No. 24-5774

IN THE

Supreme Court of the United States

DWAYNE BARRETT,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR PETITIONER

Matthew B. Larsen
Counsel of Record
Siobhan Atkins
Sarah Baumgartel
Daniel Habib
Yuanchung Lee
Edward S. Zas
FEDERAL DEFENDERS
OF NEW YORK
52 Duane Street, 10th Floor
New York, NY 10007
(212) 417-8725
Matthew_Larsen@fd.org

QUESTION PRESENTED

Whether the Double Jeopardy Clause permits punishment under both 18 U.S.C. § 924(c) and § 924(j) for one act that violates each statute.

RELATED PROCEEDINGS

Supreme Court of the United States:

- *Barrett v. United States*, No. 18-6985 (June 28, 2019) (granting petition for writ of certiorari, vacating 2018 Second Circuit judgment and remanding for consideration of *United States v. Davis*, 588 U.S. 445 (2019)) (reported at 139 S. Ct. 2774)

United States Court of Appeals (2d Cir.):

- *United States v. Barrett*, No. 21-1379 (May 15, 2024) (vacating 2021 sentence and remanding for resentencing, but requiring punishment under both 18 U.S.C. § 924(c) and § 924(j)) (reported at 102 F.4th 60)
- *United States v. Barrett*, No. 14-2641 (Aug. 30, 2019) (vacating one count of conviction and 2014 sentence and remanding for resentencing) (reported at 937 F.3d 126)
- *United States v. Barrett*, No. 14-2641 (Aug. 30, 2019) (rejecting pro se challenges) (reported at 750 Fed. Appx. 19)
- *United States v. Barrett*, No. 14-2641 (Sept. 10, 2018) (affirming 2014 judgment) (reported at 903 F.3d 166)

United States District Court (S.D.N.Y.):

- *United States v. Barrett*, No. 12-cr-45-RJS-3 (May 21, 2021) (amended judgment and new sentence of 50 years)
- *United States v. Barrett*, No. 12-cr-45-RJS-3 (July 17, 2014) (original judgment and sentence of 90 years)

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OPINION BELOW

The Second Circuit's opinion is reported at 102 F.4th 60 and appears in Petitioner's Appendix to his Petition for a Writ of Certiorari ("Pet. App.") at 1a-70a.

JURISDICTION

The Circuit entered its judgment on May 15, 2024, and denied rehearing on July 19, 2024. *Id*. at 71a. Petitioner filed his certiorari petition on October 15, 2024. The Court granted the petition, limited to Question 1, on March 3, 2025. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb."

Section 924(c)(1)(A) of Title 18 of the United States Code is violated if someone, "during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, or [], in furtherance of any such crime, possesses a firearm."

Section 924(j) is violated if someone, "in the course of a violation of subsection (c), causes the death of a person through the use of a firearm."[1]

INTRODUCTION

"The Double Jeopardy Clause . . . 'protects against multiple punishments for the same offense.'" *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). Thus,

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[1] Subsections (c) and (j) are set out in full in the Statutory Appendix at the end of this brief.

courts "presume that 'where two statutory provisions proscribe the "same offense,"' a legislature does not intend to impose two punishments." *Rutledge v. United States*, 517 U.S. 292, 297 (1996) (quoting *Whalen v. United States*, 445 U.S. 684, 692 (1980)).

"Legislatures," however, "not courts, prescribe the scope of punishments." *Missouri v. Hunter*, 459 U.S. 359, 368 (1983). The "Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Id.* at 366.

The question here is whether Congress intended to punish a fatal shooting during a "crime of violence or drug trafficking crime" under two statutes: under 18 U.S.C. § 924(j), as the defendant "cause[d] the death of a person through the use of a firearm," and also under § 924(c)(1)(A), as he "possesse[d] a firearm."

Text, statutory history and precedent confirm Congress did not intend this double punishment.

Just like receiving a firearm, Congress recognized that a person who lethally uses "a firearm must also possess it, and [] had no intention of subjecting that person to two convictions for the same criminal act." *Ball v. United States*, 470 U.S. 856, 862 (1985).

The Second Circuit also recognized gun possession is a "lesser-included offense" of fatally pulling the trigger. Pet. App. 54a. And a crime is "the 'same' for purposes of double jeopardy as any lesser offense included in it." *Brown*, 432 U.S. at 168.

Accordingly, there is a "presumption that Congress intended to authorize only one punishment" here. *Rutledge*, 517 U.S. at 307. Indeed, courts have long "presumed that Congress does *not* intend for a defendant to be cumulatively punished for two crimes

where one crime is a lesser included offense of the other." *Almendarez-Torres v. United States*, 523 U.S. 224, 231 (1998) (emphasis in original; citing *Whalen*).

This presumption cannot be "overcome" unless Congress "clearly indicates" a wish to double-punish. *Rutledge*, 517 U.S. at 303. And this "clear-statement rule is a demanding standard." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 388 (2023). Multiple punishments must be "unambiguously," *id.*, and "specially authorized by Congress." *Whalen*, 445 U.S. at 693.

Yet neither § 924(j) nor § 924(c)(1)(A) says anything about punishing under both statutes.

And Congress knows how to penalize cumulatively: § 924(c)(1)(A) requires the punishment for gun possession to be "in addition to the punishment" for the underlying "crime of violence or drug trafficking crime." If the gun possessed is fatally used, however, "subsection (j) supplies its own comprehensive set of penalties that apply instead of subsection (c)'s." *Lora v. United States*, 599 U.S. 453, 460 (2023).

There is an exception: fatal use of a gun firing "armor piercing ammunition" requires, "in addition to the punishment" for the underlying violent or drug crime, a prison term of "not less than 15 years" and a sentence for "murder" or "manslaughter." § 924(c)(5). But that is not this case, and allowing multiple punishments in that context underscores the fact that Congress has not done so here.

The Circuit nonetheless ordered Petitioner to be punished under § 924(j), and then for the lesser included § 924(c)(1)(A) offense, despite Congress nowhere authorizing punishment under both statutes.

This Court should reverse.

STATEMENT

A. Legal Background

1. The Presumption Against Multiple Punishments for the Same Offense

"Legislatures, not courts, prescribe the scope of punishments." *Hunter*, 459 U.S. at 368. And courts must stay in their lane: if one "exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." *Whalen*, 445 U.S. at 689.

"In accord with principles rooted in common law and constitutional jurisprudence, we presume that 'where two statutory provisions proscribe the "same offense,"' a legislature does not intend to impose two punishments." *Rutledge*, 517 U.S. at 297 (quoting *Whalen*, 445 U.S. at 692, and citing *Ex parte Lange*, 85 U.S. 163 (1873)).

"The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger*." *Brown*, 432 U.S. at 166. The question is whether each offense "requires proof of a fact that the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). If the answer is no, the "offenses are the same." *Brown*, 432 U.S. at 166.

"As is invariably true of a greater and lesser included offense, the lesser offense [] requires no proof beyond that which is required for conviction of the greater." *Id.* at 168. A "greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." *Id.* So if a person is

convicted of a greater and lesser included offense, courts "presum[e] that Congress intended to authorize only one punishment." *Rutledge*, 517 U.S. at 307.

This "presumption against allowing multiple punishments" cannot be "overcome" unless Congress has "clearly indicate[d] that it intended to allow courts to impose them." *Id.* at 303. There must be "clearly expressed" license to punish under both statutes. *Hunter*, 459 U.S. at 368. Congress needs to have "specially authorized" that. *Whalen,* 445 U.S. at 693.

It is not enough that two crimes are "separate statutory offenses for which punishments are separately provided." *Id.* at 690. "Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." *Id*. at 692.

This "clear-statement rule[] help[s] courts 'act as faithful agents of the Constitution,'" as, "absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds." *West Virginia v. Environmental Protection Agency*, 597 U.S. 697, 736 (2022) (Gorsuch, J., concurring; quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. Rev. 109, 169 (2010)).

If a person is convicted of a greater and lesser included offense without unmistakable allowance for punishment under both statutes, "'[o]ne of [his] convictions' . . . is unauthorized punishment for a separate offense' and must be vacated." *Rutledge*, 517 U.S. at 307 (quoting *Ball*, 470 U.S. at 864).

2. The Early § 924(c)

Enacted in 1968, § 924(c) originally said a person who "uses" or "carries" a firearm during "any [federal] felony . . . shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years." Pub. L. No. 90-618 § 102, 82 Stat. 1224.

In 1971, Congress specified that a § 924(c) sentence must be "in addition to the punishment provided for the commission of [the underlying] felony," and may not "run concurrently with any term of imprisonment imposed for the commission of such felony." Pub. L. No. 91-644 § 13, 84 Stat. 1890.

In 1978, however, this Court held "Congress cannot be said to have authorized the imposition of the additional penalty of § 924(c) for commission of bank robbery with firearms already subject to enhanced punishment under § 2113(d)." *Simpson v. United States*, 435 U.S. 6, 12-13 (1978). The Court then held "sentencing under § 924(c) is simply not permissible where the predicate felony statute contains its own enhancement" for gun use. *Busic v. United States*, 446 U.S. 398, 404 (1980). "If corrective action is needed, it is the [] Congress that must provide it." *Id.* at 405.

Congress responded in 1984 by amending § 924(c) to make clear that its penalty applies even if the underlying felony "provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." Pub. L. No. 98-473 § 1005(a), 98 Stat. 2138. "Congress thus repudiated the result we reached in *Busic*" and "*Simpson*." *United States v. Gonzales*, 520 U.S. 1, 10 (1997).

At the same time, Congress narrowed § 924(c): instead of applying to any federal felony, Congress limited it to a federal "crime of violence," Pub. L. No.

98-473 § 1005(a), which it defined. *See id.* § 1001.

Congress also changed § 924(c)'s punishment. Instead of being a sentence between one and 10 years, Congress fixed the term at "five years." *Id.* § 1005.

Two years later, in 1986, Congress expanded § 924(c) to apply to a "drug trafficking crime," which it defined. Pub. L. No. 99-308 § 104(a)(2), 100 Stat. 457. It also added penalties for use of a "machinegun." *Id.*

All along, § 924(c)'s directive to impose punishment "in addition to" that of another crime remained focused on the underlying felony.

3. Enactment of § 924(j)

In 1994, Congress addressed fatal shootings during violent or drug crimes, a problem § 924(c) did not address. Senator Domenici: "Those who commit murder in the course of violations of Federal criminal law must face the penalty of death." 140 Cong. Rec. S6018-02, *S6072. We must "authoriz[e] the death penalty for gun murders during Federal crimes of violence and drug trafficking crimes." *Id.* at *S6071.

So Congress wrote § 924(j) (initially labeled § 924(i)), which says 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 (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life." Pub. L. No. 103-322 § 60013, 108 Stat. 1973. And "if the killing is manslaughter (as defined in section 1112)," the person shall "be punished as provided in that section." *Id.* (Subsection (i) was relabeled (j) in 1996. *See* Pub. L. No. 104-294 § 603(r), 110 Stat. 3505.)

"What this does," then-Senator Biden, Chair of the

Judiciary Committee, explained, "is, it says if you are guilty of committing a crime that results in the death of an individual through the use of a gun, you are eligible for the death penalty, assuming it is a Federal crime." 140 Cong. Rec. S6018-02, *S6072.

Section 924(j) thus gave prosecutors flexibility to seek enhanced penalties – up to life imprisonment or capital punishment – for a person who uses a gun to murder "in the course of a violation of subsection (c)." The clause also provided another kind of flexibility: though the statute of limitations for a § 924(c) offense is "five years," 18 U.S.C. § 3282(a), murder under § 924(j)(1), which is "punishable by death," has no statute of limitations. 18 U.S.C. § 3281.

Notably, however, Congress did not include in § 924(j) any language indicating the punishment should be "in addition to the punishment" for any other crime. There had been a proposal to address fatal shootings in § 924(c) and require, "in addition to the punishment provided for [the underlying] crime of violence or drug trafficking crime," a penalty of "death or [] imprisonment for not less than life." 140 Cong. Rec. S12496-01, *S12553. But this suggestion to impose multiple punishments for lethal gun use wound up, as Minority Leader Dole said, "on the cutting-room floor." *Id.* at *S12551.

Section 924(j) and its range of penalties were instead enacted in a standalone provision.

4. The Current § 924(c)(1)(A)

In 1998, Congress again amended § 924(c). It "divided the statute's existing sentencing prescriptions into four paragraphs in lieu of one." *Abbott v. United States*, 562 U.S. 8, 26 (2010).

Congress also decided to drop the fixed 5-year penalty for handgun use and return to mandatory minimum punishment: at least "5 years" for possessing a handgun in connection with a violent or drug crime; at least "7 years" for brandishing; and at least "10 years" for discharging. Pub. L. No. 105-386 § 1(a)(1), 112 Stat. 3469, *codified at* § 924(c)(1)(A).

But Congress didn't revise § 924(j).

5. Section 924(c)(5)

In 2005, Congress amended § 924(c) to allow multiple punishments for fatal gun use— if the "death results from the use of [armor piercing] ammunition." Pub. L. No. 109-92 § 6(b), 119 Stat. 2102.

Specifically, Congress added § 924(c)(5). It says someone who commits a violent or drug crime with "armor piercing ammunition . . . shall, in addition to the punishment provided for such crime . . . (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," and 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," or "if the killing is manslaughter (as defined in section 1112), be punished as provided in [that] section."

Multiple punishments for a fatal shooting are thus required if armor piercing ammunition is used. But no provision permits that if such ammunition is not used.

6. This Court's Decision in *Lora*

As noted above, Congress specified in 1971 that a § 924(c) sentence should not run "concurrently" with that for the underlying "felony." Pub. L. No. 91-644 § 13. The current version of this provision appears in § 924(c)(1)(D)(ii), which says "no term of imprisonment

imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person."

In *Lora*, the Court considered "whether § 924(c)'s bar on concurrent sentences extends to a sentence imposed under a different subsection: § 924(j). We hold that it does not." 599 U.S. at 455.

"Subsection (c)'s consecutive-sentence requirement applies to a 'term of imprisonment imposed on a person *under this subsection*'— *i.e.*, subsection (c)." *Id.* at 458 (quoting § 924(c)(1)(D)(ii); emphasis in *Lora*). "By those plain terms, Congress applied the consecutive-sentence mandate only to terms of imprisonment imposed under *that* subsection." *Id.* (emphasis in original).

Section 924(c)(1)(A)'s other mandate – to impose a "term of imprisonment of not less than" 5, 7 or 10 years, depending on the facts of the case, "in addition to the punishment" for the underlying "crime of violence or drug trafficking crime" – also does not apply to § 924(j). "To state the obvious again, subsection (j) is not located within subsection (c). Nor does subsection (j) call for imposing any sentence from subsection (c)." *Lora*, 599 U.S. at 458.

The Court rejected the Government's view that a "subsection (j) defendant faces subsection (j)'s penalties *plus* subsection (c)'s penalties." *Id.* at 459 (emphasis in original). "Subsection (j) nowhere mentions – let alone incorporates – subsection (c)'s penalties." *Id.* "Instead, subsection (j) supplies its own comprehensive set of penalties that apply instead of subsection (c)'s." *Id.* at 460. As such, someone like Lora – who was convicted only under § 924(j) – is not subject to § 924(c)'s penalties.

The Court also differentiated § 924(j) from § 924(c)(5). While "Section 924(c)(5) groups . . . penalties together," *id*. at 461 – one for the underlying "crime of violence or drug trafficking crime," one term of "imprisonment of not less than 15 years" for having "armor piercing ammunition," and one for either "murder" or "manslaughter" if "death results from the use of such ammunition," § 924(c)(5) – "subsection (j) is cast from a different mold." *Lora*, 599 U.S. at 461.

"[S]everal unrelated subsections separate subsections (c) and (j) structurally, and nothing joins their penalties textually." *Id*. Further, the "aspects of § 924(c)(5) are missing from subsection (j)." *Id*. Section 924(c)(5) thus "shows how Congress could have constructed penalties that might ultimately add together. Yet Congress did not implement that design in subsection (j)." *Id*.

In short, "Congress plainly chose a different approach to punishment in subsection (j) than in subsection (c)." *Id*. at 462. "Congress designed subsection (j)'s penalties to account for the seriousness of the offense by themselves, without incorporating penalties from subsection (c)." *Id*. at 463 n.5.

The Court rejected, moreover, the Government's claim that it's "'implausible' that Congress imposed the harsh consecutive-sentence mandate under subsection (c) but not subsection (j), which covers more serious offense conduct." *Id*. at 462. That "result is consistent with other design features of the statute." *Id*. Whereas § 924(c) "is full of *mandatory* penalties," § 924(j) "eschews mandatory penalties in favor of sentencing flexibility." *Id*. (emphasis in original). "This follows the same pattern as several other provisions enacted alongside subsection (j) in the

Federal Death Penalty Act of 1994." *Id.* Nor is § 924(j)'s "flexibility incompatible with the seriousness of subsection (j) offenses. Subsection (j) merely reflects the seriousness of the offense using a different approach than subsection (c)'s mandatory penalties. For murder, subsection (j) authorizes the harshest maximum penalty possible: death." *Id.* at 463.

Finally, the Court previewed the double jeopardy question here. "According to the Government's brief, 'Section 924(j) amounts to the "same offense" as Section 924(c) for purposes of the Double Jeopardy Clause,' so 'a defendant may be punished for *either* a Section 924(c) offense *or* a Section 924(j) offense, *but not both*.'" *Id.* at 461 (citation omitted; emphasis in *Lora*). The Court, while taking "no position on the Government's view of double jeopardy," noted it "aligns with our conclusion here: If a defendant receives a sentence under subsection (j), he does *not* receive a sentence 'imposed . . . under [subsection (c)].'" *Id.* (quoting § 924(c)(1)(D)(ii); emphasis and bracketed text in *Lora*). "Accordingly, the Government's view of double jeopardy can easily be squared with our view that subsection (j) neither incorporates subsection (c)'s penalties nor triggers the consecutive-sentence mandate." *Id.* at 462.

B. Factual and Procedural Background

1. From August 2011 to January 2012, Petitioner Dwayne Barrett was part of a robbery crew, serving mainly as its driver. On December 12, 2011, he drove Jermaine Dore and Taijay Todd as they followed men in a van; they planned to rob the men of $10,000 made from selling untaxed cigarettes. *See* Pet. App. 5a.

After the men parked their van, and while "Barrett remained in the car, Dore and Todd approached the

van." *Id.* at 6a. They ordered the two men in the front out at gunpoint, making one leave $200, and then got in and drove off; but a third man, Gamar Dafalla, was still in the back. *See id.* And soon after they began to drive away, "Dafalla threw [a bag containing the other $9,800] out" to his compatriot. *Id.* "Upon realizing what Dafalla had done, Dore shot him dead." *Id.*

Based on this, Barrett was accused of three crimes: aiding a robbery in violation of 18 U.S.C. § 1951 (Count Five); aiding the use of a gun that was discharged, in violation of § 924(c)(1)(A)(iii) (Count Six); and aiding the use of that gun, which was used to commit murder, in violation of § 924(j)(1) (Count Seven). *See* 2d Cir. 21-1379, Docket Entry 70 at 145-46.[2]

A jury found Barrett guilty in March 2013. But, as his trial preceded this Court's June 2013 ruling that gun brandishing and discharge are "'element[s]' that must be submitted to the jury," *Alleyne v. United States*, 570 U.S. 99, 103 (2013), Barrett's jury was "not [] asked to make a specific finding of brandishing or discharging." Pet. App. 12a n.8.

Besides not being present when Dore shot Dafalla, Barrett denounced that killing to his confederates as "crazy" and "wrong" and "messed up," and the district judge found Barrett "didn't expect or plan for a murder to take place." 2d Cir. 21-1379, Docket Entry 98 at 11 n.3. He still sentenced Barrett to 90 years in prison,

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[2] The other charges, not at issue here, were for: robbery conspiracy in violation of 18 U.S.C. § 1951 (Count One); aiding the use of a gun that was discharged during the conspiracy, in violation of § 924(c)(1)(A)(iii) (Count Two); robbery on October 29, 2011, in violation of § 1951 (Count Three); and brandishing a gun during that robbery, in violation of § 924(c)(1)(A)(ii) (Count Four). *See* 2d Cir. 21-1379, Docket Entry 70 at 138-45.

which the Second Circuit affirmed. *See United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018).

This Court vacated that judgment in light of *United States v. Davis*, 588 U.S. 445 (2019), which held the "crime of violence" definition at § 924(c)(3)(B) is void for vagueness. *See Barrett v. United States*, 139 S. Ct. 2774 (2019). Barrett's Count Two conviction, for gun use during a robbery conspiracy, was then set aside, as conspiracy is a "crime of violence" only under the invalidated § 924(c)(3)(B). *See* Pet. App. 10a-11a.

2. At resentencing in 2021, the judge imposed a new sentence of 50 years: "20 years' imprisonment on Counts 1, 3, and 5," the conspiracy and robbery counts, "to run concurrently, followed by 5 years' imprisonment on Count 4 and 25 years' imprisonment on Count 7," the § 924(c) and § 924(j) counts (each concerning a different robbery), "to run consecutive to each other and to the sentences imposed on Counts 1, 3, and 5." 2d Cir. 21-1379, Docket Entry 70 at 277.

The judge did not impose a sentence on Count Six, the § 924(c) count stemming from the Dafalla murder, saying that conviction and the § 924(j) one "merged into one sentence because one's a lesser included of the other." *Id.* at 220. But he agreed the "mandatory minimum" for the § 924(c) count was "five" years given the lack of a jury finding of gun discharge. *Id.*

3. While Barrett's appeal was pending, this Court decided *Lora*. It held "subsection (j) [of § 924] neither incorporates subsection (c)'s penalties nor triggers the consecutive-sentence mandate." 599 U.S. at 462.

Barrett thus filed a supplemental brief, explaining that his judge believed the § 924(j) count mandated a consecutive sentence but that, given *Lora*, this was incorrect and so resentencing was warranted. *See* 2d

Cir. 21-1379, Docket Entry 127.

4. The Second Circuit agreed about that. *See* Pet. App. 44a-51a.

But it reversed the District Court's ruling that the § 924(c) and § 924(j) counts stemming from the Dafalla murder "'merged into one sentence.'" *Id*. at 49a. It held punishing under both statutes would not run afoul of the Double Jeopardy Clause: "As construed in *Lora*, § 924(c)(1) and § 924(j) crimes are separate offenses for which Congress has clearly authorized cumulative punishments." *Id*. at 52a.

The Circuit recognized "Barrett's § 924(c) crime is [] a lesser-included offense of his § 924(j) crime," *id*. at 54a, thus yielding "the presumption that Congress intended to authorize only one punishment." *Rutledge*, 517 U.S. at 307.

But, citing two clauses of § 924(c), the Circuit claimed "Congress intended to authorize cumulative sentences." Pet. App. 61a.

First, it said § 924(c)(1)'s requirement that a sentence "cannot be less than prescribed minimums," *id*. at 55a, means "*every* defendant convicted" must be "incarcerated for no less than the stated minimum." *Id*. at 55a-56a (emphasis in original).

Second, it said § 924(c)(1)(D)(ii)'s consecutive-sentence mandate "strongly signals Congress's intent to authorize a cumulative § 924(c) punishment without exception." *Id*. at 56a.

It also cited "statutory structure," noting "§ 924(j) [is] outside § 924(c)" and that they are "different crimes" with "different penalty schemes." *Id*. at 61a.

Last, the Circuit said punishing under only one statute would be "anomalous" for giving "defendants

whose § 924(c) crimes actually caused death the possibility of avoiding [its] mandates." *Id*. at 62a.

The Circuit ordered Barrett's judge to "resentence him on Count Seven" per § 924(j) and then to "sentence Barrett on Count Six" per § 924(c). *Id*. at 66a.

SUMMARY OF ARGUMENT

"Barrett's § 924(c) crime is [] a lesser-included offense of his § 924(j) crime." *Id*. at 54a. They are thus "the 'same' for purposes of double jeopardy." *Brown*, 432 U.S. at 168. This creates a "presumption against allowing multiple punishments," which cannot be "overcome" unless Congress has "clearly indicate[d] that it intended to allow courts to impose them." *Rutledge*, 517 U.S. at 303. This "clear-statement rule is a demanding standard," *Lac du Flambeau*, 599 U.S. at 388, and it's not met here.

Neither § 924(j) nor § 924(c)(1)(A) says a word about punishing under both statutes. This "silence" is deafening, as "Congress [i]s aware of the *Blockburger* rule and legislate[s] with it in mind." *Albernaz v. United States*, 450 U.S. 333, 342 (1981). Had Congress wanted § 924(j) to override the presumption against punishing both greater and lesser included offenses, it would have said so. But it didn't. "The statute does not so much as mention" cumulative punishment, "let alone require it." *Kousisis v. United States*, ___ S. Ct. ___, 2025 WL 1459593, at *6 (May 22, 2025).

And while § 924(c)(1)(A) requires the punishment for gun possession to be "in addition to" that for the underlying violent or drug crime, it says nothing about the punishment for fatal gun use. For that, where normal ammunition is fired, "subsection (j) supplies its own comprehensive set of penalties that apply instead of subsection (c)'s." *Lora*, 599 U.S. at 460.

The clause that allows multiple punishments for having and lethally using a gun is § 924(c)(5), but only where "armor piercing ammunition" is fired.

When it comes to a gun loaded with regular bullets, Congress has not "specially authorized" multiple punishments for the "same offense," *Whalen*, 445 U.S. at 692-93, of fatally "us[ing]," § 924(j), while "possess[ing]," § 924(c)(1)(A), the firearm.

Further, this Court has already rejected the notion that it's "anomalous," Pet. App. 62a, for Congress to have required multiple punishments for possessing a gun during a violent or drug crime but not for the "more serious offense" of using it to kill. *Lora*, 599 U.S. at 462. That "result is consistent with other design features of the statute." *Id.* "Congress plainly chose a different approach to punishment in subsection (j) than in subsection (c)." *Id.* While § 924(c) "is full of *mandatory* penalties," § 924(j) "eschews mandatory penalties in favor of sentencing flexibility." *Id.* (emphasis in original). "Nor is that flexibility incompatible with the seriousness of subsection (j) offenses," which are punishable by the "harshest maximum penalty possible: death." *Id.* at 463. And Barrett's judge may order imprisonment up to life under either § 924(c) or § 924(j).

What the judge may not do is punish under both § 924(j) and the lesser included § 924(c)(1)(A). The crimes are the "same offence," U.S. Const. amend. V, and Congress has not permitted – let alone clearly – punishment under both statutes.

"Accordingly, '[o]ne of [Barrett's] convictions . . . is unauthorized punishment for a separate offense' and must be vacated." *Rutledge*, 517 U.S. at 307 (quoting *Ball*, 470 U.S. at 864).

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE FORBIDS PUNISHMENT UNDER BOTH § 924(J) AND § 924(C)(1)(A) FOR FATAL USE OF A FIREARM

A. Because a Violation of § 924(j) and the Lesser Included § 924(c)(1)(A) is the Same Offense, Congress is Presumed Not to Have Intended Punishment Under Both Statutes

"No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This "guarantee against double jeopardy . . . protects against multiple punishments for the same offense." *Pearce*, 395 U.S. at 717. "'If there is anything settled in the jurisprudence of England and America,'" in fact, "'it is that no man can be twice lawfully punished for the same offence." *Id.* (quoting *Lange*, 85 U.S. at 168).

But as "[l]egislatures, not courts, prescribe the scope of punishments," *Hunter*, 459 U.S. at 368, the "Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Id.* at 366.

If a court "exceeds its own authority by imposing multiple punishments not authorized by Congress," however, "it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." *Whalen*, 445 U.S. at 689.

Where one act "'constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.'" *Id.* at 692 (quoting

Blockburger, 284 U.S. at 304). If the answer is no, the "provisions proscribe the 'same offense.'" *Id.* And if "the offenses are the same under that test, cumulative sentences are not permitted, unless elsewhere specially authorized by Congress." *Id*. at 693.

Cumulative convictions are not allowed either, as a second "conviction" for the same offense "amounts to cumulative punishment not authorized by Congress." *Rutledge*, 517 U.S. at 303. The "second conviction, even if it results in no greater sentence, is an impermissible punishment." *Ball*, 470 U.S. at 865.

This Court finds "clear-statement rules appropriate when a statute implicates historically or constitutionally grounded norms that we would not expect Congress to unsettle lightly." *Jones v. Hendrix*, 599 U.S. 465, 492 (2023). Accordingly, "we presume that 'where two statutory provisions proscribe the "same offense,"' thereby implicating the Double Jeopardy Clause, Congress "does not intend to impose two punishments." *Rutledge*, 517 U.S. at 297 (quoting *Whalen*, 445 U.S. at 692). Though Congress alone defines crimes and punishments, it generally "means for its laws to operate in congruence with the Constitution rather than test its bounds." *West Virginia*, 597 U.S. at 736 (Gorsuch, J., concurring).

Thus, a statement "clearly indicat[ing]" Congress's wish for courts to punish the same offense more than once is required to "overcome" the presumption against that. *Rutledge*, 517 U.S. at 303. And this "clear-statement rule is a demanding standard." *Lac du Flambeau*, 599 U.S. at 388. Congress must have "unambiguously expressed" its "abrogation" of the double jeopardy presumption, such that license to impose multiple punishments is "'clearly discernable'

from the statute." *Id*. (quoting *F.A.A. v. Cooper*, 566 U.S. 284, 291 (2012)). Congress needs to have "clearly expressed [its] intent" for "cumulative punishment." *Hunter*, 459 U.S. at 368.

If not, and a person is convicted under two statutes for the "same offence," U.S. Const. amend. V, then "'[o]ne of [the] convictions' . . . must be vacated." *Rutledge*, 517 U.S. at 303 (quoting *Ball*, 470 U.S. at 864). That describes this case.

Dore's fatally pulling the trigger violated each statute here. When he fired, he "possesse[d]" the gun in violation of § 924(c)(1)(A). And, "in the course of [that] violation of subsection (c)," he caused Dafalla's death "through the use of a firearm." § 924(j).

These offenses are the "same" under the *Blockburger* test. As the Circuit acknowledged, "[a]lthough Barrett's § 924(j) crime required proof of a fact, *i.e.*, causing death, not required by his predicate § 924(c) firearms crime, his § 924(c) crime required proof of no fact not also required by his § 924(j) crime." Pet. App. 54a. His "§ 924(c) crime is thus a lesser-included offense of his § 924(j) crime." *Id*. And an "offense is [] by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." *Brown*, 432 U.S. at 168.

"In accord with principles rooted in common law and constitutional jurisprudence, we [thus] presume" Congress did "not intend to impose two punishments," *Rutledge*, 517 U.S. at 297 (quoting *Whalen*, 445 U.S. at 692, and citing *Lange*), for a violation of § 924(j) and the lesser included § 924(c)(1)(A).

And nothing "clearly indicates," *id*. at 303, that punishment under both statutes has been "specially authorized by Congress." *Whalen*, 445 U.S. at 693.

B. Nothing Overcomes the Presumption Against Punishing Under Both Statutes

1. Section 924(j) Does Not Allow Punishment Under Both It and § 924(c)(1)(A)

Section 924(j) provides:

> 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.

This provision says nothing about punishing a fatal shooting under both it and § 924(c)(1)(A). It says nothing about cumulative punishment at all. Such "silence" is highly telling, as "Congress [i]s aware of the *Blockburger* rule and legislate[s] with it in mind." *Albernaz*, 450 U.S. at 342. But § 924(j) omits § 924(c)(1)(A)'s order for punishment "in addition to the punishment" for the underlying crime. And "'judicial supplementation is particularly inappropriate when . . . Congress has shown that it knows how to adopt the omitted language.'" *Lackey v. Stinnie*, 145 S. Ct. 659, 669-70 (2025) (citation omitted).

What's more, "Congress specifically considered and rejected" a call to "place[] subsection (j) within subsection (c)." *Lora*, 599 U.S. at 463 & n.6. The idea was to require the punishment for a fatal shooting to be "in addition to the punishment" for the underlying "crime of violence or drug trafficking crime." 140 Cong. Rec. S12496-01, *S12553. But this proposal to

require multiple punishments for lethal gun use, just as § 924(c)(1)(A) does for simple gun possession, wound up "on the cutting-room floor." *Id.* at *S12551. Consequently, § 924(c)(1)(A)'s "express language demonstrating the legislature's intent for cumulative punishment is absent in section 924(j)." *United States v. Gonzales*, 841 F.3d 339, 357 (5th Cir. 2016).

Of course, "Congress could have authorized cumulative punishments for convictions under sections 924(c) and 924(j) had it chosen to do so. But the plain language of section 924(j) indicates no such desire." *United States v. Garcia-Ortiz*, 657 F.3d 25, 28 (1st Cir. 2011) (citing *Hunter*, 459 U.S. at 366-68).

"Subsection (j) nowhere mentions – let alone incorporates – subsection (c)'s penalties." *Lora*, 599 U.S. at 459. "[N]othing joins their penalties." *Id.* at 461. "Congress designed subsection (j)'s penalties to account for the seriousness of the offense by themselves, without incorporating penalties from subsection (c)." *Id.* at 463 n.5. And "it is not for us to question that choice." *Carter v. United States*, 530 U.S. 255, 272 (2000).

2. Section 924(c)(1)(A) Also Does Not Permit Punishment Under Both Statutes

Section 924(c)(1)(A)(i) says:

> 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—
>
> be sentenced to a term of imprisonment of not less than 5 years.

This provision clearly requires two punishments for a "crime of violence or drug trafficking crime" committed by an armed defendant: "in addition to the punishment provided for such crime," he "shall" be sentenced to at least "5 years" for having a gun.

Per the Circuit, this expresses "Congress's intent for *every* defendant convicted under that statute . . . to be incarcerated for no less than the stated minimum." Pet. App. at 55a-56a (emphasis in original).

Yet Barrett's "convict[ion] under" § 924(c) may not stand if his § 924(j) conviction does. As the Circuit recognized, his "§ 924(c) crime is [] a lesser-included offense of his § 924(j) crime." *Id*. at 54a. The crimes thus constitute "the 'same' offense under *Blockburger*," *Whalen*, 445 U.S. at 694, and so are "the 'same' for purposes of double jeopardy." *Brown*, 432 U.S. at 168. Accordingly, two convictions may not coexist unless "Congress clearly indicates that it intended to allow courts to impose them." *Rutledge*, 517 U.S. at 303.

But § 924(c)(1)(A) does not so indicate. It is clear that "a defendant should be subject to conviction and sentence under [§ 924(c)] in addition to any conviction and sentence for the underlying felony." *Hunter*, 459 U.S. at 363-64. Yet it contains no "clearly expressed legislative intent," *id*. at 368, to additionally punish the greater offense of "caus[ing] the death of a person through the use of a firearm." § 924(j). For that,

"subsection (j) supplies its own comprehensive set of penalties that apply instead of subsection (c)'s." *Lora*, 599 U.S. at 460.

Congress has not "unambiguously expressed" in § 924(c)(1)(A) an "abrogation" of the double jeopardy presumption, such that it's "'clearly discernable'" that a fatal shooting may be punished under § 924(j) and the lesser included § 924(c)(1)(A). *Lac du Flambeau*, 599 U.S. at 388 (quoting *Cooper*, 566 U.S. at 291).

The Court's ruling in *Whalen*, moreover, shows just how lacking § 924(c)(1)(A)'s language is. Whalen was convicted in the District of Columbia of "rape, and of killing the same victim in the perpetration of rape." 445 U.S. at 685. As here, those are "separate statutory offenses for which punishments are separately provided." *Id*. at 690. But, also as here, because one crime is a lesser included offense of the other, they are the "'same offense'" under the "rule of statutory construction stated . . . in *Blockburger*." *Id*. at 691-92.

And "a congressional intention to" double-punish, the Court held, "nowhere clearly appears," *id*. at 695—not even in a statute that appeared to intend just that.

The statute said: "'A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed . . . *whether or not* the offense . . . requires proof of a fact which the other does not.'" *Id*. at 691 (citation omitted; emphasis added; Court's emphasis omitted).

The Government read this "to mean that courts may ignore the *Blockburger* rule and freely impose consecutive sentences 'whether or not' the statutory offenses are different under the rule." *Id*. at 691 n.6.

"While this may be a permissible literal reading of

the statute," the Court said, "it would lead to holding that the statute authorizes consecutive sentences for all greater and lesser included offenses." *Id.* "Such an improbable construction" would "be at odds with the evident congressional intention of requiring federal courts to adhere to the *Blockburger* rule." *Id.*

The Court thus refused a literal reading, deeming the statute's "phrasing . . . less than felicitous." *Id.* at 691. And as *that* statute – which expressly purported to allow cumulative punishment for greater and lesser included offenses – wasn't sufficiently clear, then § 924(c)(1)(A) – which says not a peep about punishing the greater § 924(j) offense – isn't either.

3. Section 924(c)(1)(D)(ii) Likewise Does Not Allow Cumulative Punishment Here

The only other provision the Circuit cited for its ruling is § 924(c)(1)(D)(ii): "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment."

The Circuit said this "strongly signals Congress's intent to authorize a cumulative § 924(c) punishment without exception." Pet. App. 56a.

But the clause doesn't speak of "punishment without exception." All it provides is that, *if* a § 924(c) sentence is "imposed," it "shall [not] run concurrently." The Double Jeopardy Clause says, however, a § 924(c) sentence *may not be imposed* if Barrett is sentenced under § 924(j) for the "same offence." And nothing in § 924(c)(1)(D)(ii) says otherwise.

Its conditional instruction on how a § 924(c) sentence should run – *if* one is imposed – does not "specifically authorize[] cumulative punishment" for the greater and lesser included offenses here. *Hunter*, 459 U.S. at 368. It's thus an even "weaker basis" than

§ 924(c)(1)(A) "to discern legislative intent to impose multiple punishments for what is treated as the same offense." *Gonzales*, 841 F.3d at 357.

4. Section 924(c)(5), Inapplicable Here, Shows How Congress Authorizes Multiple Punishments for Fatal Gun Use

For a clear congressional instruction to impose multiple punishments for a fatal shooting and the lesser included gun possession, *see* § 924(c)(5):

> . . . [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . 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.

Section 924(c)(5) thus says someone who uses a gun loaded with "armor piercing ammunition" to kill during a violent or drug crime "shall, in addition to the punishment provided for such crime," be "sentenced to a term of imprisonment of not less than 15 years" and

also be sentenced for "murder" or "manslaughter."

"But subsection (j) is cast from a different mold." *Lora*, 599 U.S. at 461. "[S]everal unrelated subsections separate subsections (c) and (j) structurally, and nothing joins their penalties textually." *Id.* Further, the above "aspects of § 924(c)(5) are missing from subsection (j)." *Id.* So "§ 924(c)(5) shows how Congress could have constructed penalties that might ultimately add together. Yet Congress did not implement that design in subsection (j)." *Id.*

And "when 'Congress includes particular language in one section of a statute but omits it in another,'" this "Court 'presume[s]' that Congress intended a difference in meaning." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Section 924(c)(5) punishes both possession and fatal use of a gun firing "armor piercing ammunition": at least "15 years" for loading the gun with such ammunition, "and" a sentence for "murder" or "manslaughter" because "death result[ed]" from firing. But there is no "clearly expressed legislative intent," *Hunter*, 459 U.S. at 368, to cumulatively punish the possession and fatal use of a gun firing regular bullets.

In sum, § 924's text and history confirm Congress knows how to require multiple punishments for the "same offence" when it so desires. U.S. Const. amend. V. After this Court ruled in *Simpson* and *Busic* that punishment for both a § 924(c) violation and the underlying felony was impermissible, Congress made clear its wish for courts to punish cumulatively. *See* Pub. L. No. 98-473 § 1005(a). It also ordered multiple punishments for the greater and lesser included offenses in § 924(c)(5).

Other such instructions appear throughout the Federal Criminal Code.[3]

But Congress wrote § 924(j) in 1994 without including § 924(c)'s instruction to impose punishment "in addition to" that for the underlying crime, rejecting an explicit call for such wording. And when it revised

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[3] *See, e.g.,* 18 U.S.C. § 844(h)(1) ("Whoever uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States . . . shall, *in addition to* the punishment provided for such felony, be sentenced to imprisonment for 10 years.") (emphasis added); § 1028A(a)(1) ("Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, *in addition to* the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.") (emphasis added); § 1039(e)(1) ("Whoever, violates, or attempts to violate, subsection (a), (b), or (c) knowing that such information may be used in furtherance of, or with the intent to commit, an offense described in section 2261, 2261A, 2262, or any other crime of violence shall, *in addition to* the penalties provided for in such subsection, be fined under this title and imprisoned not more than 5 years.") (emphasis added); § 2260A ("Whoever, being required by Federal or other law to register as a sex offender, commits a felony offense involving a minor under [certain sections of Title 18], shall be sentenced to a term of imprisonment of 10 years *in addition to* the imprisonment imposed for the offense under that provision.") (emphasis added); § 3147 ("A person convicted of an offense committed while released under this chapter shall be sentenced, *in addition to* the sentence prescribed for the offense to— (1) a term of imprisonment of not more than ten years if the offense is a felony; or (2) a term of imprisonment of not more than one year if the offense is a misdemeanor.") (emphasis added); 21 U.S.C. § 848(e)(1)(A) ("*In addition to* the other penalties set forth in this section— any person engaging in or working in furtherance of a continuing criminal enterprise . . . who intentionally kills . . . shall be sentenced to any [*sic*] term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.") (emphasis added).

§ 924 in 1998, "Congress declined again . . . to say anything," *United States v. Wong*, 575 U.S. 402, 412 (2015), that would permit multiple punishments for a fatal shooting and the lesser included gun possession. When it allowed that in 2005, moreover, it did so only for a gun firing "armor piercing ammunition." § 924(c)(5). Congress has otherwise "failed to provide anything like the clear statement this Court has demanded," *Wong*, 575 U.S. at 412, to cumulatively punish the "same offence," U.S. Const. amend. V, of possessing and lethally using a firearm.

"The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense" unless clearly permitted. *Brown*, 432 U.S. at 165. And besides § 924(c)(5), multiple punishments for fatally using a gun during a § 924 crime have not been "specially authorized by Congress." *Whalen*, 445 U.S. at 693.

There's no real doubt about this. And if there were, "we resolve an ambiguity in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act." *Heflin v. United States*, 358 U.S. 415, 419 (1959). *See also United States v. Rentz*, 777 F.3d 1105, 1107 (10th Cir. 2015) (en banc) (applying rule of lenity to "unit of prosecution" question in § 924(c) case) (Gorsuch, J.).

Yet there's no need for lenity, as Congress has done nothing to disturb the presumption that a violation of § 924(j) and the lesser included § 924(c)(1)(A) may not be punished twice. Consequently, "we adhere to the presumption that Congress intended to authorize only one punishment." *Rutledge*, 517 U.S. at 307.

5. Precedent Decidedly Supports Barrett

"As the Supreme Court observed in *Lora*," the Circuit said, "Congress specifically chose to locate § 924(j) outside § 924(c)," defining "different crimes, subject to different penalty schemes." Pet. App. 61a.

But that is a red herring here. As this Court made plain in *Whalen*, *Rutledge* and *Ball*, the fact that greater and lesser included crimes are "separate statutory offenses for which punishments are separately provided," *Whalen*, 445 U.S. at 690, has never "rise[n] to the level of the clear statement necessary for us to conclude that despite the identity of the statutory elements, Congress intended to allow multiple punishments." *Rutledge*, 517 U.S. at 304 n.14. In fact, "we have often concluded that two different statutes define the 'same offense'" that may not be double-punished, "typically because one is a lesser included offense of the other." *Id*. at 297.

The Court reached that conclusion as to the homicide and lesser included rape crimes in *Whalen*.

The Court also did so in *Rutledge*, where the crimes were "conducting a continuing criminal enterprise (CCE) in violation of [21 U.S.C.] § 848" and "conspir[ing] to distribute controlled substances in violation of . . . § 846," 517 U.S. at 294, a "lesser included offense of § 848." *Id*. at 300. These crimes are "the 'same offense'" even though they are defined in "two different statutes" and carry different punishments. *Id*. at 297. *Compare* § 846 (drug conspiracy "shall be subject to the same penalties as those prescribed for the [completed] offense," which range from a fine to life imprisonment, *see* § 841(b)) *with* § 848 (penalties ranging from imprisonment for 20 years to death).

The fact that § 846 and § 848 are "different sections of the United States Code," the Court said, "does not rise to the level of the clear statement necessary . . . to allow multiple punishments." 517 U.S. at 304 n.14. Nothing "demonstrates that Congress 'specially authorized' convictions for both the greater and lesser included offenses we address today." *Id.* (quoting *Whalen*, 445 U.S. at 693).

Indeed, "every proof of a CCE will demonstrate a conspiracy based on the same facts. That overlap is enough to conclude, absent more, that Congress did not intend to allow punishments for both." *Id.*

So too here. Despite § 924(j) and § 924(c)(1)(A) being different statutes with different penalties, nothing shows Congress "specially authorized" convictions under both for an act that violates each. Also, every § 924(j) conviction includes one for § 924(c)(1)(A), which is enough to conclude, "absent more," that Congress has allowed punishment under only one statute. And there is no "more."

Just as the Court concluded in *Ball* as to unlawful receipt of a gun, fatally shooting someone "*necessarily* includes proof of [] possession of that weapon." 470 U.S. at 862 (emphasis in original). "Congress seems clearly to have recognized that a [person] who [fatally uses] a firearm must also possess it," and did not "subject[] that person to two convictions for the same criminal act." *Id.* This is so even though, as in *Ball*, *see id.* at 866-67, the crimes here are set out in different statutes and have different penalties.

As for *Lora*, it took literally "no position" on the double jeopardy question here. 599 U.S. at 461. That hardly supports the Circuit's reversing the District Court's ruling that the Double Jeopardy Clause

precludes punishing under both statutes. Worse for the Circuit, this Court said the judge's view "aligns with" what is also Barrett's "view of double jeopardy," which is that he "cannot receive both subsection (c) and subsection (j) sentences" for his (or, more accurately, Dore's) conduct in this case. *Id.* "[S]ubsection (j) supplies its own comprehensive set of penalties that apply instead of subsection (c)'s." *Id.* at 460. They "account for the seriousness of the offense by themselves." *Id.* at 463 n.5.

Finally, *Lora* rejected the notion that there's anything "anomalous," Pet. App. 62a, or "implausible" about requiring multiple punishments for possessing a gun during a violent or drug crime but not for the "more serious offense" of using it to kill. 599 U.S. at 462. That "result is consistent with other design features of the statute," as "Congress plainly chose a different approach to punishment in subsection (j) than in subsection (c)." *Id.* While § 924(c) "is full of *mandatory* penalties," § 924(j) "eschews mandatory penalties in favor of sentencing flexibility." *Id.* (emphasis in original). "Nor is that flexibility incompatible with the seriousness of subsection (j) offenses," which are punishable by the "harshest maximum penalty possible: death." *Id.* at 463.

In sum, precedent is clearly on Barrett's side. And nothing clearly overrides "the presumption that Congress intended to authorize only one punishment," *Rutledge*, 517 U.S. at 307, for a violation of § 924(j) and the lesser included § 924(c)(1)(A). Thus, punishment under both statutes violates the Fifth Amendment. *See also United States v. Ortiz-Orellana*, 90 F.4th 689, 705 (4th Cir. 2024); *United States v. Wilson*, 579 F. App'x 338, 348 (6th Cir. 2014); *United States v. Cervantes*, 2021 WL 2666684, at *7 (9th Cir. 2021).

C. One of the Convictions Must be Vacated

As the offenses here are "the 'same' for purposes of double jeopardy," *Brown*, 432 U.S. at 168, and Congress has not "specifically authorize[d] cumulative punishment," *Hunter*, 459 U.S. at 368, "'[o]ne of [Barrett's] convictions . . . must be vacated." *Rutledge*, 517 U.S. at 307 (quoting *Ball*, 470 U.S. at 864).

Given the Circuit's ruling, it did not address vacatur; so this Court might remand for the Circuit to consider which conviction should be vacated and how.

Or the Court might "remand with instructions to have the District Court exercise its discretion to vacate one of the convictions." *Ball*, 470 U.S. at 865.

Or the Court might remand to allow the Government to move to dismiss Count Six or Seven pursuant to Federal Rule of Criminal Procedure 48(a). *See Rinaldi v. United States*, 434 U.S. 22 (1977) (remanding with instructions to grant post-conviction Rule 48(a) motion to dismiss).

Whatever the case, Barrett will not be the one to decide under which count he is punished. And no matter which it is, he will face significant penalties. If he is punished under § 924(c), he will be subjected to its "consecutive and minimum sentence mandates." Pet. App. 62a. And if he is punished under § 924(j), the judge may order "imprisonment for any term of years," § 924(j)(1), and so may opt to match § 924(c)'s minimum, and may also run the sentence "consecutively," *Lora*, 599 U.S. at 455, thereby achieving the same result § 924(c) would compel.

What the judge may not do is punish Barrett under both § 924(c) and § 924(j). The crimes here are the "same offence," U.S. Const. amend. V, and Congress has not authorized punishment under both statutes.

CONCLUSION

The Second Circuit's judgment should be reversed.

Respectfully submitted,

Matthew B. Larsen
Counsel of Record
Siobhan Atkins
Sarah Baumgartel
Daniel Habib
Yuanchung Lee
Edward S. Zas
FEDERAL DEFENDERS
OF NEW YORK
52 Duane Street, 10th Floor
New York, NY 10007
(212) 417-8725
Matthew_Larsen@fd.org

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STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(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.

18 U.S.C. § 924(j):

A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, 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.