No. 22-49

In the Supreme Court of the United States

EFRAIN LORA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant whose violation of 18 U.S.C. 924(c) encompasses a homicide, and who is therefore charged and convicted of violating 18 U.S.C. 924(j), remains subject to the consecutive-sentencing provision in 18 U.S.C. 924(c)(1)(D)(ii).

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-11a) is not yet reported but is available at 2022 WL 453368.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2022. On May 9, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including July 15, 2022, and the petition was filed on that date. The petition for a writ of certiorari was granted on December 9, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1)(A) of Title 18 of the United States Code provides in pertinent part:

* * *

[A]ny 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, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years.

18 U.S.C. 924(c)(1)(A).

Section 924(c)(1)(D)(ii) provides in pertinent part:

Notwithstanding any other provision of law—

* * *

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

18 U.S.C. 924(c)(1)(D)(ii).

Section 924(j) provides in pertinent part:

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—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

> (2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

18 U.S.C. 924(j).

The full text of the relevant statutory provisions is reprinted in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of aiding and abetting the use of a firearm during and in relation to a drug trafficking crime causing death to another by murder, in violation of 18 U.S.C. 924(j)(1) and 2, and conspiring to distribute cocaine and cocaine base, in violation of 21 U.S.C. 846. Judgment 1-2; see Superseding Indictment 1-3. The district court sentenced petitioner to 25 years of imprisonment on the conspiracy count and a consecutive term of five years of imprisonment on the firearm count, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-11a.

1. Petitioner and three co-conspirators—Luis Trujillo, Oscar Palmer, and Luis Lopez—trafficked cocaine and cocaine base in the Bronx. Pet. App. 3a. Petitioner was the "leader of [the] drug crew." 12/18/19 Sent. Tr. (Sent. Tr.) 11.

On August 11, 2002, petitioner and his co-conspirators decided to murder Andrew Balcarran, a rival drug dealer, over a dispute about drug territory. No. 14-CR-652, 2021 WL 3932027, at *1; Pet. App. 3a. While petitioner waited in a car just behind them, petitioner's co-conspirators enlisted Lopez's cousin, Dery Caban, to assist with the murder. Pet. App. 3a, 9a-10a.

On the day of the murder, the group went to Trujillo's apartment to pick up guns. Pet. App. 3a. Trujillo, Palmer, and Caban took the guns and drove away. *Ibid.* Petitioner, who was in a separate car with Lopez, acted as a scout and called the others to let them know that Balcarran was standing in front of his house. *Ibid.*; see *id.* at 10a; Sent. Tr. 7-8. The others then drove to Balcarran's house, where Palmer and Caban each shot Balcarran, killing him. Pet. App. 3a, 10a.

Balcarran's murder went unsolved for more than a decade. 2021 WL 3932027, at *2. "After a brief interlude, [petitioner] picked up his drug-dealing" at the same "location and continued to deal drugs there over the next 13 years." Sent. Tr. 23; see *id.* at 27.

2. In 2014, a grand jury in the Southern District of New York returned an indictment against Trujillo, Palmer, and Caban relating to Balcarran's murder. 2021 WL 3932027, at *1, *3. The following year, a grand jury returned a superseding indictment adding petitioner and Lopez as defendants. *Id.* at *3.

The superseding indictment charged petitioner with aiding and abetting the use of a firearm, during and in relation to a drug trafficking crime, that caused death to another, "which killing is murder," in violation of 18 U.S.C. 924(j)(1) and 2; aiding and abetting the intentional killing of a person while engaged in a drug trafficking conspiracy, in violation of 21 U.S.C. 848(e)(1)(A) and 18 U.S.C. 2; and conspiring to distribute five kilograms or more of cocaine and 280 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1), 21 U.S.C. 841(b)(1)(A) (2012), and 21 U.S.C. 846. Superseding Indictment 1-3.

Each of petitioner's co-defendants pleaded guilty to either a Section 924(j) count or a drug offense. Pet. Br. 6; see 2021 WL 3932027, at *3-*4. Following a one-week

trial, a jury found petitioner guilty on all three counts in the superseding indictment. Pet. App. 4a. The district court concluded, however, that the evidence of drug quantity was insufficient, vacated the Section 848(e)(1)(A) count in its entirety, and vacated the drug-quantity finding for the Section 841 conspiracy count. *Ibid.*; see 21 U.S.C. 848(e)(1)(A) (cross-referencing 21 U.S.C. 841(b)(1)(A) (2000), which requires a certain minimum quantity of cocaine). The court left the rest of the verdict undisturbed. Pet. App. 4a.

3. In advance of sentencing, the Probation Office prepared a presentence report, in which it determined that the advisory Guidelines sentence for petitioner's conspiracy count should be 30 years of imprisonment, and his sentence for the Section 924(j) violation should be a minimum of ten years of imprisonment and a maximum of life, "to be served consecutively to any other term of imprisonment" pursuant to Sections 924(c) and (j). Presentence Investigation Report (PSR) ¶ 86; see PSR ¶ 87.

a. Section 924(c)(1)(A) provides that "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, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime" receive a sentence of "not less than 5 years." 18 U.S.C. 924(c)(1)(A)(i). The statutory minimum becomes seven years if the firearm is brandished, 18 U.S.C. 924(c)(1)(A)(ii), and ten years if it is discharged, 18 U.S.C. 924(c)(1)(A)(ii) and (iii).

Because Section 924(c) specifies no maximum sentence, it authorizes a sentence up to life imprisonment. See *Alleyne* v. *United States*, 570 U.S. 99, 116-117 (2013); *United States* v. *Dorsey*, 677 F.3d 944, 956-957 (9th Cir. 2012) (collecting cases), cert. denied, 570 U.S. 919 (2013).

Section 924(c)(1)(D)(ii) specifies 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, including any term of imprisonment imposed for the crime of violence or drug trafficking crime" underlying the Section 924(c) violation. 18 U.S.C. 924(c)(1)(D)(ii).

Section 924(j) provides that if a defendant, "in the course of a violation of subsection (c), causes the death of a person through the use of a firearm," he "shall * * * be punished by death or by imprisonment for any term of years or for life" if "the killing is a murder," 18 U.S.C. 924(j)(1), or "be punished as provided" in 18 U.S.C. 1112 if "the killing is manslaughter," 18 U.S.C. 924(j)(2).

b. Petitioner objected to the Probation Office's application of the statutory-minimum and consecutive-sentencing regime set forth in Section 924(c). D. Ct. Doc. 204, at 18-21 (Dec. 13, 2019). The district court rejected petitioner's objection, citing *United States* v. *Barrett*, 937 F.3d 126 (2d Cir. 2019), which recognized that a defendant found guilty of homicide during the course of violating Section 924(c), in violation of Section 924(j), remains subject to Section 924(c)'s penalty enhancements and "consecutive sentencing mandate," *id.* at 129 n.2. See Sent. Tr. 12-13. The court determined, however, that the statutory minimum in this case should be five years, rather than ten, because the jury had not been asked to find that the gun was discharged. *Id.* at 13.

The district court imposed a below-Guidelines sentence of 25 years for petitioner's conspiracy conviction, and a consecutive five-year sentence for the firearm conviction. Sent. Tr. 24-25, 29; see Judgment 3.

4. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-11a. As relevant here, the

court observed in a footnote that petitioner had "briefly argue[d]" that Section 924(j) "did not require the district court to impose a consecutive sentence." *Id.* at 11a n.3. The court rejected that argument, observing that it was contrary to circuit precedent. *Ibid.* (citing *Barrett*, 937 F.3d at 129 n.2).

SUMMARY OF ARGUMENT

A defendant convicted of violating 18 U.S.C. 924(j)—causing death in the course of violating Section 924(c)—remains subject to the consecutive-sentencing mandate that Section 924(c)(1)(D)(ii) applies to all Section 924(c) violations. Petitioner's attempt to read a loophole into Section 924(j), in a counterintuitive effort to obtain lesser sentences for defendants whose Section 924(c) violations include homicides, is unsound as a legal matter and implausible as a practical one.

A. The statutory text plainly demonstrates that Section 924(c)'s consecutive-sentencing requirement applies to petitioner's conviction for violating Section 924(j). Section 924(j)(1) defines an aggravated version of the Section 924(c) offense when, "*in the course of a violation of subsection (c)*," a defendant "causes the death of a person through the use of a firearm," and the "killing" constitutes "murder." 18 U.S.C. 924(j)(1) (emphasis added). A defendant convicted of violating Section 924(j)(1) thus has necessarily violated Section 924(c) as well.

Sections 924(c) and (j) accordingly work together to prescribe the defendant's punishment. Section 924(c) provides a statutory-minimum term of years for the firearm crime, while Section 924(j)(1) authorizes the court to impose the death penalty or extended "imprisonment for any term of years or for life" to specifically reflect the murder. 18 U.S.C. 924(j)(1). Whatever

sentence the court determines is appropriate for violating Section 924(j)—and, by definition, simultaneously violating Section 924(c)—that sentence is "imposed * * * under" both Sections 924(c) and (j), thereby triggering Section 924(c)(1)(D)(ii)'s mandate that terms of imprisonment "imposed * * * under this subsection" run consecutively to any other. 18 U.S.C. 924(c)(1)(D)(ii).

The structure of Section 924 confirms the point. Section 924(j)'s reference to Section 924(c) incorporates that subsection as a whole. And because the greater offense in Section 924(j) incorporates by reference the lesser offense in Section 924(c), other provisions in Section 924(c), such as the definitions of its terms, must likewise be understood to apply when the Section 924(c) offense includes a homicide. Petitioner's contrary view impermissibly reads statutory provisions in isolation and would have anomalous consequences—including that Congress would have mandated consecutive sentences for defendants convicted of violating Section 924(c), *except* where the defendant is also guilty of the greater homicide offense in Section 924(j).

This Court's decisions further support applying Section 924(c)(1)(D)(ii)'s consecutive-sentencing mandate to convictions for violating Section 924(j). Although the Court has never addressed the question presented here, it has observed that Section 924(c)(1)(D)(ii) requires a consecutive sentence for *all* defendants who violate Section 924(c). A defendant convicted of violating Section 924(j) has by definition done so.

B. Constitutional principles reinforce the lower courts' application of Section 924(c)(1)(D)(ii). On petitioner's view, a defendant could be separately punished under each of Sections 924(c) and (j). But under the test set forth in *Blockburger* v. *United States*, 284 U.S. 299

(1932), Sections 924(c) and (j) are presumptively the "same offence" for purposes of the Double Jeopardy Clause's prohibition on multiple punishments, U.S. Const. Amend. V, because Section 924(j)'s elements are a superset of Section 924(c)'s. And nothing indicates a legislative intent that they nevertheless allow for two independent punishments.

The government has thus long recognized that it either should not charge the same conduct as violations of both Sections 924(c) and (j), or should merge two such charges for sentencing purposes. Petitioner's contrary contention is self-defeating. If a defendant could be separately punished for violating Sections 924(c) and (j), such a dual punishment would, even on petitioner's view, include Section 924(c)(1)(D)(ii)'s consecutive-sentencing mandate. Indeed, his approach could in fact yield *longer* overall terms of imprisonment.

C. The design and history of Section 924 confirm that the consecutive-sentencing requirement applies where a defendant causes death during a Section 924(c) violation, thereby violating Section 924(j). Congress enacted Section 924(j) to ensure an aggravated penalty for an aggravated form of the basic Section 924(c) offense. In that context, it is implausible that Congress intended for a mandatory consecutive sentence when a defendant uses a firearm in a crime of violence or drug trafficking crime, but for concurrent sentences to be possible when the defendant's crime *also* results in a firearm-related death.

D. Petitioner's remaining arguments lack merit. Contrary to his suggestion (Br. 25-26), no clear-statement rule applies in this case. The default rule that sentences may run concurrently or consecutively expressly gives way when "the statute mandates that the

terms are to run consecutively." 18 U.S.C. 3584(a). That is precisely what Section 924(c)(1)(D)(ii) does. The question here is simply the scope of its consecutive-sentencing requirement. And the ordinary tools of statutory construction demonstrate that the requirement applies equally to sentences for violations of Section 924(c) that also include homicides, in violation of Section 924(j).

Petitioner's invocation (Br. 21-22) of the canon against surplusage is likewise misplaced. Petitioner relies on Section 924(c)(5), which targets different conduct—the use of armor piercing ammunition—and requires a statutory-minimum 15-year term of imprisonment that Section 924(j) itself does not. Nor does the rule of lenity apply. Once the text, structure, history, and purpose of Sections 924(c) and (j) are considered, no ambiguity—much less a grievous ambiguity—remains. And the purposes of the rule of lenity would be ill-served by a decision in petitioner's favor: a defendant cannot reasonably claim unfair surprise when his sentence for committing homicide during a Section 924(c) offense is subject to the same consecutive-sentencing requirement as the lesser-included Section 924(c) offense.

ARGUMENT

THE CONSECUTIVE-SENTENCING MANDATE IN 18 U.S.C. 924(c)(1)(D)(ii) APPLIES TO PETITIONER'S CONVICTION FOR A SECTION 924(c) VIOLATION THAT INCLUDED MURDER

Petitioner was convicted of violating 18 U.S.C. 924(j), which sets forth an aggravated version of the offense established in Section 924(c). Specifically at issue here is Section 924(j)(1), which provides that 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 * * * if the killing is a murder * * * be punished by death or by imprisonment for any term of years or for life." 18 U.S.C. 924(j)(1) (emphasis added). Text, structure, constitutional principles, and statutory design all demonstrate that when a defendant is sentenced for a violation of Section 924(j)(1)—which is inherently also a violation of Section 924(c)—the sentence is imposed under both provisions, and the consecutive-sentencing mandate in Section 924(c)(1)(D)(ii) therefore applies. Petitioner's attempt to find a special exception from the mandate for the most culpable Section 924(c) violations—those that include murder—is fundamentally mistaken.

A. The Text And Structure Of Section 924 Demonstrate That Section 924(c)(1)(D)(ii)'s Consecutive-Sentencing Requirement Applies To Violations Of The Greater Offense In Section 924(j)

1. Section 924(c)(1)(D)(ii)'s consecutive-sentencing mandate directly applies when the offense is aggravated by murder pursuant to Section 924(j)(1)

a. By its plain terms, Section 924(j) defines an aggravated version of the crime specified in Section 924(c). It explicitly specifies that

> 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—
>
> (1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and
>
> (2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

18 U.S.C. 924(j) (emphasis added).

Section 924(c) defines a base offense for "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," 18 U.S.C. 924(c)(1)(A), with Sections 924(c)(2) and (3) defining "'drug trafficking crime'" and "'crime of violence'" for "purposes of this subsection." 18 U.S.C. 924(c)(2) and (3). And the statute directs that any such person "shall, in addition to the punishment provided for such crime of violence or drug trafficking crime," be sentenced to a term of imprisonment of at least five years, with greater statutory-minimum penalties if the firearm is brandished or discharged. 18 U.S.C. 924(c)(1)(A).

It is thus undisputed that Sections 924(c) and (j) work together to define the crime that petitioner committed. See Pet. Br. 13. Petitioner was convicted of violating Section 924(j)(1), which required the government to prove that his conduct satisfied the requirements in Section 924(c)—including the commission of a crime of violence or drug-trafficking crime—*and* that a person was murdered in the course of petitioner's Section 924(c) violation. See, *e.g.*, D. Ct. Doc. 107, at 32-36 (June 23, 2016) (jury instructions). Like every defendant convicted of violating Section 924(j), petitioner necessarily also committed the lesser-included offense in Section 924(c). See pp. 22-26, *infra.*

b. That observation resolves this case. Because petitioner violated Section 924(c)—the base offense—he was subject to punishment under that provision, including its statutory-minimum terms of imprisonment. See pp. 15-16, *infra*. At the same time, because petitioner's offense conduct satisfied the additional requirements of

Section 924(j)(1), he was also subject to the punishment specified in that provision, which is either capital punishment or "imprisonment for any term of years or for life." 18 U.S.C. 924(j)(1). Petitioner's sentence thus was imposed "'under'"—that is, "'pursuant to' or 'by reason of the authority of'"—both Sections 924(c) and (j). *National Ass'n of Mfrs.* v. *Department of Def.*, 138 S. Ct. 617, 630 (quoting *Kucana* v. *Holder*, 558 U.S. 233, 245 (2010), and *St. Louis Fuel & Supply Co.* v. *FERC*, 890 F.2d 446, 450 (D.C. Cir. 1989) (opinion of R. B. Ginsburg, J.)). It is therefore subject to the consecutive-sentencing mandate in Section 924(c)(1)(D)(ii).

The punishment provisions of Sections 924(c) and 924(j)(1) work in tandem, rather than at odds with one another. For the base Section 924(c) offense, the defendant is subject to a statutory-minimum term of years of imprisonment. See 18 U.S.C. 924(c)(1)(A). That "term of imprisonment" is "imposed on" the defendant "under this subsection"—*i.e.*, under Section 924(c)—and therefore cannot "run concurrently with any other term of imprisonment imposed on" the defendant. 18 U.S.C. 924(c)(1)(D)(ii).

Section 924(j)(1) then *further* specifies that if murder with a firearm occurs during "the course of a violation of subsection (c)," the defendant "shall * * * be punished by death or by imprisonment for any term of years or for life." 18 U.S.C. 924(j)(1). One effect of that provision is to authorize a capital sentence. Another is to require that the punishment for the greater offense reflects not only the firearm crime, but also the murder committed in the course of it, which might not directly be addressed by any other federal statute.

Although federal law prescribes a punishment for murder, it is limited to murder "[w]ithin the special

maritime and territorial jurisdiction of the United States." 18 U.S.C. 1111(b). Section 924(j) expands the scope of federal homicide liability to homicides that occur in the course of a Section 924(c) offense, which itself must be predicated on a felony crime of violence or drug trafficking crime that "may be prosecuted in a court of the United States." 18 U.S.C. 924(c)(1)(A).

Congress's judgment that the total term of imprisonment should reflect culpability both for the firearm-related conduct and for the murder does not exempt the defendant from the application of Section 924(c)(1)(D)(ii)'s mandate for consecutive sentencing. Instead, in non-capital cases, it requires the sentencing judge to ensure that the sentence comports with Section 924(c) *and* punishes the defendant for the murder. In some cases the judge may determine that the term of imprisonment that it would impose for the base Section 924(c) crime is in itself sufficient to encompass the firearm-related conduct and the homicide conduct. Cf. Sentencing Guidelines § 1B1.3 (requiring consideration of all related conduct). In other cases, the court may determine that some extension of that term is necessary in light of the homicide.

The consecutive-sentencing mandate applies either way. In the first alternative, the judge has imposed a sentence "under" Section 924(c) that adequately covers the full scope of the defendant's culpability. 18 U.S.C. 924(c)(1)(D)(ii). In the second alternative, the judge has imposed a sentence reflecting both the base Section 924(c) offense and the "imprisonment" for the murder as specified in Section 924(j)(1). That combined term is imposed "under"—"pursuant to or by reason of the authority of"—both provisions. See p. 13, *supra*. It therefore may not "run concurrently with any other term of

imprisonment," 18 U.S.C. 924(c)(1)(D)(ii). See, *e.g.*, *United States* v. *Berrios*, 676 F.3d 118, 143 (3d Cir. 2012) (sentence for violating Section 924(j) is subject to the consecutive-sentencing requirement because Sections 924(c) and (j) "jointly provide the legal basis for the sentence"), cert. denied, 568 U.S. 1143 (2013).[1]

2. The structural relationship between Sections 924(c) and (j) reinforces the applicability of Section 924(c)(1)(D)(ii)'s consecutive-sentencing requirement

a. The structure of Sections 924(c) and (j) underscores that understanding. By providing an aggravated offense where a defendant causes the death of another through the use of a firearm "in the course of a violation of subsection (c)," 18 U.S.C. 924(j), Congress incorporated Section 924(c) *as a whole* into Section 924(j). "It takes no special insight or leap of logic to conclude that the central reason for Congress's choice of language in writing subsection (j)—'[in] the course of a violation of subsection (c)'—was to ensure that separating out subsection (j) from subsection (c) did not deprive the law of a coherent sentencing scheme." *Berrios*, 676 F.3d at

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[1] Although not at issue here, the aggravated offense specified in 18 U.S.C. 924(j)(2) works similarly. Section 924(j)(2) requires that a manslaughter in the course of a Section 924(c) offense "be punished as provided in" Section 1112. *Ibid.* The punishment provided in Section 1112 (which would otherwise be limited to manslaughter "[w]ithin the special maritime and territorial jurisdiction of the United States") is zero to eight years for involuntary manslaughter and zero to 15 years for voluntary manslaughter. 18 U.S.C. 1112(b). If the Section 924(c) term of imprisonment were not already sufficient to cover the manslaughter, a judge would be required to extend the defendant's term of imprisonment to cover the full scope of the defendant's statutory culpability.

141; see, *e.g.*, *United States* v. *Bran*, 776 F.3d 276, 280-282 (4th Cir. 2015), cert. denied, 577 U.S. 1068 (2016).

That coherent scheme includes all of Section 924(c)'s sentencing provisions. For example, the basic statutory-minimum penalties in Section 924(c)(1)(A) apply to "any person who" commits the conduct that it describes, as do the increased mandatory penalties in Sections 924(c)(1)(B) and (C) that apply to a "a violation of this subsection"—*i.e.*, Section 924(c). 18 U.S.C. 924(c)(1)(A), (B), and (C). And "a violation of subsection (c)" is an explicit component of the aggravated Section 924(j) offense. 18 U.S.C. 924(j). Petitioner thus does not now dispute that the statutory-minimum penalties apply to the greater offense in Section 924(j). But see C.A. App. 414 (petitioner making that argument below).

By similar logic, the consecutive-sentencing mandate in Section 924(c)(1)(D)(ii) also applies to violations of Section 924(j). Once again, a violation of Section 924(j) necessarily includes a violation of Section 924(c). And it would make little sense for Congress to have imposed only *part* of Section 924(c)'s sentencing scheme on defendants who commit homicide in the course of violating that provision. Petitioner's contrary view would have the extraordinary implication that Congress required a statutory-minimum, consecutive sentence for the lesser-included offense set forth in Section 924(c), but eliminated the consecutive-sentencing requirement where additional proof of a homicide makes the defendant guilty of the greater offense in Section 924(j).

Petitioner errs in characterizing (Br. 15-16) the government as arguing that the phrase "'this subsection'" in Section 924(c)(1)(D)(ii) means "all subsections." The government agrees that it is a reference to Section 924(c). But because Section 924(j) explicitly subsumes

and creates an aggravated form of the crime described in Section 924(c), the sentence for a Section 924(j) violation must accord with both provisions. Thus, while Section 924(j) "standing alone" does not "bar[] concurrent sentences," Pet. Br. 13, Section 924(c) does, and Section 924(j) "incorporates § 924(c) by reference without disclaiming the cumulative punishment scheme which is so clearly set out in § 924(c)." *United States* v. *Allen*, 247 F.3d 741, 769 (8th Cir. 2001), vacated and remanded on other grounds, 536 U.S. 953 (2002), cert. denied, 539 U.S. 916 (2003); accord *United States* v. *Young*, 561 Fed. Appx. 85, 93 (2d Cir.), cert. denied, 574 U.S. 945 (2014).

b. This Court normally interprets statutes in a manner that will "harmonize and give meaningful effect to all of the provisions." *New Process Steel, L. P.* v. *NLRB*, 560 U.S. 674, 680 (2010); see, *e.g.*, *Beecham* v. *United States*, 511 U.S. 368, 372 (1994) ("The plain meaning that [this Court] seek[s] to discern is the plain meaning of the whole statute, not of isolated sentences."); *Smith* v. *United States*, 508 U.S. 223, 233 (1993) (explaining that "'[s]tatutory construction . . . is a holistic endeavor'" and that "[j]ust as a single word cannot be read in isolation nor can a single provision of a statute") (quoting *United Savings Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)). Here the text not only allows, but requires, that a sentencing court give effect to both Sections 924(c) and (j) in sentencing a defendant for violating the latter provision—and thus necessarily violating the former as well.

A blinkered view of Section 924(j), divorced from Section 924(c), would be untenable both with respect to punishment and in other ways. For example, Sections 924(c)(2) and (3) define "drug trafficking crime" and

"crime of violence," respectively, "[f]or purposes of this subsection." 18 U.S.C. 924(c)(2) and (3). Yet even petitioner does not contend that those definitional provisions are irrelevant to Section 924(j). Instead, because proving a violation of Section 924(j) always requires proving a violation of Section 924(c), the definitional provisions in Sections 924(c)(2) and (3) necessarily apply. The same is true of 924(c)(1)(D)(ii)'s consecutive-sentencing mandate.

c. Petitioner attempts to skirt the normal rules of statutory interpretation by suggesting (Br. 19-21) that only the "factual elements" of Section 924(c) are incorporated into Section 924(j). But nothing in Section 924(j) itself supports that gerrymandered construction. Instead, "[a]bsent persuasive indications to the contrary," this Court "presume[s] Congress says what it means and means what it says." *Simmons* v. *Himmelreich*, 578 U.S. 621, 627 (2016). And here, a "violation of subsection (c)," 18 U.S.C. 924(j) is just that: a violation of subsection (c). A homicide in the course of such a violation is therefore not only a violation of Section 924(j), but also a violation of Section 924(c).

Petitioner's reliance (Br. 20) on the *expressio unius* canon is thus misplaced. Congress did not simply cross-reference particular pieces of a Section 924(c) violation; it required a complete "violation of subsection (c)," 18 U.S.C. 924(j). And "once Congress * * * clearly stated an intention to stack punishments as it did in [S]ection 924(c)," it did not need to "reiterate that intent in any subsequent statutes that fall within the previously defined class," *i.e.*, that incorporate Section 924(c) violations. *Berrios*, 676 F.3d at 141 (brackets and citation omitted). Section 924(j) is just such a statute.

d. Nothing suggests that Section 924(j)'s cross-reference to Section 924(c) should be deprived of its natural implications. A "this subsection" proviso was a logical way for Congress to specify the scope of particular portions of Section 924(c). In its entirety, Section 924 comprises 16 subsections, some of which address topics wholly distinct from Section 924(c). See, *e.g.*, 18 U.S.C. 924(e) (punishment for certain violations of the Armed Career Criminal Act of 1984) (ACCA); 18 U.S.C. 924(*l*) (punishment for certain firearms theft); 18 U.S.C. 924(m) (similar). Petitioner accordingly errs in suggesting that Congress should have referred to "this section" rather than "this subsection." Pet. Br. 16 (citations and emphases omitted).

Even if Congress could have adopted an alternative formulation proposed by petitioner (see Br. 16-17), nothing required it to do so. As this Court has explained, even if "'Congress could have drafted * * * with more precision,'" that is true "of many (even most) statutes," and the Court "ha[s] routinely construed statutes to have a particular meaning even as [it] acknowledged that Congress could have expressed itself more clearly." *Luna Torres* v. *Lynch*, 578 U.S. 452, 472 (2016) (citation omitted). Congress was entitled to, and did, adopt a straightforward scheme in which other subsections of Section 924 incorporate subsection (c) either in part, see, *e.g.*, 18 U.S.C. 924(g)(4) (incorporating only the "crime of violence" definition), or in whole—as Section 924(j) does by requiring "a violation of subsection (c)."

Congress's decision to cross-reference Section 924(c) in Section 924(j) was sufficient to bring along Section 924(c)'s punishment provisions. As this Court has previously explained, citing Section 924(j)(1), "there is

nothing unusual about Congress prescribing" penalties in one provision "for substantive offenses codified in other provisions." *Abbott* v. *United States*, 562 U.S. 8, 27 (2010) (citation omitted). By the same token, there is nothing unusual or impermissible about Congress incorporating a consecutive-sentencing mandate in one provision to individuals who commit an aggravated form of the offense codified in a different provision. Instead, the opposite approach would be surprising. The text and structure here, however, contain no hint of surprise.

3. This Court's decisions support applying Section 924(c)(1)(D)(ii)'s consecutive-sentencing requirement to convictions for violating Section 924(j)

Although this Court has never decided the question presented here, its decisions provide yet further support for the applicability of Section 924(c)(1)(D)(ii)'s consecutive-sentencing mandate to sentences for violating Section 924(j). But see Pet. Br. 17-18.

For example, in *Greenlaw* v. *United States*, 554 U.S. 237 (2008), this Court observed that "*[a]ny sentence for violating* § 924(c) * * * must run consecutively to 'any other term of imprisonment.'" *Id.* at 241 (emphasis added; citation omitted). Similarly, in *Abbott* v. *United States*, this Court pointed out that Section 924(c) "reiterate[s] three times" its "command[] that *all* § 924(c) offenders shall receive additional punishment for their violation of that provision." 562 U.S. at 25 (emphasis added). And in *United States* v. *Gonzales*, 520 U.S. 1 (1997), the Court stated that "[w]hen a defendant *violates § 924(c),* his sentencing enhancement under that statute must run consecutively to all other prison terms." *Id.* at 9-10 (emphasis added).

Those descriptions plainly encompass petitioner's Section 924(j)(1) violation. Section 924(j) is not simply an attempt or conspiracy offense, applicable to a range of substantive crimes, some of which include a particular punishment and some of which do not. See *Bifulco* v. *United States*, 447 U.S. 381, 390 (1980) (declining to view a sentence for such an inchoate offense as "imposed under" one of the substantive provisions) (cited at Pet. Br. 30). Instead, a conviction for violating Section 924(j) always requires proof beyond a reasonable doubt of "a violation of subsection (c)." 18 U.S.C. 924(j). A sentence imposed for such a conviction is thus a "term of imprisonment imposed * * * under" Section 924(c) that may not "run concurrently with any other term of imprisonment imposed on" the defendant. 18 U.S.C. 924(c)(1)(D)(ii).[2]

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[2] Petitioner notes that in *Gonzales*, the Court referred to Section 924(c) as "cabin[ing] the sentencing discretion of district courts in a *single circumstance*." Pet. Br. 17 (quoting *Gonzales*, 520 U.S. at 9) (emphasis added by petitioner). But the Court there was actually just *emphasizing* the effect of Section 924(c)(1)(D)(ii)'s consecutive-sentencing mandate, by distinguishing it from district courts' "discretion under the Sentencing Guidelines * * * in cases where related offenses are prosecuted in multiple proceedings, to establish sentences with an eye toward having such punishments approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time." *Gonzales*, 520 U.S. at 9 (citation and internal quotation marks omitted). It was not distinguishing Section 924(c) offenses that do not include a homicide from those that do, and thus are subject to Section 924(j).

B. Double-Jeopardy Principles Support Applying Section 924(c)(1)(D)(ii)'s Consecutive-Sentencing Mandate To Sentences Imposed For Violating Section 924(j)

This Court's double-jeopardy jurisprudence likewise counsels in favor of the natural understanding of Section 924(j) as an aggravated form of the Section 924(c) offense that is subject to the consecutive-sentencing provision. The logical consequence of petitioner's contrary view would be that Section 924(j) sets forth a separate crime, such that murder or manslaughter "in the course of a violation of" Section 924(c), 18 U.S.C. 924(j), can result in independent conviction and punishment under *each* subsection. But that makes neither doctrinal nor practical sense. Instead, Section 924(j) is exactly what the text says it is—an aggravated form of the Section 924(c) offense that is the "same" for double-jeopardy purposes.

1. One of the protections provided by the Double Jeopardy Clause is a protection against "multiple punishments for the same offense." *Ohio* v. *Johnson*, 467 U.S. 493, 498 (1984) (quoting *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977)). That protection "prevent[s] the sentencing court from prescribing greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983); see, *e.g.*, *Garrett* v. *United States*, 471 U.S. 773, 778-786 (1985).

The principal "canon of statutory construction" employed to determine the legislature's intended punishment scheme is the "*Blockburger* rule," *Garrett*, 471 U.S. at 779, under which two offenses are presumptively "distinct" (and thus not the "same") if and only if "'each statute requires proof of an additional fact which the other does not.'" *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932) (citation omitted). The legislature

may "specifically authorize[] cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' [offense] under *Blockburger*." *Hunter*, 459 U.S. at 368-369; see, *e.g.*, *Garrett*, 471 U.S. at 779. But the absence of a distinction under *Blockburger* creates a "presumption" that Congress intended only one conviction and one punishment. *Garrett*, 471 U.S. at 779.

That presumption applies with full force here, because Sections 924(c) and (j) do not have distinct elements. Section 924(j) "requires proof of a fact"—a firearm-related death—"which [Section 924(c)] does not." *Blockburger*, 284 U.S. at 304. But Section 924(c) does not require proof of any element that Section 924(j) does not also require. And far from rebutting the resulting presumption, the express linkage between the two provisions, and the absence of any opposing indicators, show that Congress has not authorized separate convictions and punishments based on Sections 924(c) and (j) for a single homicide "in the course of a violation of subsection (c)."

Unlike Section 924(c) itself, which allows for multiple convictions and punishments by expressly stating that the punishment it specifies will be "in addition to the punishment provided for [the underlying] crime of violence or drug trafficking crime," 18 U.S.C. 924(c)(1)(A), Section 924(j) is written like a standard aggravated form of a lesser-included offense. See *Brown*, 432 U.S. at 168 (explaining that a "greater offense is * * * by definition the 'same' for purposes of double jeopardy as any lesser offense included in it"). Section 924(j) expressly incorporates subsection (c), requiring a "violation of subsection (c)," plus a homicide in the course of it. Cf. *Garrett*, 471 U.S. at 779, 781 (relying on, *inter*

alia, the absence of a "reference to other statutory offenses" in finding that "the *Blockburger* presumption must * * * yield").

All that Section 924(j) does is to specify additional facts that, if proved beyond a reasonable doubt, aggravate the punishments available for the Section 924(c) offense—specifying, for example, that an offense involving murder is subject to capital punishment, and ensuring that the defendant's term of imprisonment accounts for the homicide. See pp. 12-15, *supra*. Accordingly, "[S]ection 924(j) amounts to the 'same offense' as [S]ection 924(c) for purposes of the Double Jeopardy Clause." *United States* v. *Gonzales*, 841 F.3d 339, 356 (5th Cir. 2016) (noting and agreeing with government's concession that double-stacking of punishments under Sections 924(c) and (j) is impermissible), cert. denied, 137 S. Ct. 1234, and 137 S. Ct. 1237 (2017).

2. Precisely because Section 924(c) merely identifies homicide-related crimes that constitute a particularly severe subset of Section 924(c) offenses, the government's longstanding position has been that a defendant may not be sentenced to cumulative punishments for Section 924(c) and (j) offenses arising out of the same conduct. See *United States* v. *Palacios*, 982 F.3d 920, 925 (4th Cir. 2020) ("[I]n a number of cases before appellate courts since at least 2014, the Government has argued or conceded[] that the imposition of punishments" for convictions under both Section 924(c) and (j) "would violate the Double Jeopardy Clause."), cert. denied, 141 S. Ct. 2826 (2021).[3] In cases where a jury has

[3] Although the issue is not presented in this case, a defendant may be charged, convicted, and cumulatively punished for separate Section 924(j) violations based on separate killings committed in the course of a single Section 924(c) offense. See, *e.g.*, *United States* v.

found guilt for both offenses, the government seeks dismissal of one count, or merger of the two counts, before the imposition of judgment. See, *e.g.*, *Gonzales*, 841 F.3d at 355.

Where, as here, the government brings only a 924(j) charge, it may request a lesser-included-offense instruction on Section 924(c) under Federal Rule of Criminal Procedure 31(c). That is because, "as a matter of law," an indictment charging a defendant with a violation of Section 924(j) "also" charges him "with the lesser-included offense of using a firearm during a federal crime of violence [or drug trafficking crime] in violation [of] 18 U.S.C. § 924(c)(1)(A)." *United States* v. *Jiménez-Torres*, 435 F.3d 3, 10 (1st Cir. 2006).

Petitioner's observation (Br. 18) that his indictment and judgment do not reference Section 924(c), see Pet. Br. 2, is therefore irrelevant. While the government could have referenced both provisions in a single count in the indictment, see, *e.g.*, *Berrios*, 676 F.3d at 143 n.18, nothing required it to do so. Either way, a term of imprisonment is "imposed * * * under" Section 924(c), 18 U.S.C. 924(c)(1)(D)(ii), because a Section 924(c) violation is inherent in the Section 924(j) charge and conviction.

3. Petitioner cannot dispute that a homicide in the course of a Section 924(c) violation is presumptively an aggravated form of a single offense under *Blockburger*. But he nevertheless contends (Br. 29) that Congress intended "that a defendant could be convicted and sentenced under (c) and (j) at the same time." That view—

Curtis, 324 F.3d 501, 507-509 (7th Cir.), cert. denied, 540 U.S. 998 (2003). The unit of prosecution in a Section 924(j) case is the homicide, not the Section 924(c) violation.

which could expose defendants to greater sentences—is insupportable.

Petitioner's only offer of a foothold in the text (or design or history) of the statute is his assertion that Section 924(c) "says explicitly that a sentence under that subsection [*i.e.*, Section 924(c)] shall be 'in addition to' any other sentence," including a wholly separate sentence under Section 924(j). Pet. Br. 29 (citation omitted). But that is not what Section 924(c) says. It instead says that the punishment specified for a Section 924(c) violation is "in addition to the punishment provided *for such crime of violence or drug trafficking crime*." 18 U.S.C. 924(c)(1)(A) (emphasis added).

The text thereby makes clear that a violation of Section 924(c) is not the same offense for punishment purposes as the predicate crime, even though *Blockburger* would presumptively classify it as such. That explicit distinction as to the predicate crime not only fails to encompass Section 924(j), as petitioner countertextually suggests, but places the absence of a similar clause for Section 924(j) in stark relief. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted). Section 924(j) simply incorporates "a violation of Section 924(c)" wholesale, without any multiple-punishment qualifier. The statutory text thus makes clear that a defendant may be punished for either a Section 924(c) offense or a Section 924(j) offense, but not both. See, *e.g.*, *Gonzales*, 841 F.3d at 356-358.

4. Even beyond its lack of textual (or other) support, petitioner's view is self-defeating. If a defendant could be independently punished for both a Section 924(c) and a Section 924(j) violation for the same conduct, the terms of imprisonment necessarily would be consecutive, because Section 924(c)(1)(D)(ii) forecloses "run[ning]" its term of imprisonment "concurrently with any other term of imprisonment imposed." 18 U.S.C. 924(c)(1)(D)(ii).

That could result in a *harsher* total sentence. Giving effect to the aggravated-offense design of Section 924(j) allows for the requirement that a defendant "shall * * * be punished by * * * imprisonment for any term of years or for life" for a murder in the course of a Section 924(c) violation, 18 U.S.C. 924(j)(1), to be satisfied (as it was in this case) by the term of imprisonment for the incorporated Section 924(c) offense. But if the offenses were distinct for purposes of conviction and punishment, the sentencing judge would be required ("shall") to impose a distinct term of imprisonment for violating Section 924(j), to which the independent term of imprisonment for violating Section 924(c) would have to be consecutive.

Nor has petitioner identified any practical reason why Congress would have intended for Sections 924(c) and (j) to operate independently. On petitioner's view, the government could elect to charge only a Section 924(j) offense, without an accompanying (or inherent) Section 924(c) charge. But all that would do is to give the government unilateral authority to avoid the punishment that Congress has specified for the incorporated "violation of subsection (c)." 18 U.S.C. 924(j). Petitioner's view also would create the possibility that a jury might find guilt of the Section 924(j) offense, but

not an accompanying Section 924(c) charge. Although such an inconsistent verdict would be constitutionally permissible, see *United States* v. *Powell*, 469 U.S. 57 (1984), there is no reason to think that Congress would invite it.

5. Finally, petitioner errs in suggesting that other "constitutional concerns" counsel against applying the consecutive-sentencing mandate to Section 924(j) convictions. Pet. Br. 27 (capitalization and emphasis omitted). Specifically, petitioner contends that "reading subsection (j) as a mere sentencing factor would raise serious constitutional issues" under the Sixth Amendment 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." *Id.* at 28; see *Alleyne* v. *United States*, 570 U.S. 99, 107-108 (2013). But as the government explained in response to the petition for a writ of certiorari, despite earlier confusion, "[t]here is [now] no dispute that the circumstances that can lead to the enhanced punishment specified by Section 924(j) must be proved beyond a reasonable doubt"—they are not "mere sentencing factors" that can be decided by a judge. Br. in Opp. 8; see Gov't C.A. Supp. Br. at 8-12, *United States* v. *Melgar-Cabrera*, No. 16-2018 (10th Cir. Apr. 16, 2018). The natural and sensible understanding of Section 924(j) as an aggravated form of the Section 924(c) offense therefore raises no Sixth Amendment problem.

C. The Statute's History And Design Support Applying The Consecutive-Sentencing Mandate To Violations Of Section 924(j)

The history and design of Sections 924(c) and (j) provide yet further support for the application of Section 924(c)(1)(D)(ii)'s consecutive-sentencing provision to

Section 924(j) violations. Section 924(j) was enacted against the backdrop of Section 924(c)'s already-existing consecutive-sentencing mandate, and it was designed to ensure that defendants who cause death in the course of violating Section 924(c) receive a sentence that reflects both the homicide and the firearm aspects of their crimes. Nothing indicates that in crafting that greater offense—which includes the possibility of the death penalty—Congress intended to render the consecutive-sentencing mandate inapplicable.

1. As this Court has explained, Section 924(c)'s "longstanding thrust" is "its insistence that sentencing judges impose *additional* punishment for § 924(c) violations." *Abbott*, 562 U.S. at 20. When originally enacted in 1968, Section 924(c) did not mandate consecutive sentences, instead simply providing that a person who "uses a firearm to commit" a federal felony or "carries a firearm unlawfully" during the commission of a federal felony "shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years." Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1214-1226. But just two years later, Congress amended Section 924(c) to require consecutive sentences, adding the language "nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of [the federal] felony." Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 13, 84 Stat. 1889-1890.

The statute has included the consecutive-sentencing requirement for more than 50 years. Post-1971 revisions left the consecutive-sentencing requirement substantively unchanged, while strengthening the provision by, *inter alia*, increasing the statutory terms of

imprisonment. See Crime Control Act of 1990, Pub. L. No. 101-647, § 1101(1), 104 Stat. 4829; Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, Tit. VI, Subtit. N, § 6460, 102 Stat. 4373-4374; Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2), 100 Stat. 456-457.

What is now Section 924(j) was enacted as part of the Federal Death Penalty Act of 1994, Pub. L. No. 103-322, Tit. VI, § 60013, 108 Stat. 1973.[4] As today, the provision stated that "[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, if the killing constitutes murder, be "punished by death or by imprisonment for any term of years or for life"; and, if the killing constitutes manslaughter, "be punished as provided" in Section 1112. *Ibid.* The relevant section was entitled "Death Penalty For Gun Murders During Federal Crimes of Violence and Drug Trafficking Crimes," *ibid.* (capitalization and emphasis omitted), reflecting Section 924(j)'s role as an aggravated form of the Section 924(c) offense. It is implausible that Congress intended the new provision to dispense with the longstanding consecutive-sentencing requirement that applies to other, less serious, Section 924(c) violations.

The structure of Section 924(c) at the time confirms the point. When Congress enacted what is now Section 924(j), the consecutive-sentencing requirement of Section 924(c) was contained in the same paragraph as the substantive elements of a Section 924(c) violation. See 18 U.S.C. 924(c)(1) (1988). It was thus particularly clear that by cross-referencing Section 924(c) in the new

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[4] The provision was originally enacted as subsection (i), and later redesignated as subsection (j). See Economic Espionage Act of 1996, Pub. L. No. 104-294, § 603(r), 110 Stat. 3505.

enactment, Congress intended to incorporate Section 924(c) as a whole—not to incorporate only some of Section 924(c)(1)'s words or phrases into the new provision while jettisoning the consecutive-sentencing mandate.[5]

2. As described above, see p. 16, *supra*, a contrary reading would lead to results Congress could not have intended. It is "highly 'unlikely that Congress, which clearly intended to impose additional cumulative punishments for using firearms during violent crimes in cases where no murder occurs, would turn around and not intend to impose cumulative punishments" or statutory-minimum terms "in cases where there are actual murder victims." *Berrios*, 676 F.3d at 141 (quoting *United States* v. *Battle*, 289 F.3d 661, 668 (10th Cir.), cert. denied, 537 U.S. 856 (2002), overruled on other grounds by *United States* v. *Melgan-Cabrera*, 892 F.3d 1053 (10th Cir. 2018), cert. denied, 139 S. Ct. 494 (2018)).

Petitioner would have this Court overlook those extreme—and highly improbable—results on the theory that Congress "'may well' accept 'anomalies'" and that the ones produced by his view of the statute are textually required. Pet. Br. 35 (citation omitted); see *id.* at 33-34. But as already discussed, the text of the statute as a whole refutes petitioner's approach. See pp. 11-15, *supra*. And even if some doubt remained, this Court has previously declined to embrace similar Section 924(c) "anomalies," and should do the same here.

In *Abbott*, the Court construed Section 924(c)'s "except" clause, which states that a minimum term of five

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[5] The consecutive-sentencing mandate was separated out into subsection (c)(1)(D)(ii) in 1998, as part of a more general reorganization of Section 924(c). See 18 U.S.C. 924(c)(1)(D) (Supp. IV 1998); Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469-3470.

years applies "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. 924(c)(1)(A). The defendants in that case contended that "[i]f conviction on a different count yields a mandatory sentence exceeding five years, * * * the statutory requirement is satisfied and the penalty specified for the § 924(c) violation becomes inoperative." *Abbott*, 562 U.S. at 12. The Court rejected that contention.

The Court instead held that a Section 924(c) defendant is "subject to the highest mandatory minimum specified for his conduct in § 924(c), unless another provision of law directed to conduct proscribed by § 924(c) imposes an even greater mandatory minimum." *Abbott*, 562 U.S. at 13. The Court explained that the defendants' "proposed readings * * * would result in sentencing anomalies Congress surely did not intend," including that "the worst offenders would often secure the shortest sentences." *Id.* at 21.

Furthermore, as previously noted, see p. 20, *supra*, *Abbott* emphasized that Section 924(c) "reiterate[s] three times" its "command[] that all § 924(c) offenders shall receive additional punishment for their violation of that provision." 562 U.S. at 25. First, Section 924(c) requires that its punishment be imposed "in addition to" the penalty for the predicate offense. *Ibid.* (citation omitted). "Second, * * * § 924(c) demands a discrete punishment even if the crime itself 'provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.'" *Ibid.* (quoting 18 U.S.C. 924(c)(1)(A)). And third, the consecutive-sentencing mandate "rules out the possibility that a § 924(c) sentence might 'run concurrently with any other term of imprisonment.'" *Ibid.* (quoting 18 U.S.C.

924(c)(1)(D)(ii)). In that context, the Court "doubt[ed] that Congress, having retained this thrice-repeated instruction, would simultaneously provide an exception severely limiting application of the instruction." *Ibid.*

That analysis applies with the same force here. Just as this Court rejected the "bizarre result" urged by the defendants in *Abbott*, 562 U.S. at 21 (citation omitted), it should similarly reject a bizarre result under which the more serious offenders punished by Section 924(j) would escape Section 924(c)(1)(D)(ii)'s consecutive-sentencing mandate. See, *e.g.*, *Stokeling* v. *United States*, 139 S. Ct. 544, 551 (2019) (declining to adopt "anomalous" reading of "'force'" in Section 924(e)(2)(B)(i) "as *excluding* the quintessential ACCA-predicate crime of robbery, despite the amendment's retention of the term 'force' and its stated intent to expand the number of qualifying offenses"); *Greenlaw*, 554 U.S. at 251 ("We resist attributing to Congress an intention to render a statute so internally inconsistent.").

3. Petitioner cannot identify any meaningful reason why Congress would have deemed the consequences of his approach to be desirable. Petitioner observes (Br. 35) that the difference between concurrent and consecutive sentences has diminished import where a Section 924(j) defendant is sentenced to death or life imprisonment. But petitioner does not suggest that because Congress knew that some Section 924(j) defendants would incur those penalties, it intended to eliminate the consecutive-sentencing mandate (or mandatory-minimum terms) for *all* defendants convicted of violating Section 924(j), including those, like petitioner himself, who are sentenced to a term of years.

Petitioner also attempts (Br. 35) to mitigate the consequences of his position by asserting that Section 924(j) sentences "often" will be long enough that the distinction between consecutive and concurrent sentences "will have little practical relevance." But petitioner does not stand by that assertion. Instead, he asserts just two pages later (Br. 37) that the determination whether a defendant serves a concurrent or a consecutive sentence "can significantly affect how long a defendant" is imprisoned. And at the certiorari stage, he disputed the government's argument that even if the district court had authority to impose a concurrent term of imprisonment for his Section 924(j) conviction, it would likely impose the same overall 30-year sentence. Br. in Opp. 11-12; see Pet. Cert. Reply Br. 11-12; accord Pet. Br. 37.

Finally, petitioner cannot support (Br. 37) his claim that the consecutive-sentencing mandate may yield unwarranted sentencing disparities in the subset of Section 924(c) violations that satisfy Section 924(j). Petitioner points to no data suggesting that result. To the extent that he proffers his own case as exemplifying such a disparity because his "co-defendants were sentenced to between 5 and 15 years for their crimes" and petitioner "faces 30 years" in prison, Pet. Br. 37, that proffer is misplaced.

The same district court judge sentenced all five defendants in this case and explained (*e.g.*, Sent. Tr. 26) that petitioner's co-conspirators were differently situated. They each pleaded guilty, accepting responsibility for their crimes, and several cooperated with law enforcement. Pet. Br. 6; see, *e.g.*, 9/22/22 Sent. Tr. 19 (noting co-defendant's "extraordinary cooperation"). In contrast, the court found that petitioner was "the most

culpable figure," Sent. Tr. 27, and that while several co-defendants had "turned [their lives] around" in the decade-plus between the murder and their arrests, petitioner "ha[d] spent most of his adult life committing * * * drug crimes," with "no evidence that he's done anything productive" since the murder, *id.* at 26-27. See D. Ct. Doc. 309, at 15 (Sept. 20, 2022) (noting co-defendant's "extraordinary transformation").

It is far more likely that disparities would result from petitioner's own approach, under which defendants whose Section 924(c) violations did *not* result in a death would potentially face longer overall terms of imprisonment than those whose crimes included a gun-related homicide. The absence of any logical reason for Congress to have desired that counterintuitive result provides all the more reason for this Court to reject it.

D. Petitioner's Remaining Arguments Lack Merit

Petitioner's remaining arguments likewise fail to demonstrate that a defendant who violates Section 924(j) by violating Section 924(c) *and* committing a homicide is exempt from Section 924(c)(1)(D)(ii)'s consecutive-sentencing requirement.

1. No clear-statement rule applies

Petitioner tries to provide a foundation for his approach by observing that the common law afforded courts discretion whether to run sentences concurrently or consecutively and positing that "statutes should not be interpreted as changing the common law unless they clearly do so." Pet. Br. 25. But the common law does not dictate the answer to the question presented here.

As a general matter, the broad proposition that "statutes in derogation of the common law are to be

strictly construed * * * is a relic of the courts' historical hostility to the emergence of statutory law." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012) (footnote omitted). "The better view" is that statutes may alter the common law so long as they "effect the change with clarity," *i.e.*, where a "fair reading" of the statute supports that result. *Ibid.* While an "alteration of prior law must be clear * * * it need not be express, nor should its clear implication be distorted." *Ibid.*; see, *e.g.*, *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (presumption that Congress intends to keep a common-law principle in place yields "when a statutory purpose to the contrary is evident") (citation omitted).

As a specific matter, a fair reading of the relevant provisions shows that no common-law rule applies. It is true that, at common law, trial judges generally had discretion whether to run sentences concurrently or consecutively. See, *e.g.*, *Oregon* v. *Ice*, 555 U.S. 160, 168 (2009). And to some extent, Congress codified that principle in 18 U.S.C. 3584(a), which provides that "[m]ultiple 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." But Section 3584(a) *itself* deviates from the common law. Whereas "[t]he historical record * * * indicates that" at common law, "a judge's imposition of consecutive, rather than concurrent, sentences was the prevailing practice," *Ice*, 555 U.S. at 169, Section 3584 makes concurrent sentencing the default rule.

Section 3584(a) also expressly recognizes that Congress may "mandate[] that * * * terms are to run consecutively." 18 U.S.C. 3584(a). Petitioner does not dispute that Congress did precisely that in Section

924(c)(1)(D)(ii), by stating that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment." 18 U.S.C. 924(c)(1)(D)(ii). The dispute instead is whether that mandate applies to Section 924(j) violations. Again, the text provides a definitive answer: a violation of Section 924(j) is inherently a "violation of subsection (c)." 18 U.S.C. 924(j).

Petitioner suggests that in prior decisions, this Court has declined to adopt constructions of statutes that would "limit[] [a] sentencing court's discretion." Pet. Br. 26 (quoting *Dorszynski* v. *United States*, 418 U.S. 424, 441 (1974)) (brackets omitted). But the decisions he cites do not sweep as broadly as he would suggest. None addressed a situation like this, where one provision of a statute *expressly* forecloses a court from exercising discretion over a particular aspect of sentencing, and the question is simply whether that limitation applies to another, closely related provision. See *Setser* v. *United States*, 566 U.S. 231, 234-243 (2012) (applying the ordinary tools of statutory construction to hold that the district court, rather than the Bureau of Prisons, has discretion to decide whether a federal sentence runs concurrent or consecutive to a state sentence that has not yet been imposed); *Kimbrough* v. *United States*, 552 U.S. 85, 103 (2007) ("declin[ing] to read any implicit directive into * * * congressional silence" on the appropriate sentence within a statutorily prescribed range); *Dorszynski*, 418 U.S. at 440-441 (declining to assume that Congress intended a departure from "well-established doctrine" where the statute "was intended to increase the sentencing options of federal trial judges, rather than to limit the exercise of their discretion").

In any event, applying Section 924(c)(1)(D)(ii)'s consecutive-sentencing requirement to Section 924(j) does not undermine the principles of judicial discretion to the extent petitioner suggests. See Pet. Br. 37. Even if the consecutive-sentencing mandate applies, district courts retain considerable discretion regarding how to structure the sentence for a defendant's Section 924(j) conviction. If the death penalty is not imposed, the court may select imprisonment for a term of years or life, subject to Section 924(c)'s applicable statutory minimums. And when sentencing defendants for multiple offenses, district courts are free to adjust the sentences on other counts to account for the mandatory consecutive sentence on the firearm offense. See *Dean* v. *United States*, 137 S. Ct. 1170, 1177 (2017).

2. The canon against surplusage does not apply

Petitioner also contends (Br. 21-22) that requiring consecutive sentences for Section 924(j) violations would render superfluous another provision of the statute, 18 U.S.C. 924(c)(5). Section 924(c)(5) was enacted a decade after Section 924(j), and it is specifically directed at the use of "armor piercing ammunition." *Ibid.*; see Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 6(b), 119 Stat. 2102. Section 924(c)(5) states that any person who uses, carries, or possesses "armor piercing ammunition" during and in relation to, or in furtherance of, a crime of violence or drug trafficking crime "shall" be sentenced to a minimum term of 15 years of imprisonment. 18 U.S.C. 924(c)(5)(A). The provision further states that if "death results from the use of such ammunition," the defendant shall be "punished by death or sentenced to a term of imprisonment for any term of years or for life" if the killing is a murder, and "be

punished as provided in section 1112" if the killing is manslaughter. 18 U.S.C. 924(c)(5)(B).

Because Section 924(c)(5) falls within Section 924(c), petitioner agrees (Br. 21) that the consecutive-sentencing mandate applies to Section 924(c)(5) violations. But he asserts (Br. 22) that if a defendant's sentence for violating Section 924(j) is also subject to the consecutive-sentencing mandate, Section 924(c)(5)(B) would be superfluous, on the theory that Section 924(j) would then subsume and provide the same penalties for all of the crimes involving armor piercing ammunition to which Section 924(c)(5)(B) applies.

Petitioner's argument disregards that "substantial" "overlap" between two clauses "is not uncommon in criminal statutes," *Loughrin* v. *United States*, 573 U.S. 351, 358 n.4 (2014), and that no impermissible superfluity exists when the most natural, contextual reading of two provisions "would not render one or the other wholly superfluous," *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992); see, *e.g.*, *Lamie* v. *United States Trustee*, 540 U.S. 526, 536 (2004) (observing that this Court's "preference for avoiding surplusage constructions is not absolute"). Here, Congress's enactment of Section 924(c)(5) would continue to have practical effect, because it specifies a new statutory minimum 15-year sentence applicable to all Section 924(c) violations that involve armor piercing ammunition. See 18 U.S.C. 924(c)(5)(A). Congress's enactment of Section 924(c)(5) does not suggest that the new provision had the side effect of decoupling Section 924(j) from the lesser-included Section 924(c) violation and transforming it into an independent and separately punishable crime.

3. The rule of lenity does not apply

Finally, petitioner invokes (Br. 30-31) the rule of lenity. "But 'the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.'" *United States* v. *Castleman*, 572 U.S. 157, 172-173 (2014) (quoting *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010)); see *Shular* v. *United States*, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring). For the reasons discussed above, no such grievous ambiguity exists here. Instead, text, structure, history, and purpose all demonstrate that a defendant's sentence for violating Section 924(j) is subject to the consecutive-sentencing mandate in Section 924(c)(1)(D)(ii).

Indeed, the rule of lenity is particularly inapposite here. Even assuming that petitioner's approach were the more lenient one, but see p. 27, *supra*, neither of the dual purposes served by the rule—"fair warning of the boundaries of criminal conduct" and ensuring "that legislatures, not courts, define criminal liability," *Crandon* v. *United* States, 494 U.S. 152, 158 (1990)—would be advanced by adopting it. A defendant who kills someone in the course of a Section 924(c) offense cannot reasonably complain that his commission of a homicide deprived him of "fair warning" of the mandatory consecutive nature of the penalty, which Section 924(c)(1)(D)(ii) undisputedly applies to Section 924(c) violations. Similarly, acknowledging Congress's longstanding effort to ensure that such a defendant is subject to punishment commensurate with both the firearm's presence and his responsibility for a homicide ensures that the "legislature[], not courts, define[s] criminal liability." *Ibid.* It is only petitioner's approach that would do otherwise.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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1. 18 U.S.C. 924(c) provides:

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(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of

another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

2. 18 U.S.C. 924(j) provides:

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(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, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.