No. 22-49

IN THE

Supreme Court of the United States

EFRAIN LORA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This petition presents the unusual situation where the government concedes the existence of a circuit split yet still contends that the conflict need not be resolved. The government acknowledges that the circuits are divided over whether 18 U.S.C. § 924(c)(1)(D)(ii)'s bar on concurrent sentences applies when a defendant is sentenced under Section 924(j). The courts of appeals themselves have recognized the split. *See, e.g.*, *United States v. Berrios*, 676 F.3d 118, 139 (3d Cir. 2012) ("This is a question which has divided our sister circuits."). That divide is deep and intractable; and the government argues neither that further percolation is necessary, nor that the conflict will likely resolve itself.

Instead, the government contends that certiorari is unwarranted because the circuit conflict is "narrow" and "has limited practical importance." Opp. 5. Neither argument is availing: The split is deep and the government's speculation about how it might restructure charging decisions to attempt to evade an adverse merits ruling's impact does not provide a sound basis for denying review. The government adds that the question presented has been passed over for certiorari before, *id.*, but that simply shows the issue is both recurring and likely to recur. Lastly, the government improperly speculates that Petitioner Efrain Lora's "sentence is unlikely to change even if he prevails before this Court." *Id.* That conjecture is both beside the point (because the district court would have significant discretion to revise Lora's sentence) and unsupported by the record (both at Lora's sentencing and in light of two co-defendants' recent sentencings).

Thus, the government does not contest much of the petition, tellingly beginning and spending over half of its argument on the merits. *See id.* at 5–9. This Court should reach those merits (which sharply favor Lora) by granting this clean and compelling petition for certiorari.

ARGUMENT

I. THE GOVERNMENT DOES NOT DISPUTE THAT THE COURTS OF APPEALS ARE IRRETRIEVABLY DIVIDED ON THE QUESTION PRESENTED.

The government, Opp. 9, and several courts of appeals, Pet. 7, correctly recognize that the courts of appeals are in conflict over the correct interpretation of Section 924(c)(1)(D)(ii). The government does not dispute the weight of authority on its side of the split or that the split is intractable. *See* Opp. 10 (noting the split "has existed for more than a decade" and not arguing that the conflict is likely to resolve itself). Nor does the government dispute that there is disagreement even among decisions on its side of the split over how to reach their (incorrect) conclusion. *See* Pet. 10–11. Thus, there is no dispute over the existence or persistence of the circuit conflict.

Instead, the government attempts to minimize the conflict by downplaying the Tenth Circuit's unanimous en banc reversal of that court's prior decision on the government's side of the split and other authority emphasizing the conflict's depth. Those arguments do not detract from the conceded split, and they are misguided. This circuit conflict's time for resolution has come.

1. The government's parsing of its own briefs in the Tenth Circuit's reversal proves too much. *See* Opp. 9–

10. That court's prior holding has at least been invalidated and, indeed, lower courts in that circuit do not adhere to it.

In *United States v. Battle*, the Tenth Circuit had held that a sentence under Section 924(j) must run consecutively to sentences on other counts *because* that subsection merely sets forth "aggravating sentencing factors" for Section 924(c). 289 F.3d 661, 669 (10th Cir. 2002), *overruled by United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018). *Battle* thus explicitly agreed with the Eighth Circuit's decision in *United States v. Allen*, which likewise held that Section 924(j) sets forth an aggravated punishment for 924(c) offenses and therefore the latter's concurrent-sentence bar applies to both subsections. 247 F.3d 741, 769 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 953 (2002).

In *Melgar-Cabrera*, however, the Tenth Circuit reversed course and adopted the Eleventh Circuit's view that Section 924(j) sets forth a discrete crime, which drove then-Judge William Pryor's conclusion that a 924(j) sentence may run concurrently. 892 F.3d at 1059 (citing *United States v. Julian*, 633 F.3d 1250, 1255 (11th Cir. 2011)). *Melgar-Cabrera* emphasized *Battle*'s "shaky foundation from the beginning," explaining that *Battle* held "that '§ 924(c) unambiguously mandates the imposition of a consecutive sentence "in addition to" the punishment ordered for the use of a firearm during the commission of a crime of violence where the evidence demonstrates the existence of the aggravating sentencing factors set forth in § 924(j).'" *Id.* at 1058–59 (quoting *Battle*, 289 F.3d at 669). The court did not claim to preserve any aspect of that shaky foundation

or bottom line. Nor does the government cite any case reading *Melgar-Cabrera* in so limited a fashion as it now presses. Indeed, several courts in the Tenth Circuit have imposed Section 924(j) sentences *concurrently* with a sentence on another count since *Melgar-Cabrera*, suggesting the government did not invoke *Battle* or the district court did not agree with such an invocation there. *E.g.*, Judgment, *United States v. Blevins*, No. 21-CR-0207 (N.D. Okla. Oct. 21, 2022), Dkt. No. 105; Judgment, *United States v. Pemberton*, No. 21-CR-0012 (E.D. Okla. June 21, 2022), Dkt. No. 112; Judgment, *United States v. Gonzales*, No. 18-CR-03477 (D.N.M. Sept. 21, 2021), Dkt. No. 144.

2. In summarizing the circuit conflict, the government invokes the First Circuit's "suggest[ion]" that it would adopt the government's conclusion here. Opp. 9 (citing *United States v. García-Ortiz*, 657 F.3d 25 (5th Cir. 2011)). But that court supported its passing observation that Section 924(c)(1)(D)(ii)'s bar on concurrent sentences "arguably applies to section 924(j)" by citing *Battle* and *United States v. Dinwiddie*, 618 F.3d 821, 837 (8th Cir. 2010), which treated the two subsections as the same, rather than separate, offenses. *García-Ortiz*, 657 F.3d at 31. The government does not defend that approach, which raises constitutional issues. Pet. 10, 18–20, 24. Nor did the Second Circuit below.

Moreover, to the extent this Court considers dicta in tallying the split, it should count the Fifth Circuit on Lora's side. *See id.* at 15 n.4. In *United States v. Gonzales*, that court explained that Section 924(j) lacks "express language demonstrating the legislature's intent for cumulative punishment," and

Section 924(c) "says nothing" "about a section 924(c) sentence running consecutively to a sentence for a section 924(j) conviction." 841 F.3d 339, 357 (5th Cir. 2016). In discussing *Julian*, the *Gonzales* court went so far as to say that Judge Pryor "follow[ed] the plain language of section 924(c)(1)(D)(ii), which applies the prohibition on consecutive sentences only to that subsection." *Id.* at 358.

3. Similarly, the two courts of appeals decisions in the closely related context of Section 924(o) reveal further division over how to interpret Section 924(c)(1)(D)(ii). In both cases, the district court applied the concurrent-sentence bar to a Section 924(o) sentence and the court of appeals reversed because 924(o) "by its terms does not require a consecutive sentence," *United States v. Fowler*, 535 F.3d 408, 422 (6th Cir. 2008), and "does not contain any restriction on concurrent sentencing," *United States v. Clay*, 579 F.3d 919, 933 (8th Cir. 2009). Although the government now argues that the Section 924(o) context is "plainly different," Opp. 11 n.*, it failed to make such an argument in either of those cases; and the question presented, whether the language "under this subsection" in Section 924(c)(1)(D)(ii) sweeps in convictions undisputedly "under" other subsections (like (j) or (o)), is fundamentally indistinguishable.

Even without this additional weight of authority on Lora's side,[1] Judge Pryor's lengthy and carefully reasoned opinion in *Julian* will continue to bind sentencing judges in the Eleventh Circuit, controlling

[1] *See also United States v. Bran*, 776 F.3d 276, 282–85 (4th Cir. 2015) (King, J., dissenting in part).

some of the most active districts for Section 924(c) prosecutions. This classic circuit conflict over a straightforward statutory interpretation question calls out for this Court's resolution.

II. THE GOVERNMENT'S DEFENSE OF THE DECISION BELOW IS INCORRECT.

Perhaps because it concedes a circuit conflict exists, the government's opposition uncharacteristically begins with and focuses on the merits. Opp. 5–9. The parties' (and courts of appeals') sharply conflicting interpretations of Section 924(c)(1)(D)(ii) only stress the need for this Court's review. *See* Pet. 16–22. But, in any event, the government's merits arguments are wrong.

First, the government's contention that a Section 924(j) defendant's term of imprisonment "arises 'under' both" subsections (j) and (c) is unsound. Opp. 6.[2] Before advancing this theory, the government correctly notes that Lora's conviction was for a "violation of 18 U.S.C. [§] 924(j)(1)" and his sentence was "on the Section 924(j) count"—not somehow on multiple or combined subsections at once. *Id.* at 1–2; *see also id.* at 5 (describing Section 924(j) as "an aggravated version of the offense established under Section 924(c)," not as the same offense). That tracks the district court's judgment, which does not mention subsection (c). *United States v. Palmer*, No. 14-CR-0652 (S.D.N.Y. Dec. 23, 2019), Dkt. No. 207.

But then, to argue that Lora's Section 924(j) sentence qualifies as "under" 924(c), the government

[2] It is also at least insufficient to overcome the rule of lenity. Pet. 22.

notably shifts to a different and more flexible verb (*arises* under) than subsection (c)(1)(D)(ii) uses (*imposed* under). Opp. 6. Thus, no one contends that, as a formal matter, the district court "imposed" Lora's sentence for violating Section 924(c); it was for violating Section 924(j) alone. That should settle things under Section 924(c)(1)(D)(ii)'s plain language. Pet. 16–18.

The government also cites no authority for its arises-under-both theory. Indeed, mixing and merging discrete offenses that way invites precisely the kind of constitutional missteps that two courts of appeals in the government's column have committed, *id.* at 18–20; that Judge Pryor recognized and rejected in *Julian*, *see* 633 F.3d at 1255–56; that this Court rejected in *Alleyne v. United States*, 570 U.S. 99, 100 (2013); and that the government elsewhere unconvincingly attempts to waive away as unconnected, Opp. 8.

Second, none of the government's other merits arguments overcomes its problem with the statutory text. For example, there is every indication that "Congress intended to create two distinct, separately punishable offenses" in Sections 924(c) and (j). *Id.* at 6. Subsection (j) was added as a new subsection at the end of Section 924, rather than alongside other offenses literally *under* subsection (c), and the two authorize plainly different punishments.

Enforcing Section 924(c)(1)(D)(ii)'s plain text does not cause an "anomaly," much less an absurd result. *Id.* at 7. District courts still could run a Section 924(j) sentence consecutively, so safeguarding the discretion Congress granted sentencing courts would not

necessarily shorten any 924(j) sentence (especially in comparison with a 924(c) sentence). Pet. 12–13, 20–22. Indeed, it is the government's plea to atextually treat Section 924(j) as "under" 924(c) that would anomalously render Section 924(c)(5)(B) superfluous, because there would be no difference between the sentences imposed under the two provisions if the concurrent-sentence bar extended to both. *Id.* at 18.

At bottom, these sharp disagreements, which have percolated through the courts of appeals for over a decade, call out for this Court's ultimate resolution.

III. THE GOVERNMENT DOES NOT DISPUTE THAT THE QUESTION PRESENTED IS SUBSTANTIVELY IMPORTANT AND LIKELY TO RECUR.

It is indisputable that whether a judge may run sentences concurrently is substantively important, particularly for determining the length of already substantial prison sentences, like those under Section 924(j). The government does not argue otherwise. Nor does the government dispute that the question presented has implications beyond Section 924(j), nor that 924(j) sentencings are frequent and implicate important government interests. Pet. 23–25 (citing Kyle Graham, *Crime, Widgets and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CALIF. L. REV. 1573, 1574 n.2, 1621 (2012)).

1. Instead, the government argues that the question presented "has limited *practical* importance" because the government might be able to evade an adverse merits ruling. Opp. 5 (emphasis added); *id.* at 11 (surmising that Section 924(j) offenders "could simply be punished under Section 924(c)" instead). Thus, it appears that the government believes it

could: charge a defendant for the same conduct under Sections 924(c) and (j); then (if it obtains guilty verdicts on both counts) ask the court to sentence the defendant on the Section 924(c) count to trigger the bar on concurrent sentencing thereunder; then ask the court to impose the same sentence under Section 924(c) that the defendant would have received under 924(j); and that sentence then would run consecutively to sentences on other counts.

Ultimately, this argument (that the government *might* try to mitigate the impacts of an adverse interpretation of Section 924(c)(1)(D)(ii)) is beside the point (that the question of sentencing discretion is undoubtedly important), and there are serious doubts whether its untested strategy could succeed. It is an insufficient basis for denying review.

First, the government does not cite any instance where it has deployed this strategy, not even in the Eleventh Circuit where *Julian* has controlled for over a decade, presenting both the need and the opportunity to test that approach. Thus, the government's argument is entirely speculative.

Perhaps the strategy's residence in the realm of mere theory is for good reason: It is unlikely that district courts would endorse an attempt to end-run an adverse interpretation of Section 924(c)(1)(D)(ii). Assuming that Section 924(j) defines a greater offense and 924(c) defines a lesser included offense, the appropriate result for convictions on both greater and lesser included offenses is to sentence the defendant on the *greater* offense. *See, e.g.*, *In re Lampton*, 667 F.3d 585, 588 (5th Cir. 2012). The government provides no reason to think that evading precedent

would provide a sound basis for departing from that general rule. Relatedly, imposing the same sentence under Section 924(c) as under 924(j) ordinarily would require a court to depart or vary substantially upward from the presumptive Guidelines sentence, which may also dissuade courts from the speculated strategy. *Compare* U.S. SENT'G GUIDELINES MANUAL § 2K2.4 (U.S. Sent'g Comm'n 2021), *with id.* §§ 2A1.1–2A1.4.

And all that says nothing of the question's important (practical and substantive) implications for defendants who are convicted and sentenced under other Section 924 subsections that define discrete firearms offenses. *See* Pet. 24–25; *see also id.* at 14–15 n.3 (collecting subsection (o) cases facing the same question about the concurrent-sentence bar).[3]

2. The government does not dispute that the question presented is likely to recur. Indeed, the government highlights that "this Court has *repeatedly* denied petitions for a writ of certiorari" on this question. Opp. 5 (emphasis added). There are scores of cases involving a Section 924(j) charge each year, *see* Graham, *supra*, at 1621 (compiling 367 cases in a six-year period), and the numerous court of appeals

[3] The question presented is also important because it has constitutional implications in the mine-run of cases. Two courts of appeals the government cites on its side of the split have held that Section 924(j) "does not set forth a discrete crime" from 924(c), but instead merely imposes additional "sentencing factors." *Battle*, 289 F.3d at 666–67; *see Dinwiddie*, 618 F.3d at 837. Judge Pryor rightly recognized these constitutional concerns and that they weigh against the government's primary (arises-under-both-subsections) theory. *See Julian*, 633 F.3d at 1255.

opinions over the past two decades further emphasize that this issue will keep arising and keep being handled inconsistently across circuits until this Court steps in.

IV. THE GOVERNMENT'S MISGUIDED SPECULATION ABOUT LORA'S RESENTENCING (IF HE SUCCEEDS ON THE MERITS) DOES NOT UNDERMINE THIS CASE AS AN IDEAL VEHICLE.

Lastly, the government does not dispute that this case presents a clean vehicle. Pet. 25 (explaining that the question was considered and preserved at every stage; the question is dispositive of Lora's appeal; and there are no extraneous issues to complicate matters). Rather, the government speculates that it is "highly unlikely that petitioner would benefit from" a favorable decision, so the Court should not even consider giving him that chance. Opp. 11. That argument is beside the point and, crucially, mistaken.

If this Court adopts Lora's interpretation of Section 924(c)(1)(D)(ii), the district court would have broad discretion on remand to reconsider his sentence, including based on substantial evidence of rehabilitation that Lora would present. *See Pepper v. United States*, 562 U.S. 476, 507–08 (2011). That fact renders the government's forecasts unavailing. *See id.* ("[A] district court's 'original sentencing intent may be undermined by altering one portion of the calculus….'" (citation omitted)).

Moreover, the full record actually suggests that such reconsideration could benefit Lora. First, at Lora's sentencing, the district court repeatedly emphasized that consecutive sentencing was "mandatory" because of Second Circuit precedent.

Sent. Tr. 12–13, 14, 15, 25, *Palmer*, No. 14-CR-0652 (S.D.N.Y. Jan. 17, 2020), Dkt. No. 210 ("Sent. Tr."). That finding preceded and explicitly informed the court's 30-year sentence, *id.* at 28, making it far from clear that the court would reach the same result if given the appropriate discretion on remand.

Moreover, just weeks ago, Lora's co-defendants Dery Caban and Oscar Palmer (who shot at and killed the victim in this case) were sentenced to 10- and 15-years' imprisonment, respectively. Judgments, *Palmer*, No. 14-CR-0652 (S.D.N.Y. Sept. 23, 2022), Dkt. Nos. 306, 307; *see United States v. Palmer*, No. 14-CR-0652, 2021 WL 3932027, at *1 (S.D.N.Y. Sept. 1, 2021). The fact that Lora received a significantly longer sentence than Caban and Palmer, even though he did not pull the trigger, undermines the government's argument that the district court likely would refuse to reconsider on remand. Indeed, that court explicitly sought to avoid any "unwarranted disparity" when it initially imposed Lora's sentence. Sent. Tr. 25–27. In light of Caban and Palmer's sentences (one-third and one-half the length of Lora's), the district court might well reconsider those 30 years if given the sentencing discretion due under all federal criminal statutes that (like Section 924(j)) lack a consecutive-sentence mandate. 18 U.S.C. § 3584(a).

CONCLUSION

This Court should grant the petition.

November 14, 2022

Respectfully submitted,

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