Pa. 2016) (quoting Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 34 Cardozo L. Rev. 1401, 1406 (2013)). By taking this opportunity to resolve the circuit split, the Court can ensure that defendants sentenced in separate circuits receive the same constitutional protections mandated by due process.

2. The Government incorrectly asserts that there is no circuit wherein Mr. Rivera-Ruperto's case would have fared differently. For example, had Mr. Rivera-Ruperto been sentenced in either the Eighth or Tenth Circuits, he would have fared better, as more definitive guidelines exist in those circuits regarding when government misconduct constitutes sentence manipulation. See *United States* v. *Baber*, 161 F.3d 531, 532 (8th Cir. 1998) (holding that sentence manipulation may be proven when the government "engaged in the … drug transactions solely to enhance [the] potential sentence."); *United States* v. *Pedraza*, 27 F.3d 1515, 1521 (10th Cir. 1994) ("To succeed on an outrageous conduct defense, the defendant must show either: (1) excessive government involvement in the creation of

the crime, or (2) significant governmental coercion to induce the crime."). In the Tenth Circuit in particular, a defendant is allowed to appeal to *either* theory of outrageousness, contrary to the Government's assertion that Mr. Rivera-Ruperto's claim would fail because he did not assert coercion. See *Pedraza*, 27 F.3d at 1522.

In contrast to both the Eighth and the Tenth Circuits' tests, the First Circuit's test for sentence manipulation is based on a subjective determination of government intent. See *United States* v. *Montoya*, 62 F.3d 1, 4 (1st Cir. 1995). Thus, to defeat a sentence manipulation defense in the First Circuit, Government agents need only to assert one of a myriad of rational explanations.

II. THIS CASE PRESENTS A CLEAN AND TIMELY VEHICLE

A. Mr. Rivera-Ruperto's Eighth Amendment Claim Presents a Simple and Straightforward Fact Pattern

The Government asserts that Mr. Rivera-Ruperto's Eighth Amendment claim is a poor vehicle for this Court to consider the question presented because of the "factbound [sic] interaction of sentences for many distinct crimes." Opp'n Br. 19. But the issue here, § 924(c)'s mandatory stacking provision, *necessarily* requires "many distinct crimes." Furthermore, this case concerns, for the purposes of § 924(c), six factually identical fake-drug transactions—all of which were orchestrated, controlled, and directed by the FBI. It therefore presents an exceedingly simple fact pattern for the Court to decide the issue.

The Government does not contest that Mr. Rivera-Ruperto adequately raised and preserved the issues.

B. The Government Intended to Manipulate Mr. Rivera-Ruperto's Sentence

1. The facts here indicate outrageous misconduct by the Government bereft of any legitimate motive. The Government strategically orchestrated its sting operation to maximize the corresponding sentence for offenders like Mr. Rivera-Ruperto, evidenced by the Government's choice to use more than five kilograms of the fake narcotics in every transaction to invoke a mandatory minimum sentence of ten years. See 21 U.S.C. § 841(b)(1)(A)(ii)(II). Had the Government used less than five kilograms, Mr. Rivera-Ruperto would have faced only a five-year mandatory minimum under 21 U.S.C. § 841(b)(1)(B)(ii)(II), resulting in a drastically reduced total sentence. The Government even conceded below that the motive underlying its decision on the amount of fake narcotics used in each transaction was to trigger the ten-year statutory minimum. See Consolidated Br. for Appellee at 31, *United States* v. *Rivera-Ruperto*, Nos. 12-2364, 12-2367 (1st Cir. Mar. 3, 2015) ("While the government did vary the drug amount throughout … it was always an amount that was sufficiently large enough to trigger the ten (10) years statutory minimum.").

Furthermore, as the First Circuit recognized, the Government organized its sting operation so that offenders like Mr. Rivera-Ruperto would face charges for multiple conspiracies. See Pet. App. 9a ("[Rivera-Ruperto's] involvement in an FBI-engineered sting rather than a true drug trafficking conspiracy dramatically increased his sentencing exposure under § 924(c).").

2. Because the Government continued the operation past the first offense, Mr. Rivera-Ruperto was subjected to the "stacking" provisions of § 924(c). "The decision to charge Rivera for his course of conduct in

that manner was quite consequential. It helped to pave the way for the more-than-century-long mandatory prison sentence that he received under § 924(c)." Pet. App. 9a. The Government explicitly designed an operation that triggered the higher mandatory minimum and maximized the sentence for offenders like Mr. Rivera-Ruperto.

Mr. Rivera-Ruperto preserved the sentencing manipulation question and no unresolved issues exist to prevent the Court from addressing the question presented.

III. THE DECISION BELOW IS WRONG

1. The Government incorrectly claims that Mr. Rivera-Ruperto received a *less* strict sentence for a *more* severe crime than the defendant in *Harmelin*. Opp'n Br. 15–16. Mr. Rivera-Ruperto was sentenced to 161 years and 10 months imprisonment, 130 of which were for his § 924(c) convictions.[2] The Government cannot claim that this sentence is *less* severe than a life sentence without the possibility of parole. Furthermore, it is difficult to understand how the fictitious crime of standing in as a bodyguard at a sham-drug deal is more severe than the crime of actually possessing "a potential yield of between 32,500 and 65,000 doses" of cocaine. *Harmelin*, 501 U.S. at 1002 (Kennedy, J. concurring).

2. While the *Harmelin* proportionality analysis mandated deference to the legislature, nowhere did it require such deference to prosecutorial discretion. In *Harmelin*, the Court deferred to the substantive legislative judgment made by the Michigan legislature,

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[2] Even considering good-time credit, 18 U.S.C. § 3624(b)(1), Mr. Rivera-Ruperto would still be facing a mandatory 110-year sentence for his § 924(c) convictions.

which "calibrated with care, clarity, and much deliberation" in imposing a mandatory life-without-parole sentence. *Id.* at 1007 (Kennedy, J. concurring). Justice Kennedy perceived *Harmelin*'s proportionality challenge to the Michigan statute as an objection to one of the primary principles of federalism or the "independent power of a State to articulate [that state's] societal norms through criminal law." *Id.* at 999 (Kennedy, J. concurring) (citations omitted). In contrast to the Michigan legislature's deliberate decision to enact a life-without-parole sentence for drug possession in *Harmelin*, Congress did not impose a 130 year sentence for an individual's first conviction under 18 U.S.C. § 924(c).[3] The First Circuit was incorrect to conclude that there was a "rational basis" for Congress to conclude that offenders like Mr. Rivera-Ruperto deserve a life-sentence because Congress made no such determination at all.

3. At least one other circuit has found a § 924(c) conviction violated the Eighth Amendment under the approach advocated by Mr. Rivera-Ruperto. In *United States* v. *Slatten*, 865 F.3d 767, 812 (D.C. Cir. 2017), *cert. denied sub nom.*, *Slough* v. *United States*, 138 S.Ct. 1990 (2018), the D.C. Circuit found that a man-

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[3] Judge Torruella, in his dissent in the initial appeal, compared Mr. Rivera-Ruperto's crime to other federal crimes that mandate a life-sentence without parole. Pet. App. 76–77a. These include killing the president, 18 U.S.C. § 1751(a), genocide killing, 18 U.S.C. § 1091, and "wrecking a train carrying high level nuclear material and thereby causing death, 18 U.S.C. § 1992." *Id*. at 78a. Judge Torruella also listed the crimes for which, if Mr. Rivera-Ruperto *had* committed, he would have received a lesser sentence—"aircraft hijacker (293 months), a terrorist who detonates a bomb in a public place (235 months), a racist who attacks a minority with the intent to kill and inflicts permanent or life-threatening injuries (210 months), a second-degree murderer, or a rapist." Pet. App. 78–84a.

datory 30-year sentence under § 924(c) violated the Eighth Amendment's prohibition against cruel and unusual punishment.[4] In its Eighth Amendment analysis under *Harmelin*, the court in *Slatten* deemed it "highly significant" that none of the defendants had any prior convictions. 865 F.3d at 814 ("[I]n virtually every instance where the Supreme Court has upheld the imposition of a harsh sentence for a relatively minor nonviolent crime for an as-applied challenge, it has done so in the context of a recidivist criminal. Here, none of these defendants have a criminal record at all."). The court overturned the sentences, in part, because "a regime of strict liability resulting in draconian punishment is usually reserved for hardened criminals." *Id.* Had the First Circuit followed the D.C. Circuit's approach, it would have given weight to the fact that Mr. Rivera-Ruperto was a first-time offender and could have concluded that Mr. Rivera-Ruperto's sentence was in violation of the Eighth Amendment.

The Panel here instead relied on the fact that because Mr. Rivera-Ruperto's sentence was mandatory under § 924(c), and because § 924(c)'s penological goals were "rational," Mr. Rivera-Ruperto was essen-

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[4] The Government attempts to distinguish *Slatten* due to its "unique and different factual scenario." Opp'n Br. 17 n.5. But Judge Rogers, in his dissent on that issue, did not think the case presented a unique factual scenario at all. *Slatten*, 865 F.3d at 824, 830 (Rogers, J. dissenting) ("[D]efendants' Eighth Amendment challenge lacks any merit whatsoever, especially in view of the district court judge's express assessment … that the sentences were an appropriate response to the human carnage for which these defendants were convicted by a jury."). The fact that the Government enticed Mr. Rivera-Ruperto to appear 6 separate times for 6 separate sham-drug deals certainly makes this case a "unique and different factual scenario" from most § 924(c) convictions.

tially barred from asserting an Eighth Amendment claim. Pet. App. 14a. But this Court has never held that mandatory sentences are free from scrutiny. Instead, it has clearly stated that the Eighth Amendment forbids "extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001 (Kennedy, J. concurring). As Judge Torruella stated in his dissent from the initial appeal, "In over forty years on the federal bench, I have never seen so disproportionate a penalty handed down, particularly where the offense is based on fiction." Pet. App. 75a (Torruella, J. dissenting). The First Circuit was incorrect to conclude that Mr. Rivera-Ruperto's sentence was not "grossly disproportionate" to his crime.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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