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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In criminal law, the default is that judges have discretion to order multiple sentences to run consecutively or concurrently. That has been the rule since the Founding and is codified in the U.S. Code.

That discretion applies to sentences imposed under 18 U.S.C. § 924(j). Subsection (j) is silent on how multiple sentences must run—something the government concedes. Thus, the default rule applies.

Nonetheless, the government insists that the concurrent-sentences bar found in subsection 924(c) applies to subsection (j) by way of "cross-reference" and "implication[ ]." Gov't Br. 19. The plain text does not bear that out.

To begin, subsection (c)'s concurrent-sentences bar applies *only* to sentences "imposed … under this subsection"—subsection (c). But Petitioner Efrain Lora was not indicted, convicted, or sentenced under (c). His sentence was "imposed under" (j), *not* (c).

The government's solution? It argues that because subsection (j) incorporates some of the elements of (c), then (j) incorporates (c) "*as a whole*." *Id.* at 15. Not only is there no precedent for such a novel reading, it renders subsection (j) hopelessly unadministrable. To cite just one Gordian Knot: for voluntary manslaughter using a machinegun during a drug crime, the judge would be required to impose at least 30 years (under (c)) but no more than 15 years (under (j)). Obviously, no such number exists. The government's interpretation also creates superfluity: if (c)'s concurrent-sentences bar applies to both (j) and (c)(5)(B), then those provisions provide identical punishments for the same conduct.

Not only does the government's interpretation run roughshod over the text and render § 924 a confounding muddle, but it also violates numerous interpretative canons. For example, the government cannot show that it is *clear* that Congress meant to abrogate the common law or curtail sentencing discretion under subsection (j). Constitutional concerns also favor Lora's interpretation. Indeed, the government admits that its interpretation has caused "confusion" over these issues. Gov't Br. 28. And the rule of lenity favors Lora's interpretation because no ordinary English speaker would come away from (j) thinking concurrent sentences are barred.

The enactment history of § 924 further confirms that subsection (c)'s bar is limited to sentences imposed under (c). The government offers no alternative explanation of the enactment history, especially (j)'s enactment as a "*new* subsection"—that is, not a part of subsection (c).

That leaves the government's appeal to policy. But purpose cannot override text and, even if it could, the government's arguments are misguided. Preserving sentencing discretion is no "anomaly;" it is at least as weighty a purpose as the government's apparent rule of severity: to stretch the text to punish § 924(j) offenders as harshly as the text could creatively allow.

This Court should therefore reject the government's atextual reading. Instead, the Court should hold that the plain text of subsection (j) means what it says and restore the sentencing discretion judges have employed for centuries.

ARGUMENT

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

The plain text resolves this case: subsection (j) does not bar concurrent sentencing. *United States v. Julian*, 633 F.3d 1250, 1253–57 (11th Cir. 2011) (Pryor, W., J.); *see also Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

The government has significantly narrowed the issues in this case. The government concedes that subsection (j) standing alone contains no bar. Gov't Br. 17. And the government effectively concedes that subsection (c) standing alone does not impose its concurrent-sentences bar on (j). The government's only theory is that because (j) incorporates some of the elements of (c), subsection (j) incorporates (c) "*as a whole*." Gov't Br. 15. Not only does the text belie that reading, that interpretation creates conundrums that the government cannot solve. In the end, the government's statutory alchemy goes up in smoke.

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

Both sides agree that a concurrent-sentences bar cannot be found in subsection (j) alone. Gov't Br. 17; *see* Pet. Br. 12–13. The parties also agree that subsection (c)'s bar, standing alone, does not apply to subsection (j). *See* Gov't Br. 14. But *that* concession by the government is key because the critical statutory language is at § 924(c)(1)(D)(ii). It states, "[N]o 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) (emphasis added). "[T]his subsection" can only mean

subsection (c), as definitions, Congressional drafting practice, caselaw, and statutory context all confirm. Pet. Br. 14–16; *see also Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60–61 (2004) (explaining that subsections are denoted by lower-case letters, like "(c)"). The government offers no meaningful response. *See* Gov't Br. 8.

1. Petitioner was not sentenced "under this subsection"—subsection (c). Indeed, the government is still bereft of a document (from indictment to judgment) indicating that Lora was charged, convicted, or sentenced under § 924(c). Pet. Br. 18.

Nonetheless, the government insists that because Petitioner's conduct violated subsection (c), he "was subject to punishment under that provision." Gov't Br. 12. But violating a law and being charged, convicted, and sentenced under it are different things. *See Hill v. U.S. ex rel. Wampler*, 298 U.S. 460, 463–64 (1936) (noting that the penalties to be imposed on the defendant "must have expression in the sentence"). Almost everyone has violated some law. *See* Harvey A. Silvergate, *Three Felonies A Day: How The Feds Target The Innocent* xxxvi (2011) ("[T]he average busy professional in this country … likely commit[s] several crimes [a] day."). But that does not mean we are all ex-convicts.

Particularly surprising is the government's invocation of *National Ass'n of Manufacturers v. Department of Defense*, 138 S. Ct. 617, 630 (2018) ("*NAM*"). *See* Gov't Br. 13. At issue there, was whether the EPA had issued its rule defining the "waters of the United States" (WOTUS) "*under* section 1311." 138 S. Ct. at 630 (emphasis added). The Court

held that EPA had not. Section 1311 of title 33 allows EPA to establish certain "limitation[s]" on pollutants. *Id.* But the WOTUS rule defined a statutory phrase, and "[n]owhere does" § 1311 "direct or authorize the EPA to *define* a statutory phrase appearing elsewhere in the Act." *Id.*

The Court also rejected the government's argument that the practical effect of the WOTUS rule was to make the limitations under § 1311 applicable to waters that the rule covered. In other words, the government argued that § 1311 still had a role to play, and thus the WOTUS rule should be considered to have been issued "under § 1311." *Id.* But that "practical" interpretation, the Court held, was "not grounded in the statutory text." *Id.* Thus, the WOTUS rule was not issued "under § 1311." *See also St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 449–50 (D.C. Cir. 1989) (Ginsburg, R.B., J.) (declining to "stretch the word 'under'" in "under section 554" to reach beyond that section).

Consistent with *NAM*, nothing in § 924(c) authorizes a court to impose a sentence for violating subsection (j). Subsection (c) does not reference (j) at all. Moreover, even the government must agree that Petitioner was not sentenced under (c); he was sentenced under (j). Gov't Br. 3. And this Court should not "stretch the word 'under'" to cover more than that word denotes—subsection (c). *See St. Louis Fuel*, 890 F.2d at 449–50.

An analogy further demonstrates the government's error. Some federal crimes can be based on state crimes. For example, § 924(e) mandates 15 years for defendants who possess a gun and have three prior

"violent felony" convictions, "whether state or federal." *Borden v. United States*, 141 S. Ct. 1817, 1822 (2021). But no one would say that a § 924(e) sentence is imposed under *state* law. The state-law felony is simply defining some elements of the federal offense. Only the federal statute authorizes the punishment. So too with subsection (c): it simply defines some elements of a subsection (j) offense. And subsection (j) alone provided the authority to impose Lora's sentence.

2. In addition, had Congress wanted to extend subsection (c)'s concurrent-sentences bar to (j), Congress would have said so. Pet. Br. 16–17. The government effectively concedes that point. *See* Gov't Br. 19 (arguing merely that Congress was not "required" to do so). And the government offers no good explanation why Congress would choose such a roundabout way of extending (c)'s bar to (j) offenses over simply stating a bar on concurrent sentences in (j) itself.

3. Finally, this Court has consistently read § 924(c)'s bar as limited to sentences imposed under subsection (c)—as the bar itself says. Pet. Br. 17–18. The government attempts to cherry-pick language from those cases. *See* Gov't Br. 20–21. But to no avail. *Abbott*, *Greenlaw*, and *Gonzales* each speak specifically of the bar's applicability to § 924(c) *sentences*, not just to individuals whose conduct violates (c). *Abbott v. United States*, 562 U.S. 8, 12–13, 24–25 (2010); *Greenlaw v. United States*, 554 U.S. 237, 241 (2008); *United States v. Gonzales*, 520 U.S. 1, 9–10 (1997). That stands in stark contrast to the government's repeated characterizations of Lora being sentenced under (j). *See* Gov't Br. 3–4, 7, 10, 12.

Lora's sentence was thus not "imposed … under" subsection (c). Because it wasn't, the bar in subsection (c) cannot apply.

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

Now for the main event. The government maintains that because the crime in subsection (j) is defined, in part, by referencing some of the elements in (c), (j) must incorporate (c) "as a whole." Gov't Br. 8. Not only does the text not support that, but this interpretation would also create a host of intractable problems.

1. There is no doubt that subsection (j) incorporates the factual elements of (c). 18 U.S.C. § 924(j) ("A person who, *in the course of a violation of subsection (c)*, …" (emphasis added)). But there, the incorporation stops.

Subsection (j)'s only reference to (c)—"in the course of a violation of subsection (c)"—appears in the prefatory component of (j), which defines the offense that (j) proscribes. If a defendant "violat[es]" (c) and causes a death, then he has violated (j).

Only then, in separately enumerated paragraphs, does subsection (j) set forth the punishments for the offense. Neither of those paragraphs references (c). *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980) (*expressio unius*). And both speak specifically of "punish[ment]" (*i.e.*, sentencing), not what constitutes a "violat[ion]." In other words, (j)'s incorporation of (c) is limited to the factual elements that make up part of the crime, not any sentencing provisions.

The government's position has another problem. Under the government's reading, within nine words in subsection (j)—"in the course of a violation of subsection (c)"—Congress hid all 700+ words of (c). Congress does not usually "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). And it didn't do so here.

Paragraph (j)(2) provides further evidence that the government is wrong. *See* Gov't Br. 15 n.1 (recognizing that (j)(2) works similarly to (j)(1)). That paragraph specifies that when the killing is manslaughter, punishment "*shall* … *be* … as provided in" 18 U.S.C. § 1112. 18 U.S.C. § 924(j)(2) (emphasis added). In other words, (j)(2) makes explicit that the punishment provisions of subsection (c) do not apply. Instead, the punishment provisions of an entirely different provision must apply.

2. Nonetheless, the government points out that an individual who is convicted under subsection (j) *could be* convicted under (c). *See* Gov't Br. 11. After all, someone who violates (j) has necessarily violated (c) (at least the generic crime in (c)). *See id.* But that argument is akin to the practical argument this Court rejected in *NAM*. Just because another subsection of a statute is affected does not mean a rule or a sentence is issued "under" that affected section. *NAM*, 138 S. Ct. at 630.

In addition, the government's observation is limited to the generic offense set forth in subparagraph (c)(1)(A) (carrying a firearm during a drug or violent crime). It does not apply to the other versions of the offense listed throughout (c). In other words, a person who has violated (j) has not necessarily violated

(c)(1)(B)(i), because he might not have had a "short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon." And he has not necessarily violated (c)(1)(B)(ii) because he might not have used a "machinegun." It makes no textual sense to cram all of subsection (c) into (j).

3. The government's insistence that "Congress incorporated Section 924(c) *as a whole* into Section 924(j)" also creates other significant problems. Gov't Br. 15.

First, importing all of subsection (c) into (j) would create multiple contradictions. For example, under (j)(2), which proscribes voluntary manslaughter with a gun during a drug or violent crime, a person *cannot* be sentenced to "more than 15 years." 18 U.S.C. § 1112(b). But under § 924(c)(1)(B), if that firearm "is a machinegun," then the offender shall be sentenced to "*not less* than 30 years." *Id.* § 924(c)(1)(B) (emphasis added).

So if subsection (j) incorporates all of (c), the judge must sentence the defendant to at least 30 years but no more than 15 years. How does a judge square that circle?

Similar contradictions abound:

- Involuntary manslaughter involving a firearm discharge: § 924(c)(1)(A)(iii) mandates a 10-year minimum, but (j)(2) caps the sentence at 8 years.
- Involuntary manslaughter involving a short-barreled rifle: § 924(c)(1)(B)(i) requires a 10-year minimum, but (j)(2) caps the sentence at 8 years.

- Involuntary manslaughter involving a semiautomatic assault weapon: § 924(c)(1)(B)(i) requires a 10-year minimum,; but (j)(2) caps the sentence at 8 years.
- Voluntary manslaughter with a machinegun after a prior § 924(c) conviction: § 924(c)(1)(C) mandates life in prison, but (j)(2) caps the sentence at 15 years.

What is a judge to do when the floor exceeds the ceiling? The government's apparent response is to go with the harsher option each time, to punish "more serious offenders" more severely without judicial discretion. Gov't Br. 33. But that solution finds no grounding in the statute. Subsection (j) says the statutory maximums "shall" apply.

Second, the government's problems do not stop there. Its interpretation also redlines the statute. *Compare* Pet. Br. 21–22, *with* Gov't Br. 38–39.

In particular, § 924(c)(5)(B) (death resulting from armor piercing ammunition) and § 924(j) (causing a death while violating (c)) would provide identical sentences for criminals who have armor-piercing ammunition and cause a death during a drug or violent crime. Paragraphs (j)(1) and (j)(2) parallel clauses (c)(5)(B)(i) and (c)(5)(B)(ii) almost verbatim. Avoiding this superfluity "compels" reading § 924(j) "to allow concurrent sentences." *Julian*, 633 F.3d at 1255–56.

In response, the government merely points out that *other parts* of paragraph (c)(5) would not be superfluous. *See* Gov't Br. 38–39. But that misses the point. Subparagraph (c)(5)*(B)* is entirely superfluous under the government's reading. The only structural

difference between (c)(5)(B) and (j) is that (c)'s concurrent-sentences bar applies to (c)(5)(B) and not (j). If the bar applies to both, then the two are redundant and Congress might as well have never enacted (c)(5)(B). *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Finally, the government suggests that Lora does not dispute that the statutory-minimum penalties in subsection (c) apply to (j). Gov't Br. 16. Not so. That question is not presented. But to answer the government, subsection (j) does not incorporate *any* sentencing provisions of (c); it simply incorporates some factual elements. Thus, the minimums in (c) do not apply to (j).

* * *

In contrast to the government's counterintuitive interpretation, Lora's reading "give[s] effect to" all of (c) and (j), *see* Gov't Br. 17, and does so in a straightforward way grounded in the plain text: Subsection (c) provides the missing elements from (j) to define the offense and (j) provides the range of punishments. And because, as the government concedes, (j) is silent on whether multiple sentences should run concurrently or consecutively, the default rule of judicial discretion applies. *See* 18 U.S.C. § 3584.

II. INTERPRETATIVE CANONS REINFORCE THE PLAIN TEXT.

To the extent that there is any ambiguity in the statute, three interpretative canons decisively favor Lora's interpretation. Pet. Br. 25–31. The government offers none of its own, and its counterarguments all miss the mark.

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

Two clear-statement rules weigh against barring concurrent sentences under § 924(j). Pet. Br. 25–27.

1. The government agrees that "at common law, trial judges generally had discretion whether to run sentences concurrently or consecutively." Gov't Br. 36–38. Thus, that rule must govern unless Congress clearly says otherwise. *See Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304 (1959).

The government nonetheless claims that the non-derogation canon does not apply here for two reasons. Both are wrong.

First, the government argues that statutes shouldn't be "strictly construed" under this canon. Gov't Br. 36. Agreed. But as the government itself recognizes, statutes can only alter the common law if they "effect the change with clarity." *Id.* (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012)). And in § 924(j), Congress did not change the common-law rule of discretion at all—let alone with clarity.

Second, the government argues that 18 U.S.C. § 3584 (which established *concurrent* sentencing as the default) itself deviated from the common law. *Id.* That is not so. That provision merely says what the common law always was: judges have discretion to order multiple sentences to run concurrently or consecutively (unless the statute says otherwise). 18 U.S.C. § 3584(a) ("the terms may run concurrently or consecutively").

In any event, to the extent § 3584 altered the common law, it did so *clearly*. *Id.* ("Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates" otherwise). And that statute only underscores that courts should be wary of inferring bars on concurrent sentencing.

2. This Court has repeatedly declined to construe statutes to limit sentencing discretion where Congress did not clearly intend to do so. Pet. Br. 26–27. The government responds that those cases did not address "a situation like this." Gov't Br. 37. The distinction, according to the government, is that here, "one provision"—subsection (c)—"*expressly* forecloses a court from exercising discretion." *Id.*

But that is no distinction. The question before the Court is whether *subsection (j)* bars concurrent sentences. And the government does not argue that (j) standing alone (or (c) for that matter) bars concurrent sentences under (j). The only way the government gets its preferred outcome is through statutory revision—which can hardly be the "clear expression" this Court requires. *Dorszynski v. United States*, 418 U.S. 424, 441 (1974).

Finally, the government's argument that under its view courts retain *some* discretion is meaningless. *See* Gov't Br. 38. That is true for practically any sentencing provision. The judge will almost always have *some* discretion left no matter how limiting the statute is, whether by virtue of sentencing ranges or the freedom to impose concurrent or consecutive sentences.

For example, in *Kimbrough*, even under the government's argument that crack-cocaine dealers were subject to the same sentence as those dealing in 100 times more powder cocaine, the judge still had discretion within the prescribed sentencing range. *Kimbrough v. United States*, 552 U.S. 85, 91–92 (2007). The question, however, is whether Congress clearly intended to take away the particular aspect of sentencing discretion at issue. Here, that is the power to impose concurrent or consecutive sentences. And Congress did not clearly disturb the default rule when it comes to § 924(j).

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

1. Conflating subsections (c) and (j) also raises serious constitutional problems. *Julian*, 633 F.3d at 1253–55; *see* Pet. Br. 27–28. If (j) is merely a sentencing enhancement to (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 alleged in the indictment (violating the Fifth Amendment).

The government tries to sidestep these issues by saying "[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." Gov't Br. 28; *see id.* at 24. But the government ignores *why* that is so. The additional circumstances in (j) must be proved beyond a reasonable doubt *because* (j) lays out an offense separate from (c). So it makes no sense to read (j) as merely enhancing the penalties available under (c).

The government even concedes that its interpretation resulted in "earlier confusion" over these serious constitutional issues. *Id.* at 28. To lay that confusion to rest and, more importantly, avoid these serious constitutional issues, the Court should "avoid[ ]" the government's interpretation; in fact, it has a "duty" to do so. *U.S. ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909).

2. The government's double-jeopardy arguments do not move the needle. The government argues that "under the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932)," (c) and (j) "are presumptively the 'same offence,'" because (j)'s "elements are a superset" of (c)'s. Gov't Br. 8–9. In other words, because (c) does not require proof of an element separate from (j), a defendant cannot be convicted of violating both based on the same conduct.

But, as the government recognizes, "[t]he legislature may 'specifically authorize[ ] cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" [offense] under *Blockburger*.'" *Id.* at 22–23. That is the case here. As in *Castillo*, a case the government ignores, there are numerous indications in subsection (j) that Congress intended for the possibility of multiple punishments. *See Castillo v. United States*, 530 U.S. 120 (2000). Subsection (j) 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. Pet. Br. 23. There is also a large difference between using a firearm without any harm and using it to kill. And (j) significantly increases the potential sentence. All of

these features are hallmarks of a distinct offense. *Castillo*, 530 U.S. at 125–31.

In this respect, § 924 is not unlike other federal laws authorizing cumulative punishment for an underlying offense when it is part of a hate crime (18 U.S.C. § 249) or an act of terrorism (*id.* § 2332b).

The government points out that § 924(c)(1)(A) says that its sentence applies "in addition to the punishment provided for such crime of violence or drug trafficking crime." According to the government, that language makes clear that subsection (c) is distinct from the underlying drug or violent crime. And the lack of similar language in (j) shows that (j) was not meant to be distinct from (c). Gov't Br. 26. That is not right. The "in addition" language in (c)(1)(A) was necessary because the beginning of that subparagraph says its punishments apply "[e]xcept to the extent that a greater minimum sentence is otherwise provided … by any other provision of law." Standing alone, that could mean that if the underlying drug or violent crime carried a greater minimum sentence than (c)(1)(A), the punishment provision of (c)(1)(A) would not apply. *Compare, e.g.*, 21 U.S.C. § 960(b) (10-year mandatory minimum for drug crime) *with* 18 U.S.C. § 924(c)(1)(A) (5-year mandatory minimum). Thus, Congress had to add the "in addition to" language to (c).

By making (j) an entirely distinct subsection, separating its definition and punishments, and having it target distinct (and often more culpable) behavior, Congress has clearly authorized cumulative punishment for (c) and (j).

Moreover, *Blockburger* is about the overlap between *elements*. But the question here is about *sentences*. So a test about elements has nothing to say about whether sentencing provisions apply across offenses. Pet. Br. 28–30.

Blockburger is also about *subsequent* prosecutions for *greater*-included offenses. It does not extend to *simultaneous* prosecutions or subsequent prosecutions for *lesser*-included offenses. On simultaneous prosecutions, this Court held in *Garrett* (a case the government repeatedly cites, Gov't Br. 22–23) that Congress may "punish[ ] separately each step leading to the consummation of a transaction which it has power to prohibit and punish[ ] also the completed transaction." *Garrett v. United States*, 471 U.S. 773, 779 (1985). The cumulative punishments in subsections (c) and (j) do not violate the Double Jeopardy Clause. *Julian*, 633 F.3d at 1256–57. Therefore, the government's double-jeopardy argument is irrelevant.

Garrett further undermines the government's position. There, the Court considered 21 U.S.C. § 848, which defines and punishes continuing criminal enterprises. The statute "define[d] the conduct that constitutes" an offense by reference to "'any [other] provision of this subchapter.'" 471 U.S. at 781 (quoting 21 U.S.C. § 848(b)). So § 848 incorporated the elements of those other criminal provisions.

The Court nonetheless had no trouble concluding that § 848(a) "set out" "a separate penalty" from those "other statutory offenses" when it said: "'Any person who engages in a continuing criminal enterprise *shall be sentenced* to'" imprisonment and a fine. *Id.* at 780–

81 (emphasis added) (quoting 21 U.S.C. § 848(a)). Similarly here, subsection (j) "defines the conduct that constitutes" an offense by reference to (c); then, (j)(1) and (j)(2) "set out" penalties that are "separate" from that "other statutory offense[ ]." *Id.*

Finally, the government argues that treating (c) and (j) as distinct crimes "could result in" harsher sentences. Gov't Br. 27. But harsher sentences are *always* possible when Congress authorizes cumulative punishments. Moreover, the choice whether to indict under (j), (c), or both ultimately rests with the government. And because (j) permits a judge to impose "any term" of imprisonment, the judge could balance the mandatory minimum of a (c) conviction by lessening the sentence under (j). Thus, the mere possibility of harsher sentences does not undermine the fact that (j) is distinct from (c).

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

"To the extent doubt persists at this point about the best reading of [§ 924(j)], a venerable principle supplies a way to resolve it"—the rule of lenity. *Bittner v. United States*, 143 S. Ct. 713, 724 (2023) (opinion of Gorsuch, J.). The government's only response is any ambiguity here is not sufficiently "grievous." Gov't Br. 40. That gets the government nowhere.

"The law is settled that 'penal statutes are to be construed strictly,'" and an individual "'is not to be subjected to a penalty unless the words of the statute plainly impose it.'" *Commissioner v. Acker*, 361 U.S. 87, 91 (1959). The rule of lenity "protect[s] the Due Process Clause's promise that 'a fair warning should

be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Bittner*, 143 S. Ct. at 725 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). No ordinary English speaker would read § 924(j) to clearly impose a bar on concurrent sentences. Only creative lawyers can.

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

Since its inception, the concurrent-sentences bar in § 924(c) has remained limited to sentences "imposed … under" subsection (c). Pet. Br. 31–32. And Congress has repeatedly indicated that the bar does not apply outside (c). *Id.*

The government argues that because subsection (j) "was enacted against the backdrop of [§] 924(c)'s already-existing consecutive-sentencing mandate," Congress meant for (j) to carry the mandate too. Gov't Br. 29. But the government ignores that Congress enacted (j) by explicitly "*adding at the end* [of § 924] the following *new subsection*." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat 1796 (emphasis added)). Moreover, the heading in the bill that added (j) suggests that Congress was not focused on consecutive sentences but on ensuring the availability of the death penalty: "Death Penalty for Gun Murders During Federal Crimes of Violence and Drug Trafficking Crimes." *Id.* § 60013 (capitalization altered); *see Julian*, 633 F.3d at 1256 ("[t]he main point of [§] 924(j)" was the death penalty).

And when Congress did bodywork on subsection (c), "transfer[ring] the bar on concurrent sentences to

§ 924(c)(1)(D)(ii)," *Abbott*, 562 U.S. at 18, Congress did not broaden the bar's application. Congress did not say that the bar applied to all of "section" 924 or to "subsection (j)." Instead, Congress maintained the original language: "under this subsection." *Id.*

The enactment history thus demonstrates that Congress did not intend for subsection (c)'s concurrent-sentences bar to apply to (j).

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

With no textual hook, the government must retreat to purpose. But purpose doesn't override text and the purpose the government attributes to Congress is, in any event, wrong.

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

The government smuggles in its purpose arguments under the guise of "history and design." Gov't Br. 28 (capitalization altered). But whatever the packaging, this Court is clear that purpose does not dictate statutory interpretation. *Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). The government does not argue otherwise.

In any event, the government's purpose arguments are misguided.

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

The government claims that if the concurrent-sentences bar does not apply to subsection (j), then there will be anomalies. Gov't Br. 31–33. That is because defendants who commit more egregious crimes (i.e., kill someone in violation of (j)) might get

a lighter sentence than someone who commits a lesser crime (e.g., (c)(1)(A)). But the government still has no source for its "anomaly canon." *See* Pet. Br. 35. Nor does it supply any real-world examples.

Moreover, judicial discretion to run multiple sentences either consecutively or concurrently is hardly an anomaly. Congress codified that discretion as the default. 18 U.S.C. § 3584. And Lora's interpretation retains just that. Lora's interpretation does not *require* judges to impose concurrent sentences.

The government's invocation of *Abbott* is a red herring. Gov't Br. 31–32 (citing *Abbott*, 562 U.S. at 21). At issue there was § 924(c)'s prefatory "except" clause, which provides that the minimum sentences in (c) apply "[e]xcept to the extent that a greater minimum sentence is otherwise provided." The defendants in *Abbott* argued that because they were subject to a higher minimum sentence under a different law (21 U.S.C. §§ 841, 846), they were not subject to any minimum sentence for violating (c). In other words, any time a defendant was subject to a higher minimum under another law, (c)'s minimum disappeared. This Court rejected that interpretation. *Abbott*, 562 U.S. at 21. The Court explained that the defendants' interpretation would mean that (c) "would often impose no penalty at all for the conduct [§ 924(c)] makes independently criminal," and "the worst offenders would often secure the shortest sentences." *Id.* The Court's example is helpful: "Consider two defendants convicted of trafficking in cocaine. The first possesses 500 grams and is subject to a mandatory minimum of five years, § 841(b)(1)(B); the second possesses five kilograms and is subject to a

mandatory minimum of ten years, § 841(b)(1)(A)." *Id.* If both brandish firearms, they are subject to a seven-year minimum sentence under § 924(c)(1)(A)(ii).

But that minimum would lead to statutorily required differences in treatment. The first defendant would be subject to at least 12 years in prison. Why? The "except" clause in (c) wasn't triggered because the five-year minimum under § 841(b)(1)(B) is not greater than the seven-year minimum under § 924(c)(1)(A)(ii). But "[t]he second defendant's ten-year drug minimum, according to Abbott …, triggers the 'except' clause" (because it exceeds the § 924(c) minimum) "and wipes out that defendant's § 924(c) penalty." *Id.* Thus, although he is more culpable, "the second defendant's minimum term would be just ten years." *Id.*

Here, there is no such problem. Nothing about Lora's interpretation would mean that "the worst offenders would often secure the shortest sentences," as the government insinuates. Gov't Br. 32 (quoting *Abbott*, 562 U.S. at 21). On the contrary, (j)(1), which targets murder, still authorizes imprisonment up to life, or even the death penalty. And as explained above, the government can prosecute a violation of (c) at the same time as (j)—not to mention prosecuting the defendant for the underlying drug or violent crime. That distinguishes *Abbott*, where applying the "except" clause in the way the defendants argued *necessarily* meant wiping out any punishment under § 924(c).

Moreover, the breadth of situations that (j)(2) covers confirms why Congress would not want to remove sentencing discretion. Paragraph (j)(2) could

punish the doctor who offers the terminally ill patient suicide drugs and drops his gun (carried in case a family member interfered), causing it to kill the patient. Or it could punish the person who, visiting a seedy part of town to deliver a small amount of marijuana to a friend, carries a gun for self-defense, is attacked, and accidently shoots his assailant fatally during the fray. But it also covers the drug kingpin who fires his gun recklessly into a house after a drug deal gone bad. The judge must have discretion to punish those actors according to their crimes. Moreover, sentences under (j)(2) are capped "as provided in" § 1112 at 15 years for voluntary manslaughter and 8 years for involuntary manslaughter. Given that the provision imposes statutory *maximums* rather than minimums, it makes sense that Congress would not have intended to disturb a sentencing judge's discretion whether to run multiple sentences concurrently or consecutively.

More importantly, by preserving sentencing discretion, Lora's approach ensures that the court can tailor each sentence to the offense and to the individual. Pet. Br. 37.

The government's purpose arguments fail for other reasons too.

First, there is no rule of *severity* in criminal law. *See* Gov't Br. 32–33. On the contrary, there is a rule of lenity, which does not waver depending on the crime's severity. *See United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 77 (1820) (Marshall, C.J.) (applying the rule to a statute criminalizing killings on the high seas).

But even if a rule of severity existed, Lora identified multiple reasons why Congress would not want a concurrent-sentences bar to apply to all subsection (j) offenses. Pet. Br. 35–36. For example, those offenses fit comfortably in the hierarchy between the basic subsection (c) offense and the even more serious (c)(5) offense when a death occurs. *Id.* at 36. That hierarchy makes sense given (j)'s sheer breadth, from involuntary manslaughter to intentional murder. It also makes sense given (c)(5)'s later enactment to punish death caused by armor-piercing ammunition. *Id.*

Second, even if the government has identified *a* purpose of § 924—graduated punishment—no statute pursues one purpose at all costs. *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam). And another purpose in criminal law is to ensure that sentences are tailored to the individual and the crime. The history of sentencing discretion—reaching back to our Founding and with its aim of fundamental fairness—is at least as compelling as the government's rule of severity. The Court should vindicate that default here by holding that 18 U.S.C. § 924(j) leaves the important decision of whether to order multiple sentences to run concurrently or consecutively to the judge's discretion.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Respectfully submitted,

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