No. 20-256

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 U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR *AMICI CURIAE* THE HOWARD UNIVERSITY SCHOOL OF LAW HUMAN AND CIVIL RIGHTS CLINIC AND THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Howard University School of Law is the nation's first historically Black law school. For more than 150 years since its founding during Reconstruction, the law school has worked to train "social engineers" devoted to the pursuit of human rights and racial justice. As part of this mission, the Howard University School of Law's Human and Civil Rights Clinic advocates on behalf of clients and communities fighting for the realization of civil rights guaranteed by the U.S. Constitution. The Clinic has a particular interest in eradicating racial disparities in the criminal justice system and dismantling unjust laws and policies that contribute to mass incarceration and the prison industrial complex.

The National Association for Public Defense (NAPD) is an organization of more than 21,000 practitioners dedicated to the effective legal representation of persons accused of crimes who cannot afford to retain private counsel. The Association's membership includes all categories of professionals necessary to providing a robust public defense: lawyers, social workers, case managers, investigators, sentencing advocates, paralegals, researchers, and legislative advocates. These professionals often represent the interests of the most marginalized and stigmatized communities in the United States. NAPD aims

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

to de-stigmatize poverty, eradicate racial discrimination in the criminal justice system, and to promote constitutional principles critical to the fair administration of justice.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 924(c)(1)(A)(i) of Title 18 of the U.S. Code imposes a mandatory five-year sentence on "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." It is generally undisputed that the government must prove a separate crime of violence or drug trafficking crime for each § 924(c) charge. *See United States v. Rentz*, 777 F.3d 1105, 1107 n.1 (10th Cir. 2015) (Gorsuch, J.) (collecting cases). This case presents the related—but hotly disputed—question whether the government must also prove a separate use, carry, or possession for each § 924(c) charge.

Petitioner Zavian Jordan "carried" or "possessed" a firearm on a single occasion in furtherance of two separate crimes: first, conspiracy to distribute and to possess with intent to distribute cocaine and heroin over a roughly four-year period, and second, possession with intent to distribute cocaine on a single date in 2016. Whether this single possession of a firearm may be used to support two separate § 924(c) charges—based on the two separate predicate offenses—is a question that has divided the federal courts of ap-

peals, with three circuits,[2] including the Fourth Circuit in this case, holding that a single use is sufficient, and six circuits[3] reaching the opposite conclusion.

The right answer, as then-Judge Gorsuch wrote for an *en banc* Tenth Circuit, "is consequential." *Id.* at 1107. A single § 924(c) charge carries a mandatory minimum sentence of five years imprisonment in addition to the sentence for the predicate crime of violence or drug trafficking crime. 18 U.S.C. § 924(c)(1)(A)(i)-(iii). Each additional § 924(c) charge carries with it another minimum five-year sentence that must be served consecutively and, again, in addition to the penalty for the predicate offense. *Id.* § 924(c)(1)(D)(ii). For the hundreds of defendants like Zavian Jordan, resolution of the question presented thus means the difference between five years and potentially decades in federal prison.

Beyond individual cases, the minority rule of interpreting § 924(c)(1)(A)(i) to permit multiple sentences for a single firearm use, carry, or possession

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[2] *United States v. Khan*, 461 F.3d 477, 493 (4th Cir. 2006); *United States v. Sandstrom*, 594 F.3d 634, 658–659 & n.13 (8th Cir. 2010); *United States v. Hodge*, 870 F.3d 184, 196 (3d Cir. 2017).

[3] *United States v. Wilson*, 160 F.3d 732, 749 (D.C. Cir. 1998); *United States v. Finley*, 245 F.3d 199, 201 (2d Cir. 2001); *United States v. Phipps*, 319 F.3d 177, 184–185 (5th Cir. 2003); *United States v. Cureton*, 739 F.3d 1032, 1044 (7th Cir. 2014); *United States v. Rentz*, 777 F.3d 1105, 1115 (10th Cir. 2015) (en banc); *United States v. Vichitvongsa*, 819 F.3d 260, 269 (6th Cir. 2016).

exacerbates existing inequalities in the criminal justice system. It expands the use of mandatory minimum sentences, which drives overincarceration and is plagued by racial disparities. The minority rule further arms prosecutors with an incredibly effective weapon to induce guilty pleas; a defendant "bargaining" with a prosecutor permitted to attach multiple § 924(c) charges to a single firearm use is far more likely to accept a plea—even if she is innocent and even if the government's evidence against her is weak. Finally, permitting the circuit split on this issue to stand results in nonuniformity and arbitrariness in federal criminal sentencing that is repugnant to the Constitution.

The petition for a writ of certiorari should be granted.

ARGUMENT

I. Permitting Multiple § 924(c) Counts for a Single Firearm Use Improperly Expands Mandatory Minimum Sentencing.

Marion Hungerford never even *touched* a gun. Section 924(c) nonetheless required that Hungerford—a woman with no criminal history whatsoever—be sentenced to more than a century and a half in federal prison. It did not matter that Hungerford played an "extremely limited" and "passive" role in the crimes for which she was convicted—conspiracy and a string of robberies carried out by her male companion, Dana Canfield, that netted less than $10,000 and resulted in no physical harm to any victim. *United States v. Hungerford*, 465 F.3d 1113,

1119-20 (9th Cir. 2006) (Reinhardt, J., concurring). By mandating a 159-year sentence, § 924(c) forbade any meaningful consideration of significant mitigating factors, including Hungerford's severe mental illness that resulted in a "very low capacity to assess reality," and the fact that Hungerford, a newly divorced, unemployed mother of four children facing rent payments she had no way of making, had previously "led a spotless, law-abiding existence." *Id.* at 1119. Marion Hungerford was doomed to die in prison the moment a prosecutor made a "discretionary pleading choice." *Rentz*, 777 F.3d at 1112.

Marion Hungerford's case serves as "a textbook example" of the evil worked by § 924(c)'s mandatory-minimum sentences.[4] *Hungerford*, 465 F.3d at 1121. And while Congress, as part of the First Step Act,

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[4] Marion Hungerford's case is not unusual. *See, e.g.*, *United States v. Angelos*, 345 F. Supp. 2d 1227, 1251 (D. Utah 2004) (stacking of § 924(c) counts resulted in a 61-year prison sentence for carrying a gun during two $350 marijuana deals –an "irrational" and "unjust punishment."); *United States v. Holloway*, 68 F. Supp. 3d 310, 316 (E.D.N.Y. 2014) (stacking of § 924(c) counts for carjacking resulted in a sentence of more than a half-century in prison that was "far more severe than necessary to reflect the seriousness of [the defendant's] crimes and to adequately protect the community");*United States v. Rivera-Ruperto*, 884 F.3d 25, 26 (1st Cir. 2018) (stacking of § 924(c) counts resulted in a 161-year prison sentence "even though this case is replete with factors that—under a discretionary sentencing regime—would surely have been relevant to a judge's individualized rather than arithmetical assessment of whether what Rivera did should not only be punished severely but also deprive him (absent a pardon or commutation) of any hope of ever enjoying freedom again.").

recently put an end to the specific type of § 924(c) stacking at issue in *Hungerford*—the layering of multiple 25-year mandatory-minimum § 924(c) counts in a single indictment[5]—the Third, Fourth, and Eighth Circuits' decision to permit a different type of stacking under § 924(c)(1)(A) is no less pernicious. If the government is "entitled to pile on additional § 924(c)(1)(A) charges without proving any further uses, carries, or possessions," the "only limiting factor . . . is the number of qualifying crimes the prosecutor can describe as having occurred during and in relation to (or in furtherance of) that initial act of using, carrying, or possessing." *Rentz*, 777 F.3d at 1110-11 (Gorsuch, J.). "A single use, carry, or possession can thus give rise to one or one hundred counts" and the consecutive, mandatory sentences required by § 924(c). *Id.* This result is not only contrary to § 924(c)'s text and purpose, *see* Pet. 20-23, it also unnecessarily increases the application and negative effects of mandatory-minimum sentencing.

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[5] Prior to enactment of the First Step Act, § 924(c)(1)(C)(i) mandated a 25-year sentence for any "second or subsequent conviction" for the use, possession, or carrying of a firearm during a drug trafficking crime or crime of violence. Prosecutors used this provision to seek multiple § 924(c) convictions, and thus multiple 25-year sentences, in a single trial. *See, e.g.*, *Rivera-Ruperto*, 884 F.3d at 26. The First Step Act amended § 924(c)(1)(C)(i) to permit additional 25-year sentences only "after a prior conviction under [§ 924(c)] has become final." § 924(c)(1)(C)(i).

A. The Fourth Circuit's Interpretation of § 924(c) Increases Mandatory Minimum Sentences and Associated Harms.

The penalties attached to § 924(c) are among the most commonly imposed mandatory-minimum sentences in the United States. U.S. Sentencing Commission, *Mandatory Minimum Penalties for Firearm Offenses in the Federal Criminal Justice System* 16 (March 2018), https://tinyurl.com/yc249x7u (hereinafter "2018 U.S.S.C. Rep."). Mandatory minimum sentences "were a rarity in the criminal justice system until the 1950s." Karen Lutjen, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 Notre Dame J.L. Ethics & Pub. Pol'y 389, 395 (1996). The 1950s ushered in a surge of "federal support for harsh penal policies," including the use of "mandatory minimums in a completely new way—to target an entire class of offenses;" namely, narcotics crimes. *Id*. The crack cocaine public-health epidemic in the 1980s led to an additional novel use of mandatory-minimum sentences—such penalties would "remarkably . . . apply to first-time offenders" convicted of narcotics and firearms offenses. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 52 (2010).

The devasting effect of mandatory minimums is clear: "With 2.2 million people currently in the nation's prisons or jails, the United States is the world leader in incarceration with a 500% increase over the past 40 years." Mark Osler and Judge Mark W. Bennett, *A "Holocaust in Slow Motion?" America's*

Mass Incarceration and the Role of Discretion, 7 DePaul J. for Soc. Just. 117, 124 (2014). The United States imprisons a higher percentage of its population than any country in the world—even as crime rates continue to decline. *Id.* Convictions for § 924(c) offenses "significantly contribute" to the federal prison population, constituting 14.9% of that population according to the U.S. Sentencing Commission. *See* 2018 U.S.S.C. Rep. at 4.

As the use of mandatory-minimum sentences and the prison population have increased, so too has the opposition to such sentences within the federal judiciary. *See, e.g.*, *United States v. Harris*, 154 F.3d 1082, 1085 (9th Cir. 1998) ("A just system of punishment demands that some level of discretion be vested in sentencing judges to consider mitigating circumstances."); *Rivera-Ruperto*, 884 F.3d at 26 (expressing "dismay that our legal system could countenance extreme mandatory sentences under § 924(c)"). Retired Justice Anthony Kennedy observed that "[i]n too many cases, mandatory minimum sentences are unwise and unjust." Anthony M. Kennedy, Associate Justice, Supreme Court of United States, Remarks at American Bar Association Annual Meeting (Aug. 9, 2003), https://tinyurl.com/yakpjkct. *See also id.* ("I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences.").

Given the well-recognized negative effects of mandatory minimum sentences—and the resounding chorus of criticism—the current trend is moving *away* from mandatory minimums. As noted, Congress recently amended one provision of § 924 to

prohibit the charging of multiple 25-year mandatory minimums in one indictment—such minimums now apply only "after a prior conviction under [§ 924(c)] has become final." *See* 18 U.S.C. § 924(c)(1)(C)(i). While Congress has firmly shut the door on one mode of "stacking" under § 924(c), the Fourth Circuit's interpretation of § 924(c)(1)(A)(i) holds open another—and thus improperly expands the use of mandatory minimums under § 924(c).

Once § 924(c)(1)(A)(i) is read to allow multiple charges for a single firearm possession, prosecutors are free to seek *decades* in mandatory-minimum sentences from one course of conduct. And judges will have no discretion to consider mitigating circumstances that might counsel against such sentences. *See* Lutjen, *supra*, at 389 ("If [the] link between culpability and the punishment imposed is severed, then the foundations upon which the criminal justice system are based are rendered morally suspect."). That discretion is instead vested in "an assistant prosecutor not trained in the exercise of discretion," Justice Kennedy, ABA Remarks, which increases irrational and arbitrary sentences that contribute to overincarceration. Nothing in the text of § 924(c) requires this result.

B. The Fourth Circuit's Interpretation of § 924(c) Exacerbates Racial Disparities in § 924(c) Sentences.

America's incarceration rate—which exceeds the highest incarceration rates in Europe by more than 500%, *Holocaust in Slow Motion*, at 124—is distressing all on its own. But examination of the racial dis-

parity in incarceration makes the data "truly horrific." Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 Mich. J. Race & L. 295, 309 (2013). Nearly 44% percent of America's prison population is Black, more than three times the 12% Black share of the general population, and 19% is Hispanic, compared to 12% of the general population. *Id.* These disparities are reflected in the rates of conviction under § 924(c).

Black offenders are convicted of firearms offenses carrying mandatory minimums more often than any other racial group. *See* 2018 U.S.S.C. Rep. at 6. In 2016, Black offenders accounted for 52.6 percent of offenders convicted under § 924(c), followed by Hispanic offenders (29.5%). *Id.* Black offenders also receive longer average sentences for § 924(c) offenses: Black offenders convicted under § 924(c) received an average sentence of 165 months, compared to 140 months for White offenders and 130 months for Hispanic offenders. *Id.*

The Fourth Circuit's interpretation of § 924(c) needlessly exacerbates this disparity. Among those receiving multiple mandatory minimums under § 924(c), Black offenders accounted for more than two-thirds (70.5%). *Id*; *see also Holloway*, 68 F. Supp. 3d at 313 (noting that "Black defendants . . . have been disproportionately subjected to the 'stacking' of § 924(c) counts."). Allowing prosecutors discretion to stack § 924(c) charges based on a single firearm use—which, again, is contrary to the statutory text and purpose—will undoubtedly add to this disparity.

II. The Fourth Circuit's Interpretation of § 924(c) Amplifies Prosecutors' Ability to Coerce Plea Bargains.

In the minority of jurisdictions that permit multiple § 924(c) charges based on a single possession or use of a firearm, prosecutors wield outsized power to persuade criminal defendants to forego their right to trial. A prosecutor may "inflate the quantity of charges the defendant faces, by piling on overlapping, largely duplicative offenses—increasing with each new charge the defendant's potential sentence, his risk of conviction, and the 'sticker shock' of intimidation" into pleading guilty. Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 Colum. L. Rev. 1303, 1313 (2018). Criminal defendants facing "a hefty charging instrument," *id*., must undertake a sober assessment of their likelihood of success in a trial against the federal government. The shadow of multiple mandatory sentences unquestionably looms large in this assessment. *See* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 Calif. L. Rev. 652, 652-53 (1981) ("Criminal defendants today plead guilty in overwhelming numbers primarily because they perceive that this action is likely to lead to more lenient treatment than would follow conviction at trial. A number of studies suggest that this perception is justified."). For defendants facing § 924(c) convictions, the decision whether to hold the government to its burden of proving guilt beyond a reasonable doubt may turn on whether the charges are brought in a circuit that follows the minority rule.

In the majority of circuits to have considered the proper interpretation of § 924(c), prosecutors must prove to a jury that a firearm was independently associated with each alleged crime that would serve as a basis for the § 924(c) sentence. This interpretation of § 924(c)—which comports with the plain language and purpose of the statute, *see* Pet. 20-23—means that a criminal defendant charged with multiple convictions and the possibility of multiple § 924(c) mandatory minimum sentences may determine that the prosecution is likely to fail in its ability to prove its case. The defendant thus has the ability to weigh the possibility of a failed § 924(c) conviction favorably in her calculus with respect to whether to accept a plea.

By contrast, a prosecutor in a circuit that has adopted the minority rule knows that he has the advantage of not needing to prove an independent connection between the alleged firearm use and each charge. The defendant and her lawyer know this, too. The defendant also understands that the sentencing judge is powerless to consider any unique or mitigating circumstances in determining a just sentence. Accordingly, the defendant charged with multiple convictions and the possibility of multiple § 924(c) mandatory minimum sentences is stripped of the opportunity to weigh the possibility that the prosecution's link between the alleged firearm use and at least one of the charges is weak. And facing the possibility of multiple § 924(c) mandatory minimum sentences regardless of the prosecution's ability to prove that a firearm was used in the commission of each crime may lead a reasonable de-

fendant to accept a plea that she might otherwise reject.

The outsized prosecutorial pressure permitted by the minority interpretation of § 924(c) is not merely theoretical, it has real-world consequences for criminal defendants in those jurisdictions. According to a March 2018 study by the United States Sentencing Commission, despite representing only three of the twelve federal circuits, the minority-rule circuits account for 20.5% of all § 924(c) convictions. 2018 U.S.S.C. Rep. at 78-81.[6] Indeed, in that study, the minority-rule circuit at issue in this case—the Fourth Circuit—accounted for more § 924(c) convictions than any other circuit in the United States. *Id.* at 21, 78. While other factors may help to explain the high percentage of § 924(c) convictions in the minority-rule circuits, the minority rule itself is likely playing a significant role at least in the plea-bargaining phase.

According to a qualitative study conducted by Former U.S. Sentencing Commission Commissioner and Professor, Ilene Nagel, and Professor Stephen Schulhofer, "the data suggest that AUSAs simply drop § 924(c) counts to avoid the mandatory minimum consecutive five-year sentence in cases in which they think dismissal will prompt a guilty plea, or when they consider the additional mandatory consecutive sentence too harsh." Nagel & Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging*

[6] There is no clear differentiation in the report between convictions resulting from plea deals and convictions resulting from trials in this respect.

and Bargaining Practices Under the Federal Sentencing Guidelines, 66 S. Cal. L. Rev. 501, 551-552 (Nov. 1992). That qualitative study is further corroborated by the U.S. Sentencing Commission's March 2018 report, which found that defendants convicted of multiple counts under § 924(c) were significantly more likely to have proceeded to trial than other criminal defendants. *See* 2018 U.S.S.C. Rep. at 27 (providing that 34.6% of defendants convicted of multiple § 924(c) offenses went to trial, while only 2.7% of federal criminal defendants typically proceed to trial). These studies strongly suggest that prosecutors use § 924(c) convictions or the prospect thereof to push defendants into pleas they might not ordinarily enter.

III. The Conflict Regarding Proper Interpretation of § 924(c) Results in Arbitrary Sentencing.

Today, two judges sentencing indistinguishable criminal defendants convicted of the same charges for identical underlying criminal acts may be *forced* to issue vastly different sentences if one judge presides in a federal district court in Virginia, while the other presides in a federal district court in Texas. Even worse, the federal judge in Virginia can be *forced* to impose the greater sentence even if she believes the evidence compelling the increased sentence is weak and no jury has specifically weighed that evidence. The Constitution does not tolerate such arbitrariness in our criminal legal system. *See Chapman v. United States*, 500 U.S. 453, 465 (1991) (courts may impose statutorily authorized sentences "so long as the penalty is not based on an arbitrary

distinction that would violate the Due Process Clause of the Fifth Amendment.").

This hypothetical scenario is the necessary result of the circuit split at issue in the *Jordan* petition regarding the proper interpretation of a criminal statute that imposes mandatory minimum sentences—18 U.S.C. § 924(c).

Criminal defendants in the Third, Fourth, and Eighth Circuits are arbitrarily subject to mandatory minimum § 924(c)(1) sentences that are legally impermissible in the Second, Fifth, Seventh, or Tenth Circuits. Specifically, defendants in minority jurisdictions face multiple five-year mandatory minimum sentences without requiring the jury to specifically connect the predicate offense to the use, carrying, or possession of a particular firearm. The Second, Fifth, Seventh, and Tenth Circuits reject that interpretation. In those jurisdictions, a five-year mandatory minimum only attaches when the government proves that the use, carrying, or possession of a firearm is directly connected to each predicate offense. Accordingly, the same federal law subjects similarly situated federal defendants to vastly different mandatory minimum sentences. This difference does not comport with the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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