No. 20-____

IN THE
Supreme Court of the United States

ZAVIAN MUNIZE JORDAN,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 924(c)(1), "any person who, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm" commits an offense.

The question presented is whether each separate conviction under Section 924(c)(1) requires only a separate predicate crime of violence or drug trafficking offense, as the Third, Fourth, and Eighth Circuits have held, or also requires a separate act of using, carrying, or possessing a firearm, as the Second, Fifth, Sixth, Seventh, Tenth, and D.C. Circuits have held.

PARTIES TO THE PROCEEDING

Zavian Munize Jordan, petitioner on review, was the defendant-appellant below.

The United States of America, respondent on review, was the plaintiff-appellee below.

RELATED PROCEEDINGS

The following proceedings are related to this petition:

United States v. *Grant, et al.*, No. 3:16-cr-00145-RJC (W.D.N.C.):

- *United States* v. *Jordan*, No. 3:16-cr-00145-RJC-2 (W.D.N.C.) (judgment entered Nov. 10, 2017; order denying motion to merge/vacate entered Oct. 20, 2017), *aff'd*, No. 17-4751 (4th Cir. Mar. 3, 2020) (reported at 952 F.3d 160), *reh'g denied* (4th Cir. Mar. 31, 2020);
- *United States* v. *Grant*, No. 3:16-cr-00145-RJC-1 (W.D.N.C.) (judgment entered Nov. 10, 2017), *aff'd*, No. 17-4712 (4th Cir. Feb. 20, 2019) (reported at 761 F. App'x 164), *petition for cert. denied*, No. 18-9406 (Oct. 7, 2019);
- *United States* v. *Durant*, No. 3:16-cr-00145-RJC-DCK-3 (W.D.N.C.) (judgment entered June 2, 2017); and
- *United States* v. *Taylor*, No. 3:16-cr-00145-RJC-DCK-4 (W.D.N.C.) (judgment entered Sept. 18, 2017).

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Zavian Munize Jordan respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit in this case.

INTRODUCTION

The decision below entrenches a deep and acknowledged conflict among nine of the twelve regional circuit courts concerning what the government must prove for each separate charge it brings under 18 U.S.C. § 924(c)(1), which prohibits "us[ing] or carr[ying]" a firearm "during and in relation to any * * * drug trafficking crime" or "in furtherance of any such crime, possess[ing] a firearm." As the Fourth Circuit here acknowledged, a majority of these courts read Section 924(c)(1) to require a separate act of use, carrying, or possession for each separate charge

under that provision. But the Fourth Circuit is one of just three courts that read that provision as requiring only a separate predicate drug trafficking offense. In these jurisdictions, the government can obtain two Section 924(c)(1) convictions arising from a single use, carrying, or possession of a firearm so long as they are based on two predicate offenses.

Separate Section 924(c)(1) charges can generate serious consequences. Each charge carries a five-year mandatory minimum, one that cannot "run concurrently with any other term of imprisonment imposed on the person." 18 U.S.C. § 924(c)(1)(A)(i), (c)(1)(D)(ii). Under the minority rule, the government's "discretionary pleading choice" to charge multiple predicate offenses in a single prosecution can thus cause a person to languish in prison for at least an extra half a decade. *United States* v. *Rentz*, 777 F.3d 1105, 1112 (10th Cir. 2015) (en banc) (Gorsuch, J.). This harsh result is not theoretical; "[c]ases" involving multiple Section 924(c)(1) charges "are hardly unusual." *Id.* at 1107.

For Zavian Jordan, petitioner here, the consequences of this legal rule are anything but theoretical or minor. When he was sentenced, a defendant convicted on two Section 924(c)(1) counts faced a five year mandatory minimum on the first count and a *twenty-five* year mandatory minimum on the second count. *See* 18 U.S.C. § 924(c)(1)(C)(i) (2016). The Fourth Circuit, applying the minority rule, held that it "was enough" that "the jury convicted * * * based on separate and non-duplicative predicate offenses." Pet. App. 19a. For Jordan, correcting this rule

means the difference between not leaving prison until his early 70s and leaving prison in his late 40s.

This case cleanly presents a pure, important issue of law, and this Court's review is warranted.

OPINIONS BELOW

The Fourth Circuit's decision is reported at 952 F.3d 160. Pet. App. 1a–27a. The Fourth Circuit's order denying rehearing en banc is not reported. *Id.* at 34a. The District Court's decision denying the motion to merge is not reported. *Id.* at 28a–33a.

JURISDICTION

The Fourth Circuit entered judgment on March 3, 2020. Petitioners timely sought panel rehearing and rehearing en banc, which the Fourth Circuit denied on March 31, 2020. On March 19, 2020, the Court issued an order that extended the time for filing a petition for a writ of certiorari to 150 days from the date of the lower court's denial of a timely petition for rehearing, thus to and including August 28, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1)(A)(i) of Title 18 of the U.S. Code provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if com-

> mitted by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—be sentenced to a term of imprisonment of not less than 5 years.

At the time of petitioner's sentencing, Section 924(c)(1)(C)(i) of that title provided:

> In the case of a second or subsequent conviction under this subsection, the person shall—be sentenced to a term of imprisonment of not less than 25 years.

Section 924(c)(1)(C)(i) of that title now provides:

> In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—be sentenced to a term of imprisonment of not less than 25 years.

STATEMENT

1. A grand jury returned a third superseding indictment charging Jordan with several drug trafficking and firearms offenses. As relevant, Count One charged Jordan with conspiracy "to distribute and to possess with the intent to distribute" heroin and cocaine "[f]rom at least * * * 2013 to on or about January 12, 2017." Pet. App. 51a. Count Six charged him with possession with intent to distribute cocaine "[o]n or about May 11, 2016." *Id.* at 54a–55a. Count Eight charged him with possessing a

firearm in furtherance of the conspiracy alleged in Count One "[o]n or about May 11, 2016" in violation of Section 924(c)(1)(A). *Id.* at 55a–56a. Count Nine charged him with possessing a firearm in furtherance of the possession offense alleged in Count Six "[o]n or about May 11, 2016" in violation of Section 924(c)(1)(A). *Id.* at 56a.[1]

Jordan pleaded not guilty to the charges, and the government presented evidence from its investigation at trial. On April 21, 2016, a federal Drug Enforcement Administration task force agent arrested another person, Ricky Grant, for drug distribution. *Id.* at 67a–68a. The agent instructed Grant to call his supplier, and Grant called Jordan. *Id.* at 68a. Based on this call, federal agents obtained warrants to investigate Jordan further. *Id.* 69a–72a.

"The investigation came to a head on May 11, 2016." *Id.* at 4a. That day, agents watched Jordan, following him from his home, to a home on Lyles Court, and to a house on Ravencroft Avenue where agents observed what they thought was a drug sale. *Id.* at 72a–78a. The agents then "decided to conduct an investigatory stop," and one pulled Jordan over for turning through a red light without stopping. *Id.* at 4a–5a.

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[1] The indictment included two additional charges not relevant here. Count Five charged Jordan with possession with intent to distribute heroin "[o]n or about May 11, 2016." Pet. App. 54a. And Count Ten charged him with being a felon in possession "[o]n or about May 11, 2016." *Id.* at 56a–57a.

The agents conducted several searches that day. During the stop, a pat down search of Jordan and a search of his truck turned up "approximately 12 grams of cocaine," cash, cell phones, and a "Taurus .45 caliber handgun" that was "under the center console of the center bench seat." *Id.* at 5a, 67a. Agents also searched the home on Lyles Court and found "heroin, digital scales and drug-packaging materials, and a gun and ammunition." *Id.* at 5a. The agents did not know who else had access to that home. *Id.* at 78a. The agents located cash at Jordan's home and two firearms in a locked safe. *Id.* at 80a–85a. An agent testified that Jordan's girlfriend told him she was "the sole * * * owner of the keys to have access to the safe" in the master bedroom. *Id.* at 80a–81a.

The jury convicted Jordan on all counts. *Id.* at 91a–93a. It was asked to return only a general verdict. *See id.* The jury was not instructed to find a separate act of possession for each of the Section 924(c)(1)(A) counts, Counts Eight and Nine, or to identify the act of possession for those counts. *Id.* at 88a–90a. It was instructed only to consider the counts charged in the indictment, which listed both Section 924(c)(1)(A) counts as occurring on the same day: May 11, 2016. *See id.* at 87a-90a.

2. Jordan moved to merge Counts Eight and Nine or, in the alternative, to vacate one of the counts for sentencing purposes. He argued that the jury was not asked to find separate acts of possession, that the indictment did not refer to separate acts of possession, and that the jury could have rested its verdict on a single act of possession. *Id.* at 94a–97a.

The District Court denied the motion. Although it acknowledged that other circuits took a different approach, it found that Fourth Circuit precedent foreclosed Jordan's arguments. *Id.* at 31a n.2. Under that precedent, " '[a]s long as the underlying crimes are not identical under the *Blockburger* [v. *United States*, 284 U.S. 299 (1932)] analysis, then consecutive § 924(c) sentences are permissible' " and it did not need to "count 'uses' or 'align the use of a particular firearm with a particular predicate offense.' " *Id.* at 31a (quoting *United States* v. *Kahn*, 461 F.3d 477, 494 (4th Cir. 2006)). Because "the evidence amply supports the jury's verdict that the defendant violated § 924(c) in relation to two predicate crimes," it concluded that Jordan could be sentenced on both counts. *Id.* at 32a.

Jordan raised this argument again in objecting to the presentence report. *Id.* at 105a–106a. The District Court rejected it once more, again acknowledging that "if [he] were in other circuits, it might be better received but * * * the Fourth Circuit has spoken." *Id.* at 106a.

The District Court sentenced Jordan to 35 years in prison. Jordan received 5 year terms on each of Counts One, Five, Six, and Ten, to run concurrently. *Id.* at 38a. The District Court then imposed the mandatory 5-year consecutive term on Count Eight, the first Section 924(c)(1)(A) offense and the mandatory 25-year consecutive term on Count Nine, the second Section 924(c)(1)(A) offense. *Id.*

3. The court of appeals affirmed. *Id.* at 18a–19a. It reviewed the denial of the motion to merge or vacate de novo. *Id.* "Under *Khan*, there is no re-

quirement that multiple and consecutive § 924(c) sentences rest on the use of different firearms or distinct uses of the same firearm." *Id.* at 19a. Because the predicate offenses—conspiracy to possess with intent to distribute and possession with intent to distribute—were "not duplicative for double jeopardy purposes * * * they may support two § 924(c) convictions and sentences under *Khan*." *Id.*

The panel acknowledged Jordan's argument that *Khan* "conflicts with the rule adopted by several other circuits." *Id.* at 20a. Those circuits "prohibit[] multiple § 924(c) sentences arising from a single use of a firearm." *Id.* But the panel noted that it was "bound" by *Khan* and "may not reconsider" it. *Id.*[2]

The Fourth Circuit denied Jordan's petition for rehearing. *Id.* at 34a. This petition followed.

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[2] Jordan raised three other arguments on appeal that are not at issue here. One related to the First Step Act, enacted while his appeal was pending. *See* Pub. L. No. 115-391, 132 Stat. 5194 (Dec. 21, 2018). The Act clarified Section 924(c)(1)(C)(i) so that "going forward, only a second § 924(c) violation committed 'after a prior [§ 924(c)] conviction . . . has become final' will trigger the 25-year minimum." *United States* v. *Davis*, 139 S. Ct. 2319, 2324 n.1 (2019) (quoting 132 Stat. at 5221). The Fourth Circuit held that this amendment did not apply to a defendant who, like Jordan, was sentenced before the First Step Act was enacted. Pet. App. 21a–27a (citing 132 Stat. at 5222). As a result, Jordan remains subject to the 25-year mandatory consecutive minimum for a second Section 924(c)(1) offense on Count Nine.

REASONS TO GRANT THE PETITION

There is an acknowledged conflict among nine of the twelve regional circuits over whether separate convictions under 18 U.S.C. § 924(c)(1) requires separate acts of using, carrying, or possessing a firearm. The issue implicates the hundreds of prosecutions each year in which the government chooses to allege multiple Section 924(c)(1) counts in a single prosecution. The consequence for a defendant who faces these charges is a mandatory additional half-decade in prison. The minority interpretation conflicts with the text of Section 924(c)(1) and the foundational rule of lenity. And the courts in the minority have adhered to their interpretation even after a majority of circuits have rejected it. This Court's review is warranted now.

I. There Is A Deep, Acknowledged Split Over Whether Separate Section 924(c)(1) Convictions Require Separate Acts Of Using, Carrying, Or Possessing A Firearm.

Five courts of appeal have recognized the split over whether Section 924(c)(1) requires separate acts of use, carrying, or possession for separate Section 924(c)(1) charges. The Fourth Circuit here is one of them: It acknowledged "the rule adopted by several other circuits, prohibiting multiple § 924(c) sentences arising from a single use of a firearm," but refused to apply it because it was "bound by" circuit precedent that had "squarely rejected that position." Pet. App. 18a, 20a. The Sixth, Seventh, Eighth, and Tenth Circuits have also recognized the split. *See United States* v. *Vichitvongsa*, 819 F.3d 260, 269 (6th Cir. 2016); *Rentz*, 777 F.3d at 1114 (10th Cir. 2015) (en

banc); *United States* v. *Cureton*, 739 F.3d 1032, 1044 (7th Cir. 2014); *United States* v. *Sandstrom*, 594 F.3d 634, 658–659 & n.13 (8th Cir. 2010).

This split is deep and well-developed. Nine of the regional circuits have addressed the question. A minority, three in all, take the Fourth Circuit's approach of permitting separate Section 924(c)(1) convictions so long as each is based on a separate *predicate offense*. The majority, six in all, disagree, holding instead that separate Section 924(c)(1) convictions must be based on a separate *act of using, carrying, or possessing a firearm*. This question has been well considered and is ripe for this Court's review.

1. Three circuits have held that a defendant may be sentenced on multiple Section 924(c)(1) counts so long as each rests on a distinct underlying predicate offense. These courts have rejected any limits on multiple prosecutions under this provision beyond those imposed by the Double Jeopardy Clause.

In *Khan*, the Fourth Circuit held that "the plain language of" Section 924(c) requires only that separate counts be based on separate predicate offenses. 461 F.3d at 493. It saw "no ambiguity in Section 924(c)," reading it to require that "whenever a person commits" a predicate offense "and uses or carries a gun," he "shall be sentenced" to a consecutive term. *Id.* The Double Jeopardy Clause, not the statute, provides the only limits on multiple counts: "As long as the underlying crimes are not identical under the *Blockburger* analysis, then consecutive § 924(c) sentences are permissible." *Id.* at 494 (internal quotation marks and footnote omitted). One dissent-

ing judge disagreed and would have instead required courts to "determine how many 'uses' are represented by the acts a defendant performed with firearms." *Id.* at 503 (Goodwin, J., concurring in part and dissenting in part).

The Fourth Circuit has hewed to this interpretation. In *United States* v. *Dire*, the court confirmed that "separate 'uses' of the firearms need not be tallied" where "there were multiple predicate crimes of violence." 680 F.3d 446, 477 (4th Cir. 2012) (quoting *Khan*, 461 F.3d at 493 n.9). And it was even clearer in this case, stating that "there is no requirement that multiple and consecutive § 924(c) sentences rest on the use of different firearms or distinct uses of the same firearm." Pet. App. 19a. As a result, "[e]ven assuming * * * that the jury convicted * * * because it found that one use of one gun furthered both predicate offenses, separate sentences would be permissible." *Id.* at 19a–20a.

The Eighth Circuit adopted the same interpretation of Section 924(c)(1) in *Sandstrom*. There, it "addressed whether § 924(c)(1) permits multiple convictions for the single use of a firearm based on multiple predicate offenses." 594 F.3d at 658. It emphasized that Section 924(c)(1) refers to the use, carrying, or possession of a firearm "during and in relation to *any crime of violence*." *Id.* at 656 (emphasis added) (quoting 18 U.S.C. § 924(c)(1)(A)). Under that text, and its precedents, it held that "there is a 'legal basis' for more than one § 924(c)(1) conviction" if "one firearm was used to commit two different offenses." *Id.* at 659. The Eighth Circuit recognized that its decision departed from at least one other

court. *See id.* at 659 n.13 (discussing *United States* v. *Phipps*, 319 F.3d 177, 184–185 (5th Cir. 2003)). It reached this holding "even though the offenses" at issue—interfering with federally-protected activities where death results, and witness tampering—had "occurred simultaneously" when a defendant shot and killed a person. *Id.* at 659.

The Third Circuit joined these two courts in *United States* v. *Hodge*, 870 F.3d 184 (3d Cir. 2017). The defendant there argued that Section 924(c)(1) "can be read to mean that a single use, carrying, or possession of a firearm cannot support multiple prosecutions." *Id.* at 196. The court "disagree[d]." *Id.* Under that provision, if there are "separate predicate offenses" that are "properly charged as separate crimes," then "[i]t follows that each may be a separate predicate for a § 924(c)(1) conviction." *Id.* (internal quotation marks omitted).

2. Six circuits reject the approach of these three courts of appeals, holding instead that *even if* multiple Section 924(c)(1) counts rest on distinct underlying predicate offenses, each count must *also* rest on a distinct use, carrying, or possession of a firearm. As then-Judge Gorsuch summarized when writing for the en banc Tenth Circuit, these courts have credited Congress's choice to refer to a person who "uses or carries * * * or * * * possesses a firearm," 18 U.S.C. § 924(c)(1)(A), and have employed the rule of lenity to resolve the meaning of this ambiguous provision. *Rentz*, 777 F.3d at 1113–114.

The D.C. Circuit reached this conclusion first in *United States* v. *Wilson*, 160 F.3d 732 (D.C. Cir. 1998). There, the defendant "used his firearm only

one time" in connection with "two underlying offenses." *Id.* at 749. Extending earlier precedent that had held that Section 924(c)(1)'s requirements for multiple offenses were "ambiguous," the court vacated one of the Section 924(c)(1) convictions. *Id.* The distinct predicate offenses were not sufficient because they were distinct only due to "different mens rea requirements, not because of distinct conduct." *Id.* "Congress intended to penalize the choice of using or carrying a gun in committing a crime," so Section 924(c)(1) "limits the number of § 924(c) counts that may be charged" where "there was only one use of the firearm." *Id.* (internal quotation marks omitted).

The Second Circuit joined the D.C. Circuit in *United States* v. *Finley*, 245 F.3d 199 (2d Cir. 2001). There, the defendant was charged with two predicate offenses—distribution and possession with intent to distribute—and two Section 924(c)(1) offenses. *Id.* at 201. The court considered whether Section 924(c)(1) permitted separate charges for "continuous possession of a firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct" and answered no. *Id.* at 207. It "agree[d]" with the "widely-shared view that the statute's text is ambiguous" and applied the rule of lenity. *Id.* It thus reversed one of the two Section 924(c)(1) convictions. *See id.* at 208; *see also United States* v. *Wallace*, 447 F.3d 184, 188 (2d Cir. 2006) ("[A] defendant who commits two predicate offenses with a single use of a firearm may only be convicted of a single violation of § 924(c)(1)."). Judge Winter dissented and would have held that because the defendant "committed two drug trafficking crimes, his possession of

a weapon in furtherance of those crimes constituted two more crimes under both the logic and language of Section 924(c)(1)." *Finley*, 245 F.3d at 209 (Winter, J., dissenting).

The Fifth Circuit agreed with this interpretation in *Phipps*. There, the defendants threatened a woman with a firearm when they stole her car and kidnapped her and were charged with two Section 924(c)(1) offenses tied to those two predicate offenses. *See* 319 F.3d at 180–181. The court addressed "whether, as a matter of statutory interpretation, § 924(c)(1) authorizes multiple convictions for a single use of a single firearm during and in relation to multiple predicate offenses." *Id.* at 186. Citing *Wilson* and *Finley*, it held that Section 924(c)(1) was at least ambiguous and that the rule of lenity required interpreting it not to authorize multiple convictions for a single use of a firearm. *See id.* at 187–188. It thus allowed the government to elect to dismiss one of the Section 924(c)(1) counts and remanded for resentencing. *See id.* at 189; *see also United States* v. *Walters*, 351 F.3d 159, 172–173 (5th Cir. 2003) (remanding for resentencing where "the jury did not have to find" separate acts of carrying and use "to convict [the defendant] of the predicate offenses" and the defendant "used a single explosive device on a single occasion").

In *Cureton*, the Seventh Circuit agreed. There, the defendant used a firearm once to commit two predicate offenses of attempted extortion and interstate communication of a ransom request. *See* 739 F.3d at 1039–1040. It rejected the government's argument that "[t]he absence of a Double Jeopardy problem"

should "end the inquiry" over whether separate Section 924(c)(1) offenses are proper. *Id.* at 1040. Looking to the statutory text, it concluded that "the unit of prosecution" for a Section 924(c)(1) offense "is the use, carriage, or possession of a firearm during and in relation to a predicate offense." *Id.* at 1043. "With no clear indication that Congress intended more than § 924(c)(1) punishment to result" when "there was only one choice to use a gun in committing a crime," the court held that the statute authorized only one offense in these circumstances. *See id.* at 1043–1044 (invoking the rule of lenity). The Fourth and Eighth Circuit decisions that had reached the opposite conclusion did "not persuade" it because those holdings were not "consistent with the statute." *Id.* at 1044.

In *Rentz*, the Tenth Circuit sitting en banc, in an opinion authored by then-Judge Gorsuch, provided the most detailed textual defense of the majority approach. Noting that most courts of appeals agreed, "[t]hough they vary in their approach to the question," the court sided with the majority view. *Id.* at 1107, 1114. It examined Section 924(c)(1)'s text, its purpose as evidenced by its text, and the rule of lenity. All three pointed in the same direction: to a conclusion that "each" § 924(c)(1) "charge requires an independent use, carry, or possession." *Id.* at 1115. The majority opinion prompted two concurrences that further developed the arguments for and against the court's holding. *See id.* at 1115–116 (Hartz, J., concurring); *id.* at 1116–130 (Matheson, J., concurring). It also prompted a dissent, which would have held that the prosecution of multiple

Section 924(c)(1) offenses is proper if it rests on distinct predicate offenses because "§ 924(c) is a 'combination crime,' where neither the underlying offense nor use of a gun is sufficient." *Id.* at 1131 (Kelly, J., dissenting).

The Sixth Circuit joined all of these courts in *Vichitvongsa*. Citing these decisions, it held that "for the government to convict a defendant of more than one § 924(c) charge, the defendant must use, carry, or possess a firearm—even if it is the same one—more than once." 819 F.3d at 269 (discussing the textual analysis and use of the rule of lenity in *Rentz* with approval). Courts must thus "closely examine both the predicate crimes and the charged firearm use, carry, or possession" to determine "[w]hether a criminal episode contains more than one unique and independent use, carry, or possession," a question that turns "at least in part on whether the defendant made more than one choice to use, carry, or possess a firearm." *Id.* at 270 (emphases omitted); *see also United States* v. *Jackson*, 918 F.3d 467, 492 (6th Cir. 2019) (vacating one Section 924(c)(1) conviction where the defendant "made only a single choice to use, carry, or possess a firearm" in carrying out a double carjacking (internal quotation marks omitted)).

3. This Court's review is needed to establish a uniform rule whether separate Section 924(c)(1) convictions require separate acts of using, carrying, or possessing a firearm. Nine of the twelve regional circuits have addressed this recurring question. Three have answered no; six have answered yes. Those nine decisions generated an additional five

separate opinions analyzing the question. Five of these courts have recognized the split. Courts on both sides of the conflict have reaffirmed their positions over the years. There is no need for further percolation of this issue.

II. This Case Is A Clean Vehicle To Resolve This Important Question.

A. The question presented is important.

The question implicates hundreds of convictions each year. "In fiscal year 2016, 1,976 offenders were convicted of at least one offense under section 924(c)." U.S. Sentencing Comm'n, Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System 19 (2018) (*Firearms Report*), *available at* https://bit.ly/2PJgBbD. Of those, 146 "were convicted of and sentenced for multiple counts of section 924(c) in the same proceeding, which was their first conviction for any violation of section 924(c)." *Id.* Most of these defendants were convicted on two Section 924(c) counts; however, the number of counts ranged up to *11*. *See id.* at 20.

That number is just the convictions: The question alters many more charging decisions against defendants each year. *See, e.g.*, U.S. Sentencing Comm'n, Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System 12–13 (2017), *available at* https://bit.ly/31BV8qG (discussing the "practice of charging multiple violations of section 924(c) within the same indictment * * * commonly known as 'stacking' mandatory minimum penalties"). The practice of stacking Section 924(c)(1) charges increases "the defendant's potential sentence, his

risk of conviction, and the 'sticker shock' of intimidation that accompanies a hefty charging instrument." Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 Colum. L. Rev. 1303, 1313 & n.31 (2018) (outlining the effects of this practice on defendants, defense counsel, and jurors). In a system in which approximately "[n]inety-seven percent of federal convictions * * * are the result of guilty pleas," *Lafler* v. *Cooper*, 566 U.S. 156, 170 (2012), this practice has the ability to, and does, dramatically increase sentences. *See* Crespo, *supra*, at 1313 & n.31.

The acknowledged split governing multiple Section 924(c)(1) counts leads to sentencing disparities. Cases involving convictions on multiple Section 924(c) counts are "geographically concentrated." *Firearms Report* at 22. In 2016, for example, 12.8% of those cases were in the Eastern District of Virginia, subject to the minority interpretation of Section 924(c) that requires only distinct predicate offenses. *Id.* Another 15.4% of cases were in the Southern District of New York, subject to the majority interpretation that requires a showing of multiple acts of use, carrying, or possession. *Id.*

These sentencing disparities are particularly problematic because Section 924(c)(1) contains mandatory minimum sentences. It is a blunt instrument that can dramatically increase a defendant's sentence and "risk * * * inconsistent application" and "sentences that are excessively severe and disproportionate to the offense committed." U.S. Sentencing Comm'n, 2011 Report to the Congress: Mandatory Minimum

Penalties in the Federal Criminal Justice System 359, 365 (2011), *available at* https://bit.ly/2DWzSDH.

The upshot is this. A defendant charged with two Section 924(c)(1) counts in Virginia, for example, will face double the mandatory minimum sentence that a defendant facing the same charges across the Potomac in D.C. The same goes for a defendant charged in Iowa, who faces double the punishment of someone charged across the Mississippi River in Illinois. This lack of uniformity, for the very same crime, should not persist.

B. This case is a good vehicle to resolve the question presented.

Here, there is no jury finding of separate acts of possession for each of the Section 924(c)(1) counts. The jury was not required to find separate acts of possession to convict Jordan on the two Section 924(c)(1) counts. And the indictment the jury considered indicated that the two Section 924(c)(1) counts occurred on the same day: May 11, 2016. *See supra* at 6. Based on the evidence at trial, the jury could have rested its two convictions on the *same* act of possession. *See supra* at 5–6 (discussing the firearm found in Jordan's truck).

Jordan preserved the argument that, because the jury's verdict could have rested on a single act of possession, he could not be sentenced on one of his two Section 924(c)(1) convictions. He did so in a motion to vacate one conviction or merge the convictions for sentencing, and he did so again at sentencing. *See supra* at 6–7. The Fourth Circuit recognized this and reviewed his claim de novo. *See* Pet App. 18a-19a.

The question matters here. The Fourth Circuit held that "[T]here is no requirement that multiple and consecutive § 924(c) sentences rest on the use of different firearms or distinct uses of the same firearm." *Id.* at 19a. As a result, it held that Jordan's 30-year sentence on the two Section 924(c)(1) counts was permissible "[e]ven assuming * * * that the jury convicted Jordan on the two § 924(c) counts because it found that one use of one gun furthered both predicate offenses." *Id.* at 19a–20a. That is, Jordan had no opportunity to even *argue* that separate acts of possession were required but not proved or found.

III. The Fourth Circuit's Rule Is Wrong.

Jordan should have had that opportunity because that is what Section 924(c)(1) requires. The Fourth Circuit's contrary interpretation conflicts with the statutory text and the foundational rule of lenity.

The Fourth Circuit's rule misunderstands the task at hand. Under that rule, so long as the *constitutional* requirements imposed by the Double Jeopardy Clause for multiple Section 924(c)(1) sentences are satisfied, there are no additional *statutory* requirements imposed by Section 924(c)(1). But "[t]he absence of a Double Jeopardy problem does not end the inquiry" into Section 924(c)(1) because "[t]he issue * * * is one of statutory interpretation, not of constitutional reach." *Cureton*, 739 F.3d at 1040; *see also Rentz*, 777 F.3d at 1108 ("[W]hether and how multiple punishments under * * * § 924(c)(1)(A) could ever pose a *Blockburger* double jeopardy problem are questions that simply aren't presented in this appeal.")

"Instead, the question * * * is whether, as a matter of statutory interpretation, § 924(c)(1)(A) authorizes multiple charges" without multiple acts of using, carrying, or possessing a firearm. *Rentz*, 777 F.3d at 1108. It does not. The text criminalizes "during and in relation to any crime of violence or drug trafficking crime * * * us[ing] or carr[ying] a firearm, or * * * in furtherance of any such crime, possess[ing] a firearm." 18 U.S.C. § 924(c)(1)(A). "[T]he unit of prosecution is the use, carriage, or possession of a firearm" with the required connection "to a predicate offense." *Cureton*, 739 F.3d at 1043. That is, each separate Section 924(c)(1) charge requires "*both*" a separate "act of using, carrying, or possessing" and that the act occur "during and in relation to any crime of violence or drug trafficking crime" or, for a possession, "in furtherance of any such crime." *Rentz*, 777 F.3d at 1109–110.

Reading this text within the context of the rest of Section 924(c) confirms this plain-text reading. A second Section 924(c)(1) conviction *doubles* the mandatory sentence a defendant must serve: from a total of five years to a total of ten years. *See* 18 U.S.C. § 924(c)(1)(A)(i), (c)(1)(C)(i). If a "second choice to use, carry, or possess a gun to further a crime" triggers a second conviction, then this doubling of punishment makes sense. *Rentz*, 777 F.3d at 1111. "But if a second conviction doesn't require a second blameworthy choice * * *, the logic behind the leap in punishment becomes less apparent." *Id.* (discussing the pre-First Step Act text of Section 924(c)(1)(C)(i)). That Congress has required courts to run every Section 924(c)(1) count consecutively with

any other count further suggests "that Congress thought consecutive sentences appropriate precisely because each charge arises from * * * an independent intentional choice to use, carry, or possess a gun." *Id.* at 1113.

At the very least, the rule of lenity compels this conclusion. *See United States* v. *Bass*, 404 U.S. 336, 347–348 (1971) (explaining that it has "long been part of our tradition" that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" (internal quotation marks omitted)). Six courts of appeal have reviewed Section 924(c)(1)'s requirements for multiple counts and deemed the statute ambiguous. *See supra* at 13–16; *Finley*, 245 F.3d at 207 ("agree[ing]" with the "widely-shared view that the statute's text is ambiguous"). Applying the rule of lenity, "that means the government must prove both a use, carry, or possession as well as a qualifying crime." *Rentz*, 777 F.3d at 1113.

CONCLUSION

The petition for a writ of certiorari should be granted.

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