No. 22-49

IN THE

Supreme Court of the United States

EFRAIN LORA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

ANNE MARIE LOFASO
WEST VIRGINIA UNIVERSITY COLLEGE OF LAW
U.S. SUPREME COURT LITIGATION CLINIC
101 Law Center Dr.
Morgantown, WV 26506

DAVID J. WILLIAMS
GRAVEL & SHEA
76 St. Paul Street
Burlington, VT 05401

LAWRENCE D. ROSENBERG
Counsel of Record
ANDREW J.M. BENTZ
CHARLES E.T. ROBERTS
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
ldrosenberg@jonesday.com

Counsel for Petitioner

QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)(1)(D)(ii), which provides that "no term of imprisonment imposed … under this subsection shall run concurrently with any other term of imprisonment," is triggered when a defendant is convicted and sentenced under 18 U.S.C. § 924(j).

PARTIES TO THE PROCEEDING

Petitioner, who was the Defendant-Appellant in the Second Circuit, is Efrain Lora.

Respondent, who was the Appellee in the Second Circuit, is the United States.

In addition, Oscar Palmer, Dery Caban, Luis Trujillo, and Luiz Lopez were Defendants in the district court. However, they were not parties to the proceedings in the court of appeals and are not parties in this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The default in criminal sentencing is that the judge has discretion whether to order multiple sentences to run concurrently or consecutively. This was true before the founding of our Nation, carried forward by the early American States, and enshrined by Congress at 18 U.S.C. § 3584.

Despite that deep-rooted, codified rule, the court below held that Petitioner Efrain Lora must serve *consecutive* sentences—the judge had no discretion on the issue. Why? Because 18 U.S.C. § 924(c)(1)(D)(ii) says that "no term of imprisonment *imposed on a person under this subsection shall run concurrently* with any other term of imprisonment." (Emphasis added). But Lora was not sentenced under subsection (c). He was sentenced under subsection (j). So the concurrent-sentences bar in subsection (c) should not apply.

The only way to reach the contrary conclusion (that sentences under (j) must be consecutive to others) is through a tortured reading of the text. Here's how the argument runs: Subsection (j) makes it a crime to "cause[ ] the death of a person through the use of a firearm" while carrying a firearm during a drug trafficking crime. 18 U.S.C. § 924(j). Subsection (j) does not, however, explicitly spell out the latter elements of the crime (while carrying a firearm during a drug trafficking crime). Instead, (j) shorthands those elements by referencing subsection (c). So (j) makes it a crime to "cause[ ] the death of a person through the use of a firearm" "in the course of a violation of subsection (c)." *Id.*

This is where the argument goes awry: Because (j) incorporates the elements of (c), then (c)'s bar on concurrent sentences comes along too. But nothing in the text supports that result. Put most simply: a sentence imposed under (j) is not a sentence imposed under (c), so the concurrent-sentences bar does not apply. After all, (c)'s bar specifically says that it applies to sentences "imposed … under *this subsection*," that is subsection (c). *Id.* § 924(c)(1)(D)(ii) (emphasis added). The government has never argued that Lora was charged or convicted under (c). And since subsection (j) is silent on the issue, the default rule of discretion applies.

Even if any textual ambiguity could be contrived, numerous canons of statutory interpretation further weigh in favor of retaining the default rule of judicial discretion. First, interpreting subsection (j) to bar concurrent sentences would violate two clear-statement rules. At common law, judges had discretion to order sentences to run consecutively or concurrently. And the default under federal criminal law has always been judicial discretion at sentencing. To abrogate either—the common law or sentencing discretion—Congress must clearly say so. Whatever ambiguity the government might conjure, subsection (j) certainly does not *clearly* bar concurrent sentences.

Second, importing (c)'s bar into (j) would violate the canon of constitutional avoidance. If subsection (j) is merely a sentencing enhancement to subsection (c), then a person could be convicted under (j) without the key element (a death) being proved to a jury (violating the Sixth Amendment) or even alleged in the indictment (violating the Fifth Amendment).

Third, the rule of lenity mandates that any tie goes to the criminal defendant. Thus, even if the government is able to manufacture doubt as to the meaning of subsection (j), this Court should adopt the less severe interpretation.

One other source reinforces the text: the enactment history of the provisions involved. From the time Congress introduced the bar on concurrent sentences in subsection (c), that bar has always said it was limited to "this subsection." Congress has also specifically called subsection (c) "subsection (c)" when amending that provision, confirming that is what "this subsection" means in (c)(1)(D)(ii). And when Congress enacted subsection (j), Congress explicitly designated (j) as a "new subsection," separate from (c).

Finally, the government has argued that the "purpose" of the statute would be better served by imposing a concurrent-sentences bar on subsection (j) sentences: Since (j) covers a more serious crime than (c), it makes more sense to apply the harsher rule to (j) as well. But purpose cannot override text. And the government's purpose argument falls apart anyway. Lora's interpretation does not *require* judges to impose concurrent sentences; it simply preserves their discretion. Moreover, Lora's interpretation advances the greater goal of individualized sentencing by affording judges the power to tailor sentences to both the defendant and the crimes he committed.

Accordingly, this Court should reverse the court below, enforce the words Congress wrote, and restore to district judges the discretion to impose concurrent or consecutive sentences when defendants are convicted under 18 U.S.C. § 924(j).

OPINION BELOW

The decision of the United States Court of Appeals for the Second Circuit is not reported but is available at 2022 WL 453368 and is reproduced at Pet.App.1a–11a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions (18 U.S.C. §§ 924(c) and 924(j)) are at Pet.App.12a–15a.

STATEMENT

A. Statutory Background.

This case turns on the interpretation of three provisions of federal law. The first is 18 U.S.C. § 3584. It incorporates the common law rule that judges generally have discretion to order that multiple terms of imprisonment run concurrently or consecutively. The provision states that sentences imposed at the same time are to run concurrently "unless the court orders or the statute mandates that the terms are to run consecutively." 18 U.S.C. § 3584(a).

The second provision is 18 U.S.C. § 924(j). It prohibits "caus[ing] the death of a person through the use of a firearm" "in the course of a violation of subsection (c)." *Id.* § 924(j). Subsection (j) does not mention concurrent or consecutive sentencing.

The last provision is 18 U.S.C. § 924(c). The elements of subsection (c), which (j) incorporates, are using or carrying a firearm during or in relation to a crime of violence or drug trafficking crime.

Subsection 924(c) also contains a bar on concurrent sentences at § 924(c)(1)(D)(ii). That provision says that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person." *Id.* § 924(c)(1)(D)(ii).

B. Factual Background.

Petitioner Efrain Lora was a drug trafficker in the Bronx. *United States v. Palmer*, No. 14-CR-0652, 2021 WL 3932027, at *1–2 (S.D.N.Y. Sept. 1, 2021). In 2002, he and his associates, Oscar Palmer and Luis Lopez, conspired to kill a rival drug trafficker, Andrew Balcarran, who had threatened to kill Palmer first. Pet.App.3a. Two other men were also enlisted, Dery Caban and Luis Trujillo. *Id.* Once the plan was set, Trujillo drove Palmer and Caban to Balcarran's home where Palmer and Caban shot and killed Balcarran. *Palmer*, 2021 WL 3932027, at *1–2.

A decade passed with the murder unsolved. *Id.* at *2–3. But eventually federal prosecutors obtained indictments against the group. All five men were indicted under 18 U.S.C. § 924(j) for possessing or using a firearm "during and in relation to, and in furtherance of, a conspiracy to distribute cocaine, and … us[ing] the firearm to cause the death" of a person. *Palmer*, 2021 WL 3932027, at *1. Lora was also charged with drug trafficking conspiracy, 21 U.S.C. §§ 841(b)(1)(A), 846, and causing the intentional killing of Balcarran in furtherance of that conspiracy, *id.* § 848(e)(1)(A). Pet.App.3a–4a; *Palmer*, 2021 WL 3932027, at *4.

C. District Court Proceedings.

A jury found Lora guilty of all three counts. The judge, however, vacated the § 848 charge because there was insufficient proof of the quantity of drugs. Pet.App.4a. When it came to sentencing for the two remaining charges, Lora argued that the court was not required to impose those sentences consecutively, and that Lora should serve them concurrently.

The district court disagreed, stating that § 924(j) required the court to impose "*mandatory consecutive*" sentences. Sentencing Tr. 12:23, 14:23, 15:11, 25:1–2, *United States v. Lora*, No. 14-CR-0652 (S.D.N.Y. Jan. 17, 2020), Dkt. No. 210 (emphasis added). The court thus imposed a 30-year sentence: five years for the § 924(j) charge and 25 years for the other. Pet.App.4a.

Lora's co-defendants pleaded guilty. Caban and Palmer (who killed Balcarran) were sentenced to 10 and 15 years, respectively. Pet.App.3a; *United States v. Palmer*, No. 14-CR-0652 (S.D.N.Y. Sept. 23, 2022), Dkt. Nos. 306, 307. Trujillo (the driver, who also provided the firearms) received 5 years. *United States v. Trujillo*, No. 14-CR-0652 (S.D.N.Y. Jan. 27, 2017), Dkt. No. 160. And Lopez (who recruited Caban) received 10 years. *United States v. Lopez*, No. 14-CR-0652 (S.D.N.Y. Nov. 1, 2016), Dkt. No. 137.

D. The Second Circuit's Decision.

Lora appealed, arguing that the district court was not required to impose consecutive sentences under subsection (j). But the court of appeals affirmed. Pet.App.3a. The Second Circuit explained that Lora's argument was "foreclosed by our case law." Pet.App.11a n.3 (citing *United States v. Barrett*, 937 F.3d 126, 129 n.2 (2d Cir. 2019)).

Through a series of cases, the Second Circuit had held that subsection 924(j) "incorporates the entirety of [subsection 924(c)]," including the bar on consecutive sentences at § 924(c)(1)(D)(ii). *E.g.*, *United States v. Young*, 561 F. App'x 85, 93–94 (2d Cir. 2014); *see also Barrett*, 937 F.3d at 129 n.2 (adopting *Young* in a precedential opinion).

SUMMARY OF ARGUMENT

I. The plain text of the statutory provisions at issue shows that under 18 U.S.C. § 924(j), sentencing judges have discretion to order multiple sentences to run concurrently or consecutively.

A. In federal criminal law, the historical and codified default rule is that the sentencing judge has discretion to order multiple sentences to run concurrently or consecutively. Unless a statute clearly takes that discretion away, the sentencing judge decides, based on all the information specific to the case and to the defendant. 18 U.S.C. § 3584.

This default rule applies to the provision at issue here: 18 U.S.C. § 924(j). That provision says nothing about concurrent versus consecutive sentencing. It simply defines a crime (causing a death with a firearm while committing a drug trafficking crime) and provides penalties. Therefore the default rule applies.

B. Although a different subsection, § 924(c), bars concurrent sentences, that bar does not apply to (j). The bar in subsection (c) explicitly says that it applies only to sentences "imposed … *under this subsection*." *Id.* § 924(c)(1)(D)(ii) (emphasis added). "[T]his subsection" means subsection (c). Definitions, Congressional drafting practice, and statutory context all confirm that.

Moreover, had Congress wanted (c)'s bar extended to (j), it would have said so. Congress could have said "section" instead of "subsection" or specifically referenced "subsection (j)." Congress has used both methods in other provisions but did not do so here. And because Lora was not charged or convicted under subsection (c), its bar does not apply.

C. Subsection 924(j) also does not incorporate subsection (c)'s concurrent-sentences bar. Although (j) does incorporate the factual elements of (c) to define a new crime, that limited incorporation does not sweep in other aspects of (c). Thus expanding (j)'s reference about (c)'s elements to (c)'s sentencing would run roughshod over the presumption that the expression of one thing implies the exclusion of others, the presumption against superfluity, and this Court's precedents that require (j) to be treated as a separate offense from (c). Indeed, there is no principled way to extend (c)'s sentencing provisions in the piecemeal way the government urges.

The plain text thus does not bar concurrent sentences under subsection (j).

II. Even if there were ambiguity over the two provisions' interaction, three interpretive canons confirm Lora's interpretation (that "under this subsection" does not somehow mean "under subsection (j) as well") is correct.

A. Requiring consecutive sentences would violate two clear-statement rules. At common law judges had discretion to order sentences to run consecutively or concurrently, and a statute modifies the common law only when there is a clear statement from Congress. Relatedly, this Court has long explained that courts

will read a statute as restricting judges' sentencing discretion only when a statute clearly requires it. Whatever "textual" arguments the government might deploy, § 924(j) does not *clearly* displace discretion. Thus, judges should have discretion under (j), even if the text is unclear.

B. The canon of constitutional avoidance also supports Lora's interpretation. Some courts have held that subsection (j) is simply a sentencing factor for (c). But reading (j) as a mere sentencing factor would raise serious constitutional issues. That is because the additional facts required to prove an offense under subsection (j) (*i.e.*, a death), would not need to be submitted to a jury or even alleged in the indictment, in clear violation of the Fifth and Sixth Amendments.

For its part, the government has also raised constitutional principles in an attempt to support its reading of § 924(j). Specifically, the government appears to argue that the Double Jeopardy Clause requires treating (c) as not distinct from (j). But the Double Jeopardy Clause does not tell us anything about whether (j) incorporates (c)'s concurrent-sentences bar. Nothing in the Constitution prevents Congress from punishing separately each step of a crime, including the completed transaction. Subsection (j) potentially increases the sentence for a crime when the criminal uses a firearm and causes a death. Thus, punishment for that crime can be applied in addition to punishment for the underlying crime (violating (c)). So Lora's (correct) interpretation does not offend the Double Jeopardy Clause.

C. Finally, in statutory interpretation, the rule of lenity must break any tie in the defendant's favor

(contrary to the government's backwards rule of severity). Here, that means that subsection (j) should not be subject to a bar on concurrent sentences.

III. The enactment history of § 924 confirms that Congress removed concurrent-versus-consecutive sentencing discretion only as to sentences imposed under § 924(c). That provision has always applied only "under" "this subsection." In amending subsection (c), Congress has specifically said it was amending "subsection (c)," confirming that § 924(c) is the relevant subsection when it comes to the bar on concurrent sentences. Moreover, Congress added subsection (j) as a "new subsection" separate and apart from subsection (c), without any mention of concurrent versus consecutive sentencing.

IV. Finally, the government maintains that it would be an anomaly not to apply a concurrent-sentences bar to subsection (j) because subsection (c) is a less egregious offense and has a bar. But statutory interpretation is not about divining Congress's purpose. It is about interpreting Congress's words.

In any event, the government's purposive argument does not work. There is no "anomaly canon" that permits courts to amend statutes to better serve Congress's ostensible purpose. Moreover, Lora's interpretation does not *require* concurrent sentences. It simply means that the district judge retains his or her discretion when it comes to sentencing.

At bottom, if "purpose" is to have any sway here, the Court should adopt Lora's interpretation, which furthers the value of individualized sentencing and preserves the discretion judges have exercised for centuries. This Court should reverse the court below.

ARGUMENT

I. THE PLAIN TEXT CONFIRMS THAT § 924(j) DOES NOT REQUIRE CONSECUTIVE SENTENCES.

"In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). "Where, as here, that examination yields a clear answer, judges must stop." *Id.*

The relevant federal criminal statutes are clear. District judges have discretion to order sentences under § 924(j) to run concurrently *or* consecutively to other sentences. Indeed, discretion to choose concurrent or consecutive sentences is the default rule for all federal criminal statutes (and has been the rule since our Founding). 18 U.S.C. § 3584. Unless a statute says otherwise, judges are free to order multiple sentences to run concurrently or consecutively. *Id.* And the provision at issue here, subsection 924(j), says nothing about whether sentences must run consecutively or concurrently. Thus, the default rule applies and the choice resides with the district judge.

Nonetheless, the government insists that sentences imposed under § 924(j) must be consecutive to other sentences. To find that requirement, the government looks to a separate subsection of § 924: subsection (c). A provision in that subsection says that sentences "imposed … *under this subsection*" must run consecutively to any others. *Id.* § 924(c)(1)(D)(ii) (emphasis added). By its own terms then, that concurrent-sentences bar does not apply to sentences imposed under other subsections, such as (j).

Still, the government insists that subsections (c) and (j) work together to define the crime in (j). That is because (j) makes it a crime to cause a death with a firearm "in the course of a violation of subsection (c)." *Id.* § 924(j). But the text makes clear that (j) is a separate crime from (c). Subsection (j)'s incorporation of the elements of (c) does not mean all the rest of (c) is also incorporated, and numerous textual clues confirm that reading.

Accordingly, "the plain language of [§] 924(j) and [§] 924(c)(1)(D)(ii)" means that consecutive sentencing is not required when it comes to subsection (j). *United States v. Julian*, 633 F.3d 1250, 1253, 1257 (11th Cir. 2011) (Pryor, W., J.).

A. Because § 924(j) is silent on the issue, judges have discretion to impose consecutive or concurrent sentences.

In the Sentencing Reform Act of 1984, Congress made explicit the rule that had prevailed for centuries: "Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively." Pub. L. No. 98-473, 98 Stat. 1837, 2000 (1984) (codified at 18 U.S.C. § 3584(a)); *see also Oregon v. Ice*, 555 U.S. 160, 168 (2009) (tracing the history of the common law rule). In other words, when a criminal statute is silent on whether sentences should run concurrently or consecutively, the choice rests with the sentencing judge—as it has for hundreds of years. 18 U.S.C. § 3584(a) ("If multiple terms of imprisonment are imposed on a defendant at the same time … the terms may run concurrently or consecutively….").

So it is with 18 U.S.C. § 924(j). Subsection (j) says nothing about whether a sentence imposed under that provision must run consecutively with or concurrently to other sentences. The provision simply creates an offense and sets forth the range of potential punishments. Pet.App.15a.

Subsection (j) starts by making it a crime to "cause[ ] the death of a person through the use of a firearm" "in the course of a violation of subsection (c)." 18 U.S.C. § 924(j). Subsection (c) in turn provides the further elements of the crime: "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." So the crime under subsection (j) is causing a death through the use of a firearm while committing a crime of violence or drug trafficking crime.

Subsection (j) then metes out the punishments. If the killing is a murder, the offender is to "be punished by death" or imprisoned. *Id.* § 924(j)(1). And "if the killing is manslaughter" the offender is to be either fined or imprisoned. *Id.* § 924(j)(2).

Unsurprisingly, since subsection (j) is silent on the matter, no one has argued that (j) standing alone bars concurrent sentences. And as this Court has long held, a matter not covered by statutory text is to be treated as not covered (*casus omissus pro omisso habendus est*). "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.). Here, § 924(j) does not say anything about concurrent or consecutive sentencing. That should end the matter. The default discretion rule applies. 18 U.S.C. § 3584.

B. The concurrent-sentences bar in § 924(c) does not apply outside that subsection.

Since subsection (j) standing alone says nothing about multiple sentences, the government is forced to look to another subsection: (c). Subsection (c) provides that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person." 18 U.S.C. § 924(c)(1)(D)(ii). By its own terms, that bar does not apply outside of subsection (c). Had Congress wanted the bar to apply to other subsections, it would have said so. And this Court (unsurprisingly) has consistently read (c)'s bar as limited to sentences under that subsection.

1. Subsection (c)'s bar explicitly says that it applies only to sentences imposed "*under this subsection*." *Id.* (emphasis added). That means subsection (c)—not any other subsection, such as (j).

To begin, the word "this" is a demonstrative adjective, meaning "the … thing … that is present or near in place" or "the more immediately under observation or discussion." *This*, Webster's Third New Int'l Dictionary 2379 (1993). "This" is used to specify the thing at hand, not to sweep in *other* things not specified. Accordingly, in § 924(c)(1)(D)(ii), "this" subsection does not mean "some other" subsection. It means the present subsection or the subsection immediately under discussion (*i.e.*, subsection (c)).

In addition, this Court has made clear that "subsection" refers to a subdivision denoted by a lower-case letter (here, that is "c"). *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60–61 (2004) (capitalization altered).

"Congress ordinarily adheres to a hierarchical scheme in subdividing statutory sections," and the "hierarchy is set forth in drafting manuals prepared by the legislative counsel's offices in the House and the Senate." *Id.* at 60. After "section," those drafting manuals list "subsection[ ]" in the hierarchy, "starting with (a)," followed by "paragraphs," "subparagraphs," and "clauses" denominated by different numerical or alphabetical ordinals like (1), (A), and (i). *Id.* at 60–61; *see also* L. Filson, *The Legislative Drafter's Desk Reference* 222 (1992). And this Court has long treated statutory subsections accordingly. *See, e.g.*, *ICC v. Parker*, 326 U.S. 60, 64 (1945) (treating the text following a lower-case letter and preceding the next lower-case letter as "[t]he entire subsection"). Thus "this subsection" in § 924(c)(1)(D)(ii) must mean subsection (c).

Context reinforces the point. As this Court has said time and again, "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Subsection 924(c) uses the phrase "this subsection" multiple times. And the only way to read that phrase consistently is for it to mean subsection (c), and only subsection (c). *See* 18 U.S.C. § 924(c)(1)(A), (c)(1)(B), (c)(1)(C), (c)(1)(D)(i), (c)(1)(D)(ii), (c)(2), (c)(3), (c)(4), (c)(5).

For example, take (c)(3). It says, "For purposes of this subsection the term 'crime of violence' means…." and then provides a definition. *Id.* § 924(c)(3). But if "this subsection" meant other subsections, that would make no sense. Which subsections?

Moreover, it would make the first five words of § 924(c)(3)'s definition superfluous. Something that should obviously be avoided. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). If "this subsection" meant all subsections, then Congress could have omitted entirely "for purposes of this subsection."

Finally, another subsection related to (c)(3) confirms that "this subsection" means what it says. Subsection (g) of § 924 relates to traveling across state lines to obtain a firearm to commit certain crimes. And it says the crimes covered include "a crime of violence (as defined in subsection (c)(3))." 18 U.S.C. § 924(g)(4). That demonstrates that the use of "this subsection" in (c) must mean only subsection (c); otherwise, § 924(g) would not have needed to incorporate the definition of "crime of violence" with a specific reference to the definition in subsection (c).

2. Had Congress wanted subsection (c)'s bar on concurrent sentences to apply to subsection (j), Congress would have said so. For example, in mandating consecutive sentences for acts of terrorism, Congress said, "[N]or shall the term of imprisonment imposed under this *section* run concurrently with any other term." *Id.* § 2332b(c)(2) (emphasis added). That concurrent-sentences bar therefore reaches beyond just subsection (c) and applies to all offenses in § 2332b. Similar examples abound. *E.g.*, *id.* § 3146(b)(2) ("[a] term of imprisonment imposed under this *section* shall be consecutive" (emphasis added)); *id.* § 1028A(b)(2) (similar).

But when it comes to the bar in § 924(c)(1)(D)(ii), Congress said the bar only applies to sentences imposed under *subsection* (c).

Relatedly, Congress also knows how to state that a bar on concurrent sentences listed in one subsection applies to another. For example, 18 U.S.C. § 1791(b) prohibits prisoners from having contraband. And subsection (b) lays out the various punishments. Then subsection (c) provides that any "punishment imposed under subsection (b) for a violation of this section involving a controlled substance shall be consecutive" to any other sentences for drug offenses. So when it comes to § 924(c)(1)(D)(ii), Congress could have said "any punishment imposed under subsection (j)" must be consecutive. But Congress did not.

Finally, in the section at issue, Congress demonstrated that it knows how to refer to the same subsection, other subsections, and the section overall. Subsection 924(a) says, "Except as otherwise provided in *this subsection*, *subsection* (b), (c), (f), or (p) of this section, or in *section* 929…." (Emphasis added). Congress clearly meant for the words "under this subsection" to have a particular meaning in § 924(c)(1)(D)(ii). Congress did not say "section" or "subsection (j);" instead, Congress said "this subsection"—which must mean only subsection (c).

3. Unsurprisingly given the text of subsection (c), this Court has read (c)'s concurrent-sentences bar as limited to sentences imposed under § 924(c). Soon after it was enacted in its current form, this Court explained, "When Congress enacted § 924(c)'s consecutive-sentencing provision … it cabined the sentencing discretion of district courts in a *single circumstance*: When a defendant *violates § 924(c)*, his sentencing enhancement under that statute must run consecutively to all other prison terms." *United States v. Gonzales*, 520 U.S. 1, 9–10 (1997) (emphasis added).

And most recently, this Court described the concurrent-sentences bar as limited to "the offense described in § 924(c)," a "§ 924(c) conviction," and "§ 924(c) sentences." *Abbott v. United States*, 562 U.S. 8, 12–13, 24–25 (2010); *see Greenlaw v. United States*, 554 U.S. 237, 241 (2008) (similar).

Thus, there is no way to read § 924(c)'s bar as applying to any offenses outside that subsection consistent with this Court's cases.

4. Finally, even the government recognizes that Lora was not convicted under subsection (c). No document relevant to defining Lora's offense (from the indictment to the judgment) indicates that Lora was charged, convicted, or sentenced for violating § 924(c) (*i.e.*, under (c)). It would defy logic, language, and caselaw to hold that an uncharged and unmentioned provision of federal criminal law silently provided the basis for depriving Lora's liberty. *See Stirone v. United States*, 361 U.S. 212, 215 (1960) ("[T]he Fifth Amendment requires that prosecution be begun by indictment."). Indeed, the Sentencing Guidelines explain that the "offense of conviction" is limited to "the offense conduct charged in the count of the indictment or information of which the defendant was convicted." U.S.S.G. § 1B1.2(a). Accordingly, even the government must and does describe Lora's conviction as for a "violation of 18 U.S.C. [§] 924(j)(1)" and his sentence as "on the Section 924(j) count"—not somehow on multiple or combined subsections at once. Cert. Opp'n 1–2.

For all these reasons, Lora's sentence was not "imposed … under" subsection (c).

C. Subsection 924(j) does not incorporate subsection 924(c)'s bar.

Neither subsection (j) nor subsection (c) standing alone bars concurrent sentences when a defendant is convicted of violating subsection (j). But wait. The government maintains that the confluence of the two subsections is the key: "[B]ecause Sections 924(c) and (j) work together to identify the necessary elements, a sentence based on those elements arises 'under' both provisions." Cert. Opp'n 6. The text does not support that bizarre reading. When it comes to subsection (j), all that (c) does is provide the missing elements. It does nothing more.

But before digging too deep, it is worth clarifying what subsection (c) actually says. That is because the government deploys a subtle (but significant) textual substitution. Subsection 924(c)(1)(D)(ii) actually says "*imposed* … under." (Emphasis added). The government swaps "imposed" for "arises." Now, if Congress had said "arises under," the government's argument might be more plausible. One might squint and read the crime in (j) as arising under (c) and (j), since (j) incorporates the elements of (c). But Congress did not say the concurrent-sentences bar applies to any sentences that *arise* under (c). Congress said the bar applies to sentences *imposed* under subsection (c).

1. In any event, it is true that subsection (j) incorporates the factual elements of subsection (c) to define a new crime. 18 U.S.C. § 924(j) ("A person who, *in the course of a violation of subsection (c)*, causes the death of a person through the use of a firearm…." (emphasis added)). But (j) does not incorporate other aspects of (c), such as the bar on concurrent sentences.

Subsection (j)'s only reference to (c) is to shorthand the elements of the crime. In other words, instead of writing out the elements of (c) all over again in subsection (j), Congress referenced them by saying "in the course of violating subsection (c)." But that does not mean that the limitations or punishments listed in (c) also apply to (j). As this Court has repeatedly held, the expression of one thing implies the exclusion of others (*expressio unius est exclusion alterius*). *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980). Here, § 924(j) only incorporates the *elements* of a subsection (c) offense: "A person who, in the course of a *violation* of subsection (c), causes the death of a person through the use of a firearm, shall…." (Emphasis added). The sentencing provisions of (c), including the concurrent-sentences bar, have nothing to do with whether someone violates subsection (c). So subsection (j) does not incorporate the sentencing aspects of subsection (c); it only incorporates the elements that make violating (c) a crime.

A simple analogy confirms this reading. Imagine you go to a restaurant and open the menu. At the top, it says that entrées come with a side. Then, in the appetizer section, the menu lists various salads, such as a Caesar salad, and says, "No sides come with appetizers." In the entrée section, there are various delights, along with a note that says, "Chicken can be added to an appetizer salad to make it an entree." If you order a chicken Caesar salad, you expect to also receive a side because you have ordered under the entrée section, not the appetizer section. And you expect a side despite the fact that the salad is initially defined in the appetizer section of the menu.

Here, a subsection (c) offense is like the appetizer salad: it comes with a restriction against concurrent sentencing (or a restriction against side dishes). A subsection (j) offense is like the entrée salad: it is defined, in part, by reference to the appetizer salad, but it does not come with a restriction against concurrent sentencing (or a restriction against side dishes).

2. Moreover, reading subsection (j) to incorporate (c)'s concurrent-sentences bar renders another provision of the statute superfluous. *See TRW Inc.*, 534 U.S. at 31. Subsection (c)(5)(B) prescribes the punishment for criminals who use armor-piercing ammunition in relation to a crime of violence or drug trafficking crime and cause death. And since (c)(5)(B) is "under" subsection (c), the concurrent-sentences bar must apply. But if the bar also applied to (j), there would be no difference between (c)(5)(B) and (j). That is because someone who uses armor-piercing ammunition in a crime of violence or drug trafficking crime and causes death ((c)(5)(B)) also causes a death while carrying a gun during a crime of violence or drug trafficking crime ((j)). So there would be no difference between the two provisions as to that factual element if the concurrent-sentences bar applied to both. To avoid this superfluity, the concurrent-sentences bar must be limited to sentences imposed under (c).

It is true that the government has argued that all of (c)(5) would not be superfluous under its interpretation because that provision sets forth specific facts about the use of armor-piercing ammunition that are missing from (j) and prescribes a different mandatory minimum sentence (for crimes that do not result in death). *See* Cert. Opp'n 8.

But that is not responsive. Lora's point is not that *all* of subsection (c)(5) would be superfluous, rather that *subparagraph (B)* of that subsection would be. Subparagraph (B) makes it a crime to cause a death while using armor-piercing ammunition and it imposes the same penalties as subsection (j). 18 U.S.C. § 924(c)(5)(B). Since any crime where "death results from the use of [armor piercing] ammunition," *id.*, is also a crime that "causes the death of a person through the use of a firearm," *id.* § 924(j), the *only* practical difference between (c)(5)(B) and (j) is that the former bars concurrent sentences and the latter does not. *Julian*, 633 F.3d at 1255–56. Apply the concurrent-sentences bar to subsection (j) and the two provisions reach precisely the same result.

Said another way, under the government's interpretation, if a criminal kills someone using armor-piercing ammunition during a drug crime, it does not matter whether he is convicted of violating (c)(5)(B) or (j); they impose precisely the same penalties with precisely the same concurrent-sentences bar. *Id.* The government's interpretation of subsection (j) thus renders § 924(c)(5)(B) redundant. And such an interpretation should be avoided if possible. *TRW Inc.*, 534 U.S. at 31.

3. Finally, some courts have concluded that § 924(j) does not establish a crime that is distinct from (c), but merely describes sentencing factors or enhancements. This Court's decisions in *Castillo* and *Alleyne* dispense with that argument. *See Castillo v. United States*, 530 U.S. 120 (2000); *Alleyne v. United States*, 570 U.S. 99, 100, 115 (2013).

Castillo interpreted the provision that is now at § 924(c)(1)(B)(ii). It provides punishments for those who use machineguns in the course of violating subsection (c). *Castillo* concluded that using a machinegun was a distinct crime (not just a sentence enhancement) for several reasons. First, Congress included both the elements and the penalty provision for the use of a machinegun "in a single sentence, not broken up with dashes or separated into subsections." *Castillo*, 530 U.S. at 125. Second, "[t]raditional sentencing factors often involve either characteristics of the offender … or special features of the manner in which a basic crime was carried out." *Id.* at 126. But the use of a machinegun is not a "special feature[ ] of the manner" in which an offense is committed because "the difference between carrying ... a pistol and carrying a machinegun ... is great, both in degree and kind." *Id.* Third, the length of the additional mandatory minimum sentence for using a machinegun—25 years—suggested that Congress intended the use of a machinegun to be an element, not a sentencing factor. *Id.* at 131.

Subsection 924(j) has the same trademarks of being a distinct crime. Like the provision in *Castillo*, subsection (j) itself defines the offense and has subparts that define the punishments. Further, homicide is not a "special feature" of the way § 924(c) is violated; it is a new type of crime (manslaughter or murder). *See Julian*, 633 F.3d at 1254. And there is obviously a large difference between using a firearm without any physical harm and using a firearm to commit a homicide. Finally, like the provision in *Castillo*, § 924(j) significantly increases the potential sentence—from a term of years to death.

But even if subsection (j) did not have these hallmarks, subsection (j) would be a separate crime under *Alleyne*. There, this Court held that any fact that aggravates the potential punishment for a crime must be submitted to a jury. *Alleyne*, 570 U.S. at 99. That fact creates a distinct crime under federal law. The Court explained, "the core crime and the fact" that triggers a harsher sentence "together constitute a new, aggravated crime, each element of which must be submitted to the jury." *Id.* at 113. Thus, because subsection (j) adds an element (a death) to the crime defined in subsection (c) (using a firearm during a drug trafficking crime), and provides for aggravated punishments (including the death penalty), subsection (j) must be a separate, distinct crime under *Alleyne*. *See also Apprendi v. New Jersey*, 530 U.S. 466, 492 (2000) (holding that a fact that increases maximum sentence is an element of the crime).

Thus, under *Castillo* and *Alleyne*, subsection (j) is its own, distinct crime. The concurrent-sentences bar from subsection (c) should therefore not apply to (j).

* * *

At every turn, the text proves that the concurrent-sentences bar in subsection 924(c) does not apply to sentences imposed under subsection 924(j). That bar applies only when a sentence is imposed "under" (c). While subsection (j) incorporates the elements of (c), (j) does not incorporate anything else. Instead, subsection (j) is silent on whether multiple sentences should run concurrently or consecutively. Thus, the default rule of judicial discretion applies. And because the text is plain on this issue, the Court should stop there. *Food Mktg. Inst.*, 139 S. Ct. at 2364.

II. INTERPRETATIVE CANONS REINFORCE THE PLAIN TEXT.

This case should start and end with the words Congress wrote. But even if one found ambiguity in the statute, at least three interpretive canons favor Lora's interpretation.

A. There is no clear statement that sentencing discretion is eliminated under § 924(j).

Interpreting § 924(j) to bar concurrent sentences would violate two forms of the clear-statement canon.

First, as this Court has held, statutes should not be interpreted as changing the common law unless they clearly do so. *See, e.g.*, *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304 (1959); *see also* Antonin Scalia & Brian Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012).

Congress did not clearly change the common law when it comes to § 924(j). "The historical record demonstrates that" at common law the decision "to impose sentences consecutively or concurrently" rests with "the judge." *Ice*, 555 U.S. at 168 (citing 1 J. Bishop, *Criminal Law* § 636, at 649–50 (2d ed. 1858)); A. Campbell, *Law of Sentencing* § 9:22 (Sept. 2022 update) (It is "[f]irmly rooted in common law" that "the selection of either concurrent or consecutive sentences rests within the discretion of sentencing judges."). This was the rule in England before we were a Nation. *E.g.*, *King v. Wilkes*, 19 How. St. Tr. 1075, 1132–36 (1770). The early American States adopted the rule. *E.g.*, *Russell v. Commonwealth*, 7 Serg. & Rawle 489, 490 (Pa. 1822). And Congress enshrined the rule in the U.S. Code. 18 U.S.C. § 3584.

Thus, if a statute is to be read as abrogating the common law rule of sentencing discretion, that abrogation must be clearly stated in the text.

Second, and relatedly, this Court has explained that rescinding judicial discretion in sentencing is not lightly presumed. This Court has repeatedly recognized the value of sentencing discretion. The American approach to sentencing (that "the punishment should fit the offender and not merely the crime") depends on a sentencing judge's consideration of the "fullest information possible" and the full range of authorized punishments. *Williams v. People of State of N.Y.*, 337 U.S. 241, 247 (1949); *Lockett v. Ohio*, 438 U.S. 586, 602 (1978) (plurality opinion) ("[T]he concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country."). Such discretion "has been uniform and constant in the federal judicial tradition." *Koon v. United States*, 518 U.S. 81, 113 (1996); *see In re De Bara*, 179 U.S. 316, 321–22 (1900). And it has been consistent specifically regarding concurrent versus consecutive sentencing. *Setser v. United States*, 566 U.S. 231, 236 (2012). Safeguarding sentencing discretion has become "one of the most powerful and pervasive doctrines in the law of sentencing." A. Campbell, *Law of Sentencing* § 9:3.

To that end, where one interpretation of a statute would "limit[ ] the sentencing court's discretion," courts "will not assume Congress to have intended such a departure from well-established doctrine without a clear expression to disavow it." *Dorszynski v. United States*, 418 U.S. 424, 441 (1974); *see also Kimbrough v. United States*, 552 U.S. 85, 103 (2007).

Accordingly, both the presumption against changes to the common law as well as the presumption that Congress does not lightly withdraw sentencing discretion resolve any ambiguity over whether concurrent sentences are barred under § 924(j). Whatever the government can cobble together when it comes to the text of subsections (c) and (j), no one can seriously maintain that it is *clear* that concurrent sentences are barred under subsection (j). Thus, reading such a bar into (j) would effect a change in the common law and curtail judges' sentencing discretion, where Congress has not expressly said that. The Court should not do that here.

B. Constitutional concerns favor not importing a concurrent-sentences bar to § 924(j).

1. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter." *U.S. ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909). Here, conflating subsections (c) and (j) would raise serious constitutional issues.

Some courts have held that subsection (j) is simply a sentencing enhancement or factor for (c). *United States v. Dinwiddie*, 618 F.3d 821, 837 (8th Cir. 2010). As already explained, the text does not support that reading. The subsections clearly define separate offenses. *See supra* Part I.C.3. Indeed, subsection (c) lists a number of sentencing enhancements. So if that is what subsection (j) is, why did Congress not just include (j) as a part of (c)?

Nonetheless, reading subsection (j) as a mere sentencing factor would raise serious constitutional issues. That is because the additional facts required to prove an offense under (j) (*i.e.*, a death), would not need to be submitted to a jury or even alleged in the indictment. So a defendant who committed a drug trafficking crime with a firearm could be convicted by a jury of violating subsection (c)—which should at most carry a life sentence. But at sentencing, a judge could impose the death penalty if the judge—and the judge alone—found that a murder occurred. That cannot be correct in light of this Court's holding that a fact that increases the maximum potential penalty for a crime is an element of an offense, and must be found by a jury (as required by the Sixth Amendment) and alleged in the indictment (as required by the Fifth Amendment). *See Alleyne*, 570 U.S. at 100, 115; *Hamling v. United States*, 418 U.S. 87, 117 (1974).

2. For its part, the government also raises "[c]onstitutional principles" in an attempt to support its reading of § 924(j). Cert. Opp'n 6. Specifically, the government appears to argue that the Double Jeopardy Clause requires treating subsection (c) as not distinct from (j). But the Double Jeopardy Clause does not tell us anything about whether (j) incorporates (c)'s concurrent-sentences bar.

The Double Jeopardy Clause affords three protections. "[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977).

The relevant protection here is the one against multiple punishments for the same offense. "In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Ohio v. Johnson*, 467 U.S. 493, 499 (1984). "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction." *Garrett v. United States*, 471 U.S. 773, 779 (1985). As this Court has explained, "[b]ecause the substantive power to prescribe crimes and determine punishments is vested with the legislature, the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent." *Johnson*, 467 U.S. at 499.

So for double-jeopardy purposes, the question is whether Congress intended for subsection (j) to be cumulative punishment—that is, additional punishment to that provided for in subsection (c). The answer is yes. Subsection (j) "potentially increases the sentence for a crime when the criminal uses a firearm." *Julian*, 633 F.3d at 1256–57. And subsection (c) says explicitly that a sentence under that subsection shall be "in addition to" any other sentence. 18 U.S.C. § 924(c)(1)(A). Thus, Congress made clear that a defendant could be convicted and sentenced under (c) and (j) at the same time. Those cumulative punishments therefore do not violate the Double Jeopardy Clause. *Julian*, 633 F.3d at 1256–57.

It is true that this Court has held that after a person is tried for a crime, that person cannot be tried again for a greater offense. *See Garrett*, 471 U.S. at 778–86. And the test for whether a crime is a greater offense is whether each of the crimes (the lesser and greater) have an element that the other one does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The government appears to argue that because subsection (c) does not require proof of a different element from (j), the *Blockburger* test shows that the two crimes are not distinct.

But again, the Double Jeopardy Clause does not forbid Congress from imposing cumulative punishments for violating (c) and (j). And if the government were to obtain a conviction for violating subsection (j) and then, afterward try the defendant for violating subsection (c), the Double Jeopardy Clause would simply mean that the defendant would receive credit for his time already served. "[W]here a defendant is retried following conviction, the Clause's third protection ensures that after a subsequent conviction a defendant receives credit for time already served." *Johnson*, 467 U.S. at 499. Thus, the Double Jeopardy Clause says nothing relevant here.

C. The rule of lenity weighs against barring concurrent sentences under § 924(j).

Finally, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971). This rule of lenity extends "not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

Therefore, to the extent that the government tries to conjure up textual ambiguity to support its interpretation, the rule of lenity weighs against the harsh, mandatory extension of already significant prison sentences imposed under subsection (j). *See Simpson v. United States*, 435 U.S. 6, 14 (1978) (applying the rule to disallow stacking a § 924(c) sentence "upon a sentence already enhanced under § 2113(d)"), *superseded by statute as recognized in Gonzales*, 520 U.S. at 10; *id.* at 15–16 (describing the Court's "reluctance to increase or multiply punishments absent a clear and definite legislative directive").

III. THE STATUTE'S ENACTMENT HISTORY CONFIRMS THAT REVERSAL IS REQUIRED.

The history of § 924 also confirms what the plain text says: subsection (c)'s concurrent-sentences bar does not apply to sentences under (j). *See Abbott*, 562 U.S. at 15–18 (tracing history of § 924(c)).

Subsection 924(c) was originally enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1223–24. And it did not address concurrent versus consecutive sentencing. Then in 1971, Congress added the following language to subsection (c): "nor shall the term of imprisonment imposed *under this subsection* run concurrently with any other term of imprisonment…." Pub. L. No. 91-644, 84 Stat. 1880, 1889–90 (1971) (emphasis added). The "under this subsection" language has remained unchanged since then.

Subsequent developments confirm that the concurrent-sentences bar applies only to sentences under subsection (c).

For example, in 1984, Congress amended other language in subsection (c) and in doing so it explicitly stated: "*Subsection (c)* of section 924 of title 18 '18 USC 924' is amended to read as follows…." Pub. L. No. 98-473, 98 Stat. 1837 (1984) (emphasis added). Thus, Congress amended subsection (c) by explicitly calling it "subsection (c)," showing that the phrase "under this subsection" means subsection (c).

Then, in 1994, Congress added what is now subsection (j). In doing so, Congress stated, "Section 924 of title 18, United States Code … is amended by adding at the end the following *new subsection*…." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat 1796 (emphasis added). Congress explicitly chose *not* to locate the new provision under subsection (c) but to create a "new," separate "subsection." *Id.*

Finally, the current version of § 924(c) came about in 1998, when Congress reformulated the entire subsection and "transferred the bar on concurrent sentences to § 924(c)(1)(D)(ii)." *Abbott*, 562 U.S. at 18; *see* Pub. L. No. 105-386, 112 Stat. 3469 (1998). When transferring the bar, Congress did not broaden the bar's application. Instead, Congress maintained the "under this subsection" language. In addition, Congress did not merge subsection (j) into (c), even though Congress could have, especially considering Congress was doing some major bodywork on § 924(c).

Since its inception, the concurrent-sentences bar has remained limited to sentences imposed under subsection (c). And Congress has repeatedly indicated that the bar does not apply outside subsection (c). The enactment history thus confirms what the text says.

IV. THE GOVERNMENT'S "PURPOSE" ARGUMENT FAILS.

The government does not have a textual hook to hang its hat on, so it turns to what the government believes is the purpose of the statute. That has been the driving force behind why some courts concluded that concurrent sentences must be barred under § 924(j). *E.g.*, *Young*, 561 F. App'x at 93. Indeed, the Third Circuit candidly admitted that it rejected the statute's "literal" reading in favor of its "purpose." *United States v. Berrios*, 676 F.3d 118, 141–42 (3d Cir. 2012) (choosing to pursue the statute's "raison d'etre").

The government's basic premise is that that § 924(j) offenders should be treated as harshly as § 924(c) offenders. Put another way, it doesn't make sense to give a subsection (j) defendant a "break" as to consecutive sentencing when their offense is worse than a subsection (c) offense. This argument is unpersuasive for numerous reasons.

A. Statutory construction does not turn on what Congress should have done.

Fundamentally, statutory construction is not about divining and realizing Congress's intent. *Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) ("The question … is not what Congress 'would have wanted' but what Congress enacted."). Nor is it about enforcing a court's own view of what would be most rational. As this Court has made clear, "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27 (1933).

Accordingly, even if a court thinks it is better to extend § 924(c)(1)(D)(ii) to cover other subsections, that view cannot prevail over the text. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam).

Indeed, this Court has previously rejected the government's invitation to enforce what the government views as § 924's purpose. *Busic v. United States*, 446 U.S. 398, 408–09 (1980) (rejecting an interpretation of § 924(c) that was based on the "assumption that … Congress' sole objective was to increase the penalties … to the maximum extent possible"), *superseded on other grounds by statute as recognized in Abbott*, 562 U.S. at 23; *see also United States v. Smith*, 756 F.3d 1179, 1191 (10th Cir. 2014) (Gorsuch, J.) (rejecting the government's "sort of rule-of-severity interpretive canon," whereby the government suggested courts "should opt for the more severe option to effect (presumed) congressional intent" in § 924(c)). The Court should do so again here.

B. The "anomaly" of discretion under § 924(j) proves nothing.

Nonetheless, the government says that if concurrent sentences are not barred under § 924(j), that would be "an anomaly, under which the lesser-included offense set forth in [§] 924(c) would require a consecutive sentence, but additional proof of homicide would eliminate that requirement." Cert. Opp'n 7.

But there is no "anomaly canon" that permits courts to amend laws to better serve Congress's ostensible purpose. For something that "may seem odd … is not absurd," *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005), and Congress "may well" accept "anomalies" when fashioning uniform rules of general applicability, *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 414 n.13 (2010).

Moreover, Lora's interpretation does not *require* concurrent sentences under subsection (j). Rather, his interpretation honors the default of discretion that Congress codified in no uncertain terms. 18 U.S.C. § 3584. So a district judge is still free to order subsection (j) sentences consecutively to others. Relatedly, concurrent versus consecutive sentencing is irrelevant to the most severe punishment § 924(j) authorizes: death. Indeed, the heading in the bill that added subsection (j) suggests that this was Congress's focus: "Death Penalty for Gun Murders During Federal Crimes of Violence and Drug Trafficking Crimes." Pub. L. No. 103-322, § 60013, 108 Stat. 1796, 1973 (1994) (capitalization altered); *see Julian*, 633 F.3d at 1256 (citing death penalty as "[t]he main point of [§] 924(j)").

And the distinction between consecutive and concurrent sentencing often will have little practical relevance to the other available punishment (imprisonment for up to life) because of the sheer length of those sentences. Thus, only where the harshest punishments available under (j) are *not* imposed would this purposive argument have any currency. But in those circumstances, harsher punishments would still be available under the statute.

Moreover, Lora's interpretation is still consistent with the purpose the government ascribes to Congress: providing harsher consequences for more serious crimes. Subsection (j)'s focus is on homicides committed with firearms during a crime of violence or drug trafficking crime. And there is a hierarchy of punishments for those crimes (taking into account subsection (c)'s bar on concurrent sentencing).

- Subsection (c)(1) provides the baseline punishment for using a firearm during a crime of violence or drug trafficking crime: 5 years imprisonment that must run consecutive to other sentences.
- Subsection (j) provides enhanced punishments for committing a homicide with a firearm during a crime of violence or drug trafficking crime: up to life imprisonment or even the death penalty.
- Subsection (c)(5)(B) provides even further enhanced penalties for committing a homicide with armor-piercing ammunition during a crime of violence or drug trafficking crime: a term of imprisonment (up to life) that runs consecutive to any other sentences or the death penalty.

As discussed above, this interpretation gives effect to both subsections (j) and (c)(5)(B). *See supra* I.C.2. This interpretation also makes sense because subsection (c)(5)(B) was enacted in 2005, years after subsection (c)'s current consecutive-sentences bar and subsection (j). *See* Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005). But in any event, the text of the provisions at issue makes clear that consecutive sentences are not required under subsection (j).

Finally, if any purpose should drive the interpretation of sentencing statutes, it is that judicial discretion is a guiding principle. That is because our system treats each defendant as an individual when it comes to sentencing. "[T]he concept of individualized sentencing in criminal cases … has long been accepted in this country." *Lockett*, 438 U.S. at 602 (plurality opinion). As the government itself has recognized, "[f]or generations, legislatures have relied on individual judicial judgment to balance case-specific equities in order to impose a fair sentence." Reply Brief for U.S. at 12, *Beckles v. United States*, 137 S. Ct. 886 (2017) (No. 15-8544).

That discretion can significantly affect how long a defendant sits in prison. This case is just one example. Lora's co-defendants were sentenced to between 5 and 15 years for their crimes. But Lora faces 30 years because the district judge felt compelled to order the subsection (j) sentence (5 years) to run consecutively to the sentence for drug conspiracy (25 years). Pet.App.3a–4a. Had the judge followed the default rule, however, Lora could have been sentenced to only 25 years in prison, which would be more in line with the punishment of his co-defendants. (In fact, he may have faced far fewer years in prison, since there was no mandatory minimum for the drug trafficking conspiracy charge, 21 U.S.C. § 841(b)(1)(C).)

Since our Founding, the choice of whether to impose concurrent or consecutive sentences has (absent legislative intervention) rested with the judge. And for good reason. Sometimes the offender or the offenses warrant harsher punishment (such as consecutive sentences). Other times the offender and the offenses do not warrant that harsher treatment.

To ensure that individuals are treated as such, the choice should typically rest with the judge. Guided by that principle, this Court should hold that 18 U.S.C. § 924(j) leaves the important decision of whether to order multiple sentences to run concurrently or consecutively to the sentencing judge's discretion.

CONCLUSION

The judgment of the court of appeals should be reversed.

January 20, 2023

Respectfully submitted,

ANNE MARIE LOFASO
WEST VIRGINIA
UNIVERSITY
COLLEGE OF LAW
U.S. SUPREME COURT
LITIGATION CLINIC
101 Law Center Dr.
Morgantown, WV 26506

DAVID J. WILLIAMS
GRAVEL & SHEA
76 St. Paul Street
Burlington, VT 05401

LAWRENCE D. ROSENBERG
Counsel of Record
ANDREW J.M. BENTZ
CHARLES E.T. ROBERTS
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
ldrosenberg@jonesday.com

Counsel for Petitioner