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 United States Court of Appeals for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Government's cursory opposition contains several significant concessions and a few insignificant arguments against review.

The Government concedes that nine of the twelve regional circuits are split on the question presented: whether the government must prove a separate act of using, carrying, or possessing a firearm for each charge it brings under 18 U.S.C. § 924(c)(1), which prohibits those acts "during and in relation to any * * * drug trafficking crime" or "in furtherance of any such crime, possess[ing] a firearm." It does not discuss, much less dispute, the amici's powerful explanations of why the question is important and deserves this Court's attention. *See* FAMM Br. 15–19; Howard

Univ. School of Law Human & Civil Rights Clinic et al. Br. 7–15. And it does not defend the erroneous, minority reading of Section 924(c)(1) that the Fourth Circuit applied below. *See* Pet. 20–22.

The Government's arguments for why this Court should pass on this petition do not overcome these compelling reasons for review. It notes that this Court declined to resolve this question more than five years ago. It implies that Jordan did not preserve this question. And it hypothesizes that applying the correct interpretation of Section 924(c)(1) would not help Jordan in light of the trial record. None of these arguments are true barriers to this Court's review.

This split is real and the question presented "is consequential." *United States* v. *Rentz*, 777 F.3d 1105, 1107 (10th Cir. 2015) (en banc) (Gorsuch, J.); *see* FAMM Br. 15–19; Howard Univ. School of Law Human & Civil Rights Clinic et al. Br. 2–3. Each separate Section 924(c)(1) conviction carries a five-year mandatory minimum. The minority reading of Section 924(c)(1), applied below, thus leads to significantly increased prison terms, sentencing disparities, and excessively severe and disproportionate sentences relative to the offense committed. This will all continue until this Court steps in to settle the issue.

The petition should be granted.

ARGUMENT

1. As the Government concedes, nine courts of appeals have weighed in on the question presented and have divided six to three. Under the majority rule, each separate Section 924(c)(1) conviction must rest on a separate act of using, carrying, or possessing a

firearm. *See* Pet. 12–16; Opp. 9. This "reading of the statute—like most good ones—flows from plain old grade school grammar" and the rule of lenity. *Rentz*, 777 F.3d at 1110, 1113. Three courts, including the Fourth Circuit below, have adopted the opposite rule, under which separate Section 924(c)(1) convictions require a separate predicate offense but not a separate act of using, carrying, or possessing a firearm. *See* Pet. 10–12; Opp. 8–9.

The Government suggests that because this Court has passed on this split before, it should do so again. To start, it has been *five* years since this Court last considered the question presented. Opp. 8 n.2. And since then the split has *deepened*, with the Sixth Circuit adopting the majority interpretation, Pet. 16 (citing *United States* v. *Vichitvongsa*, 819 F.3d 260, 269 (6th Cir. 2016)), and the Third Circuit joining the minority, *id.* at 12 (citing *United States* v. *Hodge*, 870 F.3d 184 (3d Cir. 2017)). The circuits have weighed in, the split has grown deeper, and there is no sign it will resolve on its own. The question is ripe for this Court's review.

The Government leans on the Fourth Circuit's observation that some courts have considered this question in different factual settings. *See* Opp. 9–10. The court first held that it was bound to apply circuit precedent that had adopted the minority interpretation. Pet. App. 18a, 20a (acknowledging "the rule adopted by several other circuits" but declining to apply it because it was "bound by" precedent "squarely reject[ing] that position"). That foreclosed Jordan's challenge that two of his Section 924(c)(1) convictions were invalid because the jury had not been required

to find separate acts of carrying or possession. The court then went on to note that the application of that rule has most troubled courts where "the evidence presented at trial makes clear that multiple § 924(c) convictions rest on a single use of a single gun." Pet. App. 20a. That the injustice of an interpretation might be more stark in one factual setting than another does not undermine the split. The courts that addressed this question did not interpret the statute differently based on different trial records; instead, they applied the ordinary tools of statutory interpretation to the statutory text and reached opposite results. This is a pure issue of law, not of fact.

For similar reasons, the Government's observation that some courts have resolved the proper interpretation of Section 924(c)(1) in cases where multiple predicate offenses occurred simultaneously also does not undermine the split. *See* Opp. 12–13. Each of those courts held that *even if* multiple Section 924(c)(1) counts rest on separate predicate offenses (simultaneous or not), each count must *also* be based on *separate acts* of using, carrying, or possessing a firearm. *See Rentz*, 777 F.3d at 1115; *Vichitvongsa*, 819 F.3d at 269; *United States* v. *Cureton*, 739 F.3d 1032, 1043–44 (7th Cir. 2014); *United States* v. *Wallace*, 447 F.3d 184, 188 (2d Cir. 2006); *United States* v. *Walters*, 351 F.3d 159, 172–173 (5th Cir. 2003); *United States* v. *Phipps*, 319 F.3d 177, 187–188 (5th Cir. 2003); *United States* v. *Finley*, 245 F.3d 199, 201, 207–208 (2d Cir. 2001); *United States* v. *Wilson,* 160 F.3d 732, 749–750 (D.C. Cir. 1998). In these cases, the separate predicate offenses were committed by "one unique and independent use, carry, or possession," *Vichitvongsa*,

819 F.3d at 270, which the courts held "limit[ed] the number of § 924(c) counts that may be charged," *Wilson*, 160 F.3d at 749.

The Government attempts a sleight of hand, claiming "no court doubts that a defendant can be convicted on separate Section 924(c) offenses when" the defendant "possessed multiple firearms in different places in relation to distinct drug-trafficking crimes." Opp. 9. But the question here is whether the Government must *prove*—to *a jury's satisfaction*—that each Section 924(c)(1) count rests on a separate act of carrying, possessing, or using a firearm. Jordan's jury was not asked to find, and did not make any finding, regarding those separate acts. *See* Pet. 19. The Fourth Circuit affirmed Jordan's conviction despite the absence of those jury findings precisely because, under its precedent, none were required. Pet. App. 19a. That the *Government* is satisfied that it made a sufficient case does not undermine the split over the elements required to support a conviction.

2. As Jordan and the amici explained, the proper interpretation of Section 924(c)(1) has serious consequences. Each year, over a hundred defendants are convicted on multiple Section 924(c)(1) counts. Pet. 17. Each subsequent Section 924(c)(1) count carries—at a minimum—an extra five-year mandatory minimum sentence. FAMM Br. 7–8 (noting that the additional sentence can range up to 30 years). The prospect of these stacked penalties means that prosecutors charge many more defendants with multiple Section 924(c)(1) counts, creating a strong pressure to plead guilty to avoid those penalties. *See* Howard Univ. School of Law Human & Civil Rights Clinic et

al. Br. 11–14. "[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 * * * ." *Id.* at 4, 11–14. In the circuits that have adopted the minority interpretation, prosecutors may bring these charges—and secure convictions—so long as they can identify a *single* act of carrying, possessing, or using a firearm. *See* FAMM Br. 11–13 (citing *Rentz*, 777 F.3d at 1107). The longer sentences that result "have devastating effects on both the accused and their families," *id.* at 17, and "exacerbates" racial sentencing disparities between defendants, Howard Univ. School of Law Human & Civil Rights Clinic Br. 10.

The Government does not seriously attempt to disagree. It asserts that simply because the minority interpretation *permits* this result, "that does not mean that such convictions will in fact be sought or obtained." Opp. 13. Jordan and amici provided data from the U.S. Sentencing Commission to show the practical consequences of the minority interpretation. *See* Pet. 17–18; FAMM Br. 18; Howard Univ. School of Law Human & Civil Rights Clinic Br. 13–14. These consequences are real, not hypothetical, unlike the Government's supposition.

The Government also states that "guidance to federal prosecutors that postdates the trial in this case instructs them, when possible, to treat the use or possession of the firearm as the unit of prosecution." Opp. 13. It offers no citation to support this statement. And its reassurances ring hollow in light of the qualifier that prosecutors need only follow that guidance "when possible." That is, the Government's

description of this guidance leaves open the possibility that when it is *not* possible to base multiple Section 924(c)(1) counts on separate acts of using, carrying, or possessing a firearm, prosecutors may still proceed to stack Section 924(c)(1) counts based on a single act.

3. The Government suggests that this Court should decline review because Jordan's convictions did rest on separate acts of possessing a firearm. Opp. 10–11. No matter how much the Government insists otherwise, that is a contested statement. It is the kind of fact-intensive question that this Court leaves for the lower courts to sort out *after* it has resolved the question presented.

As the Government impliedly concedes, the jury was never told it had to find separate acts of possessing a firearm. It was not instructed to find a separate act of possession for the two Section 924(c)(1)(A) counts, or to identify the act of possession for those counts. Pet. App. 88a–90a. It returned a general verdict on these two counts. *Id.* at 91a–93a.

The Government suggests that it is enough that it "linked" specific acts of possession of distinct firearms to specific predicate counts. Opp. 10–11. But Jordan contested the acts of possession that the Government now relies on, introducing evidence that multiple people had access to one location in which one firearm was found and that Jordan *did not* have control over another location in which a firearm was found. *See* Pet. App. 94a–95a; *see also id.* at 105a–106a. And there is no basis in the record to conclude that the jury must have based its verdict on distinct acts of possession. In fact, the Government told the jury that it needed to find only *one* act of possession to convict on

both of the Section 924(c)(1) counts. In its closing arguments on the Section 924(c)(1) counts, it emphasized that "the allegation is, the defendant knowingly possessed one or more firearms in furtherance of a drug trafficking crime, only needs to be one, that's very important." W.D.N.C. Trial Tr., ECF No. 149 at 17 (No. 3:16-cr-00145-RJC). And the jury was instructed to consider the counts charged in the indictment, in which the Section 924(c)(1)(A) counts were alleged to have occurred on the same day. Pet. App. 87a–90a.

There is no merit to the Government's suggestion that Jordan did not preserve this argument. Opp. 10. In his motion to merge or vacate, he argued that the indictment did not refer to separate acts of possession, the jury was not asked to find separate acts of possession, and the jury could have rested its verdict on a single act of possession. Pet. App. 94a–97a. He raised these arguments again at sentencing. *Id.* at 105a–106a. The Fourth Circuit acknowledged this in reviewing his claim de novo. *Id.* at 18a–19a. Indeed, the court suggested that it is the *Government's* forfeiture argument that was not preserved. *Id.* at 21a n.2.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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