No. 24-5774

# In the Supreme Court of the United States

DWAYNE BARRETT, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR RESPONDENT SUPPORTING PETITIONER**

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## QUESTION PRESENTED

Whether petitioner may be cumulatively sentenced both for murder using a firearm during a Hobbs Act robbery, in violation of 18 U.S.C. 924(j), and also for the predicate offense of using a firearm during and in relation to the same Hobbs Act robbery, in violation of 18 U.S.C. 924(c)(1)(A).

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 102 F.4th 60. Prior decisions of the court of appeals are available at 937 F.3d 126, 903 F.3d 166, and 750 Fed. Appx. 19.

### JURISDICTION

The judgment of the court of appeals was entered on May 15, 2024. A petition for rehearing was denied on July 19, 2024 (Pet. App. 71a). The petition for a writ of certiorari was filed on October 15, 2024, and was granted on March 3, 2025. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that

"[n]o person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.

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

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime * * * , uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years.

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

Section 924(c)(1)(D)(ii) provides that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person." 18 U.S.C. 924(c)(1)(D)(ii).

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.

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

The full text of those provisions, along with other pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-4a.

## INTRODUCTION

In the context of multiple punishments imposed in a single proceeding, the Double Jeopardy Clause "prevent[s] the sentencing court from prescribing greater punishment than the legislature intended" for a single crime. *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983). The general rule, under *Blockburger* v. *United States*, 284 U.S. 299 (1932), is that statutes define distinct—and thus cumulatively punishable—offenses so long as "each statute requires proof of an additional fact which the other does not." *Id.* at 304 (citation omitted). But where the elements completely overlap, multiple punishments are presumptively precluded unless there is "a clear indication of * * * legislative intent" to allow them. *Whalen* v. *United States*, 445 U.S. 684. 691-692 (1980).

In this case, the court of appeals required multiple punishments for the same conduct under 18 U.S.C. 924(c)(1)(A) and (j)—notwithstanding that proving a violation of Section 924(j) explicitly requires proof of every element of "a violation of subsection (c)," 18 U.S.C. 924(j). Because Section 924(c) is therefore a lesser-included offense of Section 924(j) under *Blockburger*, Congress had to clearly indicate any intent to authorize such cumulative convictions and sentences under the two provisions. But nothing in the text, context, or history of those provisions supplies that clear indication.

The text of Section 924(c)(1)(A) conspicuously authorizes cumulative punishments for lesser-included offenses of the Section 924(c) crime itself—but does not

authorize cumulative punishment for an overlapping offense under Section 924(j). And Section 924(j) does not address cumulative punishments for lesser-included "violation[s] of subsection (c)" at all. 18 U.S.C. 924(j). The contrasting textual approaches toward cumulative punishments in various Section 924 contexts provide a powerful indication that Congress—in line with the *Blockburger* presumption—did not intend to authorize cumulative punishments under Sections 924(c)(1)(A) and (j). Moreover, Congress enacted Section 924(j) against a historical backdrop that indicated that express language would be necessary to authorize multiple punishments.

For those reasons, the government has long understood that multiple punishments for the same conduct under Sections 924(c)(1)(A) and (j) are impermissible. Accordingly, in *Lora* v. *United States*, 599 U.S. 453 (2023), the government argued that because only one punishment is allowed, Congress intended to punish a violation of Section 924(j) with a sentence that incorporated aspects of the Section 924(c) sentencing scheme, including the minimum-sentence and mandatory-consecutive-sentence requirements of Section 924(c). The Court, however, declined to combine the two schemes, explaining that Congress adopted different approaches to sentencing under each provision, with Section 924(c) favoring statutory minimums and Section 924(j) favoring judicial discretion with higher maximums. *Id.* at 462-463. And although the Court did not expressly decide the question presented here, it stated that its holding could "easily be squared" with the government's longstanding position on the double-jeopardy issue. *Id.* at 462.

That is correct. Sections 924(c)(1)(A) and (j) simply provide alternative ways to punish certain types of firearm crimes, each with its own sentencing approach. Prosecutors are free to pick one offense or the other, or to pursue a Section 924(j) charge with an instruction on a lesser-included Section 924(c)(1)(A) offense. But nothing provides the requisite legislative authorization for the same conduct to be cumulatively punished under both provisions. The court of appeals erred in concluding otherwise.

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951; two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951; three counts of carrying and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A); and one count of murder using a firearm during a crime of violence, in violation of 18 U.S.C. 924(j)(1) and (2). Judgment 1-2. The district court sentenced petitioner to 90 years of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. 903 F.3d 166; 750 Fed. Appx. 19.

This Court granted a petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of *United States* v. *Davis*, 588 U.S. 445 (2019). 139 S. Ct. 2774. On remand, the court of appeals vacated one Section 924(c) conviction. 937 F.3d 126. The district court resentenced petitioner to 50 years of imprisonment, to be followed by three years of supervised release. Am. Judgment 1-4. The court of appeals affirmed petitioner's

convictions but vacated petitioner's sentence and remanded for resentencing. Pet. App. 1a-70a.

1. In 2011 and 2012, petitioner and others, known as "the Crew," conspired to commit a "series of frequently armed, and invariably violent, robberies." Pet. App. 5a; 903 F.3d at 170-171. In one of those robberies, petitioner and other Crew members robbed a poultry business owner, Ahmed Salahi, of $15,000. 903 F.3d at 170. In another robbery, petitioner and other Crew members shot and killed Gamar Dafalla after robbing him. Pet. App. 5a-7a.

A federal grand jury in the Southern District of New York returned an indictment charging petitioner with one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951; two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951; three counts of carrying and using a firearm in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A); and one count of murder using a firearm during a crime of violence, in violation of 18 U.S.C. 924(j)(1) and (2). Superseding Indictment 1-9.

Under 18 U.S.C. 924(c)(1)(A), "any person who, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime" be subject to a term of imprisonment of "not less than 5 years." 18 U.S.C. 924(c)(1)(A)(i). Section 924(c)(1)(D)(ii) then specifies that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the

crime of violence or drug trafficking crime" underlying the Section 924(c) violation. 18 U.S.C. 924(c)(1)(D)(ii).

Under 18 U.S.C. 924(j), any "person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall * * * be punished by death or by imprisonment for any term of years or for life" if "the killing is a murder." 18 U.S.C. 924(j)(1). If "the killing is manslaughter," the defendant shall "be punished as provided in" 18 U.S.C. 1112, the statute criminalizing manslaughter within the special maritime and territorial jurisdiction of the United States. 18 U.S.C. 924(j)(2); see 18 U.S.C. 1112. Section 924(j) does not itself contain directives for minimum consecutive sentences like Section 924(c) does.

Petitioner's first Section 924(c) charge was predicated on the Hobbs Act conspiracy charge. Superseding Indictment 6. His second Section 924(c) charge was predicated on the Hobbs Act robbery charge for the robbery of Salahi. *Id.* at 7-8. The third Section 924(c) charge was based on the other Hobbs Act robbery charge, for the robbery in which Dafalla was killed. *Id.* at 8-9. The Section 924(j) charge was likewise based on the Dafalla robbery. *Id.* at 9.

A jury found petitioner guilty on all counts. Judgment 1-2. The district court sentenced petitioner to 90 years of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The sentence consisted of 20 years on the Hobbs Act conspiracy count; 15 years on each of the Hobbs Act robbery counts, to run concurrently to each other but consecutive to the 20-year sentence on the conspiracy count; a five-year consecutive sentence on the first Section 924(c) count; a 25-year consecutive sentence on the second Section

924(c) count; and a 25-year consecutive sentence on the Section 924(j) count. Judgment 3.[1]

The district court did not impose a sentence for the Section 924(c) count predicated on the Dafalla robbery. Judgment 3. The court observed the Section 924(c) crime was a lesser-included offense of the Section 924(j) offense for murder during the course of that robbery, and therefore declined to punish petitioner under both penalty schemes. *Ibid.*

2. The court of appeals affirmed. 903 F.3d 166; 750 Fed. Appx. 19. Among other things, the court rejected petitioner's argument that the district court had erred by imposing a consecutive 25-year sentence for his Section 924(j) conviction. 750 Fed. Appx. at 23. The court reasoned that Section 924(j) incorporates the requirements of Section 924(c), which mandates enhanced consecutive sentences. *Ibid.*; see 18 U.S.C. 924(c)(1)(A) and (D)(ii).

This Court granted a petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Davis*, which held that the definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. 139 S. Ct. 2774; see *Davis*, 588 U.S. at 470. On remand, the

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[1] At the time of petitioner's sentencing, Section 924(c) provided for a five-year statutory minimum sentence for a first offense and required a consecutive 25-year minimum sentence "[i]n the case of a second or subsequent conviction under this subsection." 18 U.S.C. 924(c)(1)(C)(i) (Supp. IV 1998). In *Deal* v. *United States*, 508 U.S. 129 (1993), this Court construed the statutory phrase "'second or subsequent conviction'" in Section 924(c) to include a defendant's second and subsequent counts of conviction under Section 924(c) even when those convictions are entered "in [a] single proceeding" along with the defendant's first Section 924(c) conviction. *Id.* at 131 (citation omitted); see *id.* at 131-134.

court of appeals vacated petitioner's Section 924(c) conviction predicated on Hobbs Act conspiracy and remanded for resentencing, noting that the parties had agreed that the classification of Hobbs Act conspiracy as a "crime of violence" depended on the now-invalid Section 924(c)(3)(B) definition, as opposed to the still-valid alternative definition in 18 U.S.C. 924(c)(3)(A). 937 F.3d at 128; see *Davis*, 588 U.S. at 449.

The court of appeals adhered, however, to the view that Section 924(j) incorporates Section 924(c)'s penalty enhancements and mandatory consecutive sentencing. 937 F.3d at 129 n.2. The district court accordingly resentenced petitioner to 50 years of imprisonment—consisting of concurrent 20-year sentences on the Hobbs Act conspiracy count and the two Hobbs Act robbery counts; a consecutive five-year sentence on the Section 924(c) count predicated on the Salahi robbery; and a consecutive 25-year sentence on the Section 924(j) count predicated on the Dafalla murder—to be followed by three years of supervised release. Am. Judgment 3-4. The court again declined to sentence petitioner on the lesser-included Section 924(c) offense predicated on the Daffala robbery.[2]

3. The court of appeals affirmed petitioner's convictions but again remanded for resentencing. Pet. App. 1a-70a.

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[2] At the time of petitioner's resentencing, the First Step Act of 2018 had become law. See Pub. L. No. 115-391, 132 Stat. 5194. In Section 403(a) of the First Step Act, Congress deleted Section 924(c)(1)(C)'s reference to a "second or subsequent conviction" and replaced it with the phrase "violation of this subsection that occurs after a prior conviction under this subsection has become final." 132 Stat. 5221-5222. The district court applied the amended version of Section 924(c)(1)(C) at the resentencing. See Pet. App. 11a-12a.

While the appeal was pending, this Court decided *Lora* v. *United States*, 599 U.S. 453 (2023), which held that Section 924(j) does not in fact incorporate the minimum and consecutive-sentence mandates of Section 924(c)(1)(D)(ii). *Id.* at 458-459. In light of that decision, the court of appeals concluded that the district court had erred by imposing a mandatory consecutive sentence for petitioner's Section 924(j) offense. Pet. App. 44a-51a. And because the court could not determine based on the record whether the error was harmless, it found that a remand was required. *Id.* at 48a-51a.

The court of appeals rejected petitioner's argument that, on remand, the Double Jeopardy Clause would preclude separate sentences for the Section 924(c) and Section 924(j) convictions that were both predicated on the Dafalla robbery. Pet. App. 52a. Although the court recognized that the 924(c) conviction was a lesser-included offense of the Section 924(j) conviction, the court nevertheless concluded that the two "crimes are separate offenses for which Congress has clearly authorized cumulative punishments." *Ibid.*

The court of appeals focused on Section 924(c)'s mandatory prison terms, which apply "without regard to whether the proscribed use [of a firearm] causes actual harm," and on the requirement that a sentence for a Section 924(c) conviction "must run consecutively to any other sentences imposed on a defendant." Pet. App. 55a-56a (citing 18 U.S.C. 924(c)(1)(A) and (D)(ii)). The court also "understood *Lora*'s reasoning"—which explained (*inter alia*) that Congress took a "'different approach to punishment'" in Section 924(c) than in Section 924(j)—to "compel * * * the conclusion" that Congress intended separate punishments for Section 924(c) and Section 924(j) convictions predicated on the same con-

duct. *Id.* at 58a (quoting *Lora*, 599 U.S. at 462). And the court deemed it "illogical" that Congress would have adopted a regime in which a court could impose a lower sentence under Section 924(j) on a defendant who committed an offense that caused death than it could impose under Section 924(c) on a defendant whose firearm use did not cause death. *Id.* at 62a.

The court of appeals remanded the case to the district court and instructed that court to impose separate sentences on the Section 924(c) and Section 924(j) counts that were predicated on the robbery of Dafalla. Pet. App. 52a-53a, 66a.

## SUMMARY OF ARGUMENT

When the same conduct violates two statutory prohibitions, the Double Jeopardy Clause prohibits courts from imposing multiple punishments unless the legislature has clearly authorized them to do so. Here, Congress expressly defined the crime of killing with a firearm during a crime of violence or drug trafficking crime, in violation 18 U.S.C. 924(j), to require a "violation of subsection (c)." And because a 18 U.S.C. 924(c)(1)(A) offense is therefore a lesser-included offense of a Section 924(j) offense, multiple punishments are prohibited unless Congress clearly indicated that it wanted to allow them. The court of appeals erred in finding such a clear indication here.

A. The Double Jeopardy Clause does not itself preclude a legislature from authorizing multiple punishments for the same conduct. As a threshold matter, under *Blockburger* v. *United States*, 284 U.S. 299 (1932), when "each statute requires proof of an additional fact which the other does not," *id.* at 304, the offenses are distinct and thus present no double-jeopardy concerns at all. And even where the offenses are not distinct un-

der the *Blockburger* rule, a legislature can still authorize multiple punishments by providing a "clear indication" of its intent to do so. *Albernaz* v. *United States*, 450 U.S. 333, 340 (1981).

B. Sections 924(c)(1)(A) and (j) do not define distinct offenses under the *Blockburger* rule. Section 924(c)(1)(A) criminalizes use of a firearm during a crime of violence or drug trafficking crime. Section 924(j) criminalizes a killing with a firearm "in the course of a violation of subsection (c)"—thereby explicitly identifying a Section 924(c) violation as a lesser-included offense. 18 U.S.C. 924(j). And nothing in the text, context, or history of Sections 924(c)(1)(A) and (j) clearly indicates that Congress intended for a defendant to be convicted and sentenced for the same conduct under both provisions.

Section 924(c)(1)(A) expressly states that punishments under that section shall be "in addition to" punishment for *one* additional offense—namely, the crime of violence or drug trafficking crime that serves as a predicate for a 924(c) offense. But it does not similarly indicate that its penalties should be applied in addition to those for a Section 924(j) offense. Nor does Section 924(j) include any language of its own, analogous to Section 924(c)(1)(A)'s, that would authorize cumulative punishment for its predicate 924(c) offense. The contrasting approaches in different provisions of Section 924, with some explicitly providing for cumulative punishments and others saying nothing of the sort, shows that Congress did not clearly intend to authorize cumulative punishments for conduct that violates Sections 924(c)(1)(A) and (j).

The statutory history of Sections 924(c) and (j) provides additional confirmation. Congress enacted Section 924(j) years after Section 924(c), and after this

Court had specifically indicated that Section 924(c) needed to speak plainly in authorizing multiple punishments for the same conduct. Congress was presumptively aware of this Court's jurisprudence, and in fact had responded to it with amendments that more explicitly authorized certain cumulative punishments under Section 924(c). But Congress nonetheless declined to include similar authorization for cumulative punishments in Section 924(j). Instead of evincing an intent to authorize cumulative punishments, the history surrounding Section 924(j) indicates that Congress's primary concern was allowing for killings during a crime of violence or drug trafficking crime to be punished in the same way as manslaughter and murder—including with the death penalty.

C. Although this Court's recent decision in *Lora* v. *United States*, 599 U.S. 453 (2023), did not directly answer the question presented here, its analysis lends further support to the government's longstanding position that Sections 924(c)(1)(A) and (j) do not authorize cumulative punishments for the same conduct. The Court made clear in *Lora* that the government's double-jeopardy position "can easily be squared" with *Lora*'s holding that "subsection (j) neither incorporates subsection (c)'s penalties nor triggers the consecutive-sentence mandate" in that provision. *Id.* at 461-462.

The Court explained in *Lora* that the separate penalty schemes in Sections 924(c) and (j) indicate that Congress intended each to embody a different approach to punishment—Section 924(c) provides statutory minimums that constrain judicial discretion, while Section 924(j) provides for sentencing flexibility but higher maximum punishment, including the death penalty. 599 U.S. at 463. Those differing approaches suggest alter-

native, independent punishments, not punishments that Congress intended to be imposed cumulatively. Prosecutors may assess the different regimes in determining which offense to pursue. But they may not obtain convictions and sentences for both based on the same underlying conduct.

D. The court of appeals focused its analysis on Section 924(c)'s statutory minimums and prohibition against concurrent terms of imprisonment, viewing those as requiring cumulative punishments for any offense. But those provisions speak to the appropriate sentences for a Section 924(c) conviction. They do not address the question whether a defendant may be convicted for both a Section 924(c) offense and a Section 924(j) offense in the first place. If statutory requirements for mandatory non-concurrent terms of imprisonment were alone sufficient to authorize cumulative punishments, then Section 924(c)(1)(A) would not have needed to explicitly state that its punishment scheme should be applied "in addition to" punishment imposed for the predicate crime of violence or drug trafficking crime. 18 U.S.C. 924(c)(1)(A).

The court of appeals misunderstood *Lora* to compel multiple punishments under Sections 924(c)(1)(A) and (j), despite *Lora*'s express statement that the government's position on double jeopardy could be easily squared with the Court's conclusions. Contrary to the court of appeals' reasoning, the separate and independent penalty schemes of Sections 924(c)(1)(A) are consistent with a congressional intent to allow courts to apply one scheme or the other—but not both—when the same conduct violates both provisions. Separate penalty schemes are a commonplace feature of cases implicating the multiple-punishment issue. Neither they,

nor anything else, provides the requisite clear indication that Congress intended multiple punishments for a single violation of Sections 924(c)(1)(A) and (j).

## ARGUMENT

### CONGRESS DID NOT AUTHORIZE CUMULATIVE PUNISHMENTS FOR THE SAME CONDUCT UNDER 18 U.S.C. 924(c)(1)(A) AND (j)

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Clause provides protections not only against multiple trials, but also against multiple convictions or sentences in a single trial, for the same legal transgression. See, *e.g.*, *Ball* v. *United States*, 470 U.S. 856, 861 (1985); *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). Multiple punishments for the same conduct in a single trial are constitutionally permissible only if the legislature has authorized them. And for offenses like 18 U.S.C. 924(c)(1)(A) and (j), where a violation of the second literally requires "a violation of" the first, courts presume that the legislature intended only a single punishment, unless the legislature has clearly indicated otherwise. No such clear indication can be found in Sections 924(c) and (j), and the court of appeals accordingly erred in ordering the district court to sentence petitioner cumulatively under both provisions.

#### A. The Double Jeopardy Clause Allows Multiple Punishments When Offenses Require Distinct Elements Or When There Is Another Clear Indication Of Congressional Intent

"With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing

greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983). Where criminal prohibitions each have distinct offense elements, a court should presume that Congress intended that a defendant may be punished under both. But where one is a lesser-included offense of the other, the permissibility of multiple punishments for the same conduct turns on whether the legislature has clearly indicated that multiple punishments are authorized.

1. The first step in determining "whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively" is to apply the "rule of statutory construction stated by [the] Court in *Blockburger* v. *United States*, 284 U.S. 299 [(1932)]." *Whalen* v. *United States*, 445 U.S. 684, 691 (1980). Under the *Blockburger* rule, cumulative convictions and sentences are presumptively authorized—and constitutionally unproblematic—so long as "each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304; see, *e.g.*, *Albernaz* v. *United States*, 450 U.S. 333, 339 (1981).

As the Court explained in *Blockburger*, "[a] single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." 284 U.S. at 304 (citation omitted). "The fact that an offender violates by a single transaction several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic" for double-jeopardy purposes. *Albernaz*, 450 U.S. at

338 (quoting *Gore* v. *United States*, 357 U.S. 386, 389 (1958)).

2. "Insofar as the question is one of legislative intent," however, "the *Blockburger* presumption must of course yield to a plainly expressed contrary view on the part of Congress." *Garrett* v. *United States*, 471 U.S. 773, 779 (1985). *Blockburger* is a simply "rule of statutory construction" that rests on an "assumption * * * that Congress ordinarily does not intend to punish the same offense under two different statutes." *Whalen*, 445 U.S. at 691-692. And "because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Albernaz*, 450 U.S. at 340.

The multiple-punishments analysis thus requires a second step, which looks to whether "legislative intent is clear from the face of the statute or the legislative history." *Garrett*, 471 U.S. at 779; see, *e.g.*, *id.* at 782 (describing text-based "conclusion as to Congress' intent" to allow multiple punishment as "fortified by the legislative history"); see also *Hunter*, 459 U.S. at 366-368 (discussing prior decisions). In *Missouri* v. *Hunter*, for example, the Court addressed two Missouri statutes. 459 U.S. at 361-362. The first proscribed robbery in the first degree, and the second proscribed armed criminal action. *Ibid.* Missouri courts had interpreted robbery in the first degree to be a lesser-included offense of armed criminal action, bringing into play the presumption against cumulative punishments. *Id.* at 363. This Court nevertheless held that the Missouri legislature had clearly authorized cumulative punishments for the two offenses because the armed criminal action provision expressly stated that the "punishment im-

posed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon." *Id.* at 362 (quoting Mo. Ann. Stat. § 559.225 (West 1979)).

### B. There Is No Clear Indication That Congress Authorized Cumulative Punishments For The Same Conduct Under Sections 924(c)(1)(A) And (j)

As the court of appeals recognized, see Pet. App. 54a, Sections 924(c)(1)(A) and (j) are not distinct crimes under the *Blockburger* rule. Section 924(c) prohibits "us[ing] or carr[ying] a firearm" "during and in relation to" (or "possess[ing] a firearm" "in furtherance of") a "crime of violence or drug-trafficking crime." 18 U.S.C. 924(c)(1)(A). Section 924(j), in turn, prohibits "caus[ing] the death of a person through the use of a firearm" "in the course of a violation of subsection (c)." 18 U.S.C. 924(j). It is therefore impossible to prove a violation of 18 U.S.C. 924(j) without proving every fact necessary for a lesser-included "violation of" Section 924(c). And neither the text, nor the context, nor the history of Sections 924(c) and (j) provides a clear indication that Congress nonetheless intended to authorize multiple punishments for both offenses.

1. Nothing in the text of Sections 924(c)(1)(A) and (j) provides the requisite "clear indication" that Congress authorized cumulative punishments for conduct that violates both provisions. Although Congress linked the two provisions in certain respects, it failed to include any language suggesting that defendants may be punished for the same conduct under both provisions. That choice is particularly instructive in light of language elsewhere in Section 924 that plainly authorizes cumulative punishments in other circumstances.

Most tellingly, Section 924(c)(1)(A) itself expressly authorizes cumulative punishments for a class of offenses that does *not* include Section 924(j) crimes. Under the statute, punishment for violating Section 924(c)(1)(A) is "in addition to the punishment provided for [the] crime of violence or drug trafficking crime" that underlies it. 18 U.S.C. 924(c)(1)(A). Without that proviso, the *Blockburger* rule might preclude cumulative punishment for both a Section 924(c) violation and its predicate (*e.g.*, robbery), because proof of the Section 924(c) violation requires proof of every element of the underlying crime. See *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). But the proviso does not apply to a Section 924(j) violation—which itself requires proof of "a violation of subsection (c)," and which cannot circularly serve as the predicate for a Section 924(c) violation.

For its own part, Section 924(j) says nothing at all about cumulative punishments. Like Section 924(c)(1)(A), Section 924(j) requires proof that the defendant committed a predicate offense—namely, a "violation of subsection (c)." 18 U.S.C. 924(j). But unlike Section 924(c)(1)(A), Section 924(j) does not specify that the punishment it prescribes be "in addition to" the punishment for the predicate offense. "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *DHS* v. *MacLean*, 574 U.S. 383, 391 (2015) (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). And that is exactly what it has done by providing for cumulative punishment for the "crime of violence" or "drug trafficking crime" underlying a Section 924(c) violation, but not the "violation of subsection (c)" underlying a Section 924(j) violation.

The absence of any express authorization for multiple punishments under Sections 924(c)(1)(A) and (j) is all the more instructive in light of another instance in which Congress has expressly directed cumulative punishments under Section 924(c). In Section 924(c)(5), Congress specified particular punishments for a person who "during and in relation to any crime of violence or drug trafficking crime * * * uses or carries armor piercing ammunition" or possesses such ammunition "in furtherance of any such crime." 18 U.S.C. 924(c)(5). In doing so, Congress expressly stated that such punishments shall be "in addition to the punishment provided for such crime of violence or drug trafficking crime *or conviction under this section*." *Ibid.* (emphasis added).

That language provides another example of how Congress has expressly overcome the *Blockburger* presumption in Section 924. If either Section 924(c)(1)(A) or Section 924(j) included similar language requiring that punishment be cumulative to punishment for any other conviction under Section 924, that would likewise be enough to overcome the *Blockburger* presumption. The absence of such language, however, creates the opposite inference. See *MacLean*, 574 U.S. at 391.

2. The statutory history of Sections 924(c)(1)(A) and (j) reinforces that the provisions do not authorize cumulative punishments for the same conduct. By the time it enacted Section 924(j), Congress was fully aware, from decisions of this Court, of the type of language required to authorize punishment for both a Section 924(c)(1)(A) offense and the underlying crime of violence or drug trafficking crime. But Congress declined to include similar language in the newly created Section 924(j). Instead, Congress adopted a provision focused on broadening the availability of the punishments, includ-

ing the death penalty, applicable to manslaughter and murder—not authorizing cumulative punishments.

When originally enacted in 1968, Section 924(c) did not affirmatively authorize punishments that could be imposed in addition to a punishment for the predicate crime itself. Instead, Section 924(c) simply provided that a person who "uses a firearm to commit" a federal felony or "carries a firearm unlawfully" during the commission of a federal felony "shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years." Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1214, 1224.

Two years later, Congress amended Section 924(c) to require cumulative punishment by adding the language "in addition to the punishment provided for the commission of such felony." Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, Tit. II, § 13, 84 Stat. 1889, 1889-1890.[3] But this Court found that statutory language insufficient to show that Congress "authorized the imposition of the additional penalty of § 924(c) for commission" of a predicate federal felony that is itself "already subject to enhanced punishment" for other reasons. *Simpson* v. *United States*, 435 U.S. 6, 13 (1978); see *Busic* v. *United States*, 446 U.S. 398, 404 (1980) ("[P]rosecution and enhanced sentencing under § 924(c) is simply not permissible where the predicate felony statute contains its own enhancement provision.").

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[3] Congress also added to Section 924(c) the consecutive-sentence mandate, which prohibits a "term of imprisonment imposed under this subsection" from "run[ning] concurrently with any term of imprisonment imposed for the commission of [the predicate] felony." Omnibus Crime Control Act § 13, 84 Stat. 1890.

In response to the Court's decisions, Congress amended Section 924(c) to expressly state that Section 924(c)'s punishments should be imposed even when the predicate "provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005, 98 Stat. 2138; see *United States* v. *Gonzales*, 520 U.S. 1, 10 (1997) (explaining that Congress "repudiated" *Simpson* and *Busic*). But notwithstanding that experience, Congress included no cumulative-punishment language at all when it later enacted Section 924(j), as part of the Federal Death Penalty Act of 1994, Pub. L. No. 103-322, Tit. VI, § 60013, 108 Stat. 1959, 1973.[4]

The history of Section 924(j) indicates that Congress had a different focus. The relevant section of the Federal Death Penalty Act was entitled "Death Penalty For Gun Murders During Federal Crimes of Violence and Drug Trafficking Crimes." § 60013, 108 Stat. 1973 (capitalization altered). Consistent with the title of the section enacting it, the new provision subjected a broader range of killings to the punishments for murder and manslaughter under 18 U.S.C. 1111 and 1112, which are by themselves limited to murder and manslaughter "[w]ithin the special maritime and territorial jurisdiction of the United States," 18 U.S.C. 1111(b), 1112(b). See H.R. Rep. No. 466, 103d Cong., 2d Sess. 11 (1994) (indicating that Congress's primary concern revolved around ensuring that the death penalty was available for, *inter alia*, "terrorist killings, drug-related killings and others"). But the new subsection did not provide

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

for cumulative punishment of an underlying Section 924(c) offense.

Given Congress's own history of expressly authorizing cumulative punishments under Section 924(c), the omission of such authorization in Section 924(j) should not be viewed as inadvertent. At minimum, Congress's silence on the matter cannot provide the necessary "clear indication," *Albernaz*, 450 U.S. at 340, of congressional intent to rebut the *Blockburger* presumption.

### C. This Court's Decision In *Lora* v. *United States* Reinforces That Congress Did Not Intend Cumulative Punishments For The Same Conduct Under Sections 924(c)(1)(A) And (j)

In *Lora* v. *United States*, 599 U.S. 453 (2023), this Court held that Section 924(c)'s consecutive-sentence mandate does not apply to punishments under Section 924(j). *Id.* at 459. In reaching that conclusion, the Court "express[ed] no position" on the double-jeopardy question at issue here. *Id.* at 461. Nevertheless, the analysis of Sections 924(c) and (j) in that decision supports the government's longstanding position that cumulative punishments for the same conduct under those sections are not permissible. The Court's description of the "different approach" to punishment that Congress took with the two provisions fully "aligns" with a congressional intent that the two function as alternative, not cumulative, punishments. *Id.* at 461-462.

The issue in *Lora* was whether the requirement in 18 U.S.C. 924(c)(1)(D)(ii) that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person" applied to Section 924(j) offenses. 599 U.S. at 459. The government contended that the consecutive-sentence mandate should be incorporated into

Section 924(j), arguing in part that such an amalgamation of the two sentencing schemes together would be consistent with the fact that double-jeopardy principles would permit only one punishment for a violation of both. *Id.* at 461. The Court disagreed with the government's bottom-line position, interpreting the consecutive-sentence mandate to apply to Section 924(c) offenses alone. *Id.* at 459. But it cast no doubt on the government's double-jeopardy premise, which "align[ed] with [the Court's] conclusion." *Id.* at 461.

The Court observed that the government's "view of double jeopardy can easily be squared with [the Court's] view that subsection (j) neither incorporates subsection (c)'s penalties nor triggers the consecutive-sentence mandate." *Lora*, 599 U.S. at 462. And *Lora*'s explanation of the interaction between Sections 924(c) and (j) in fact supports the government's view of how double-jeopardy principles apply. The Court noted in *Lora* that Congress selected a "different approach to punishment in subsection (j) than in subsection (c)." *Ibid.* While Section 924(c) opted for "mandatory minimums" (and, at one time, "exact mandatory terms of imprisonment"), Section 924(j) "generally eschews mandatory penalties in favor of sentencing flexibility." *Ibid.* That congressional choice would be undermined just as much by simultaneously applying each of the two sentencing schemes (as the court of appeals did here) as it would by combining them through incorporation (as the government unsuccessfully urged in *Lora*).

Section 924(j) "reflects the seriousness of the offense" not through mandatory penalties, but instead by authorizing higher maximum punishment. *Lora*, 599 U.S. at 463. "For murder, subsection (j) authorizes the harshest maximum penalty possible: death." *Ibid.* "And

for manslaughter, subsection (j) imposes the same harsh punishment that the Federal Criminal Code prescribes for other manslaughters." *Ibid.* Indeed, at the time "[w]hen Congress enacted subsection (j), it actually imposed higher maximum penalties for manslaughter under subsection (j) than what subsection (c) had authorized for the base offense." *Id.* at 463 n.5 (noting that under the then-current version of Section 924(c), a "base offense" resulted in a "fixed five-year sentence"). That history "reinforces that Congress designed subsection (j)'s penalties to account for the seriousness of the offense by themselves, without incorporating penalties from subsection (c)." *Ibid.*

The penalty schemes in Sections 924(c)(1)(A) and (j) are accordingly designed to operate in the alternative—not in combination. When a defendant uses a firearm to kill another person in the course of a violation of Section 924(c)(1)(A), Congress gave prosecutors a choice. Prosecutors may elect to charge the defendant under either Section 924(c)(1)(A) or Section 924(j). Prosecutors may also charge a Section 924(j) offense and request a lesser-included-offense instruction on Section 924(c) at trial, see Fed. R. Crim. P. 31(c), or they may charge both Section 924(c) and (j) offenses in the indictment and seek dismissal of one count, or merger of the two counts, before the imposition of judgment, see *Ball*, 470 U.S. at 860-861 (noting that a defendant may be prosecuted simultaneously under two statutes, even if he may not be convicted and punished for the two offenses under *Blockburger*). But the regime that Congress adopted does not provide the necessary "clear indication" that Congress intended to give the government the option of obtaining convictions and sentences for a defendant

whose conduct violates both Sections 924(c)(1)(A) and (j).[5]

**D. The Court Of Appeals' Reasoning Is Flawed**

The court of appeals' contrary conclusion principally rested on a misunderstanding of the proper legal framework for determining whether a legislature intended to authorize multiple punishments. The court noted (Pet. App. 55a-56a) that Section 924(c) both prescribes statutory minimum punishments and directs that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person." 18 U.S.C. 924(c)(1)(D)(ii). And it framed the relevant question as "whether § 924(j) somehow *negates* § 924(c)'s mandates." Pet. App. 58a (emphasis added); see, *e.g.*, *id.* at 60a-61a. That framing effectively flips the *Blockburger* presumption, which requires a "clear indication" that Congress actually "*authorize[d]* cumulative punishments." *Whalen*, 445 U.S. at 692 (emphasis added). Section 924(c)'s requirements for mandatory consecutive sentences alone do not provide such an indication.

1. The court of appeals correctly recognized that Section 924(c)'s statutory minimums "make[] plain Congress's intent for every defendant *convicted* under that statute of a proscribed firearms use to be incarcerated for no less than the stated minimum term." Pet. App. 55a-56a (emphasis altered). But that says nothing

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[5] Although the issue is not presented in this case, a defendant may be charged, convicted, and cumulatively punished for separate Section 924(j) violations based on separate killings committed in the course of a single Section 924(c) offense. See, *e.g.*, *United States* v. *Curtis*, 324 F.3d 501, 507-509 (7th Cir.), cert. denied, 540 U.S. 998 (2003). The unit of prosecution in a Section 924(j) case is the homicide, not the Section 924(c) violation.

about whether a defendant may be convicted under Section 924(c) in the first instance, if he is also convicted under Section 924(j) for the same conduct.

The Double Jeopardy Clause's prohibition on duplicative punishment encompasses a "criminal conviction and not simply the imposition of sentence." *Ball*, 470 U.S. at 861. To rebut the presumption against cumulative punishments, the statute must clearly indicate Congress's intent to allow for multiple punishments, including convictions—not simply to allow for cumulative sentences when a conviction properly occurs.

Consistent with that understanding, even though Section 924(c)(1)(A) expressly includes statutory minimums and a consecutive-sentence mandate, Congress also specifically made clear that punishment under Section 924(c)(1)(A) is "in addition to the punishment provided" for the predicate "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). There would have been no need for such an additional proviso if the statutory minimums and consecutive-sentence mandate sufficed to authorize cumulative punishments. Importantly, that proviso does not apply to Section 924(j), and Section 924(j) contains no similar proviso of its own. The natural implication of the different language that Congress used to address the predicate offenses in the two provisions—which the court of appeals failed to consider—undermines the court of appeals' conclusions.

2. The court of appeals also misunderstood this Court's reasoning in *Lora* to "compel the * * * conclusion" that Congress intended to authorize cumulative punishments under Sections 924(c) and (j). Pet. App. 58a. The court viewed *Lora* as "[i]mplicit[ly]" concluding that Section 924(c) provides "'its own comprehensive set of penalties'—'mandatory penalties'" that must

"apply to a defendant being sentenced for a § 924(c) crime without regard to the penalties imposed for a related § 924(j) crime." *Id.* at 59a (quoting *Lora*, 599 U.S. at 460, 462). But as *Lora* itself explained, a conclusion that "someone cannot receive both subsection (c) and subsection (j) sentences for the same conduct" is fully "align[ed]" with *Lora*'s reasoning. 599 U.S. at 461.

In observing that each provision sets out its own distinct penalty scheme, the Court did not suggest that both penalty schemes should apply when the same conduct violates both provisions. To the contrary, as explained above (see pp. 24-25, *supra*), the comprehensive nature of the penalties for each provision suggests that only one conviction and one sentence should be imposed for conduct that violates both. If separate penalty schemes were a clear indication of intent for multiple punishments, then multiple punishments for non-distinct offenses would be the rule, not the exception—in contravention of *Blockburger*.

The court of appeals was likewise mistaken in deriving authorization for multiple punishments from Congress's decision "to locate § 924(j) outside § 924(c)," with "'nothing join[ing] their penalties textually.'" Pet. App. 61a (quoting *Lora*, 599 U.S. at 461) (brackets in original). Congress did expressly link the *violations*, making clear that "a violation of Section 924(c)" is a necessary component of a Section 924(j) *violation*—and thus a lesser included offense of Section 924(j) under *Blockburger*. 18 U.S.C. 924(j). But it then declined to link the *penalties* in any way that would rebut the *Blockburger* presumption.

3. The court of appeals also purported to rely on "[c]ommon sense," suggesting that it would be "illogical" to allow a court to "impose a lower sentence on a

defendant whose firearms use caused death * * * than it would be required to impose on a defendant whose firearms use in similar circumstances did not cause death." Pet. App. 62a. But the government made an analogous argument in *Lora*, and this Court rejected it. See 599 U.S. at 462-464.

As the Court explained there, the lack of statutory minimums in Section 924(j) is not "incompatible with the seriousness of subsection (j) offenses." *Lora*, 599 U.S. at 463. Section 924(j) "merely reflects the seriousness of the offense using a different approach than subsection (c)'s mandatory penalties." *Ibid.* Where death does not result, Congress chose to prescribe statutory minimums to restrain judicial discretion to impose sentences that it viewed as too low. See 18 U.S.C. 924(c)(1)(A). Where death results, Congress apparently saw less of a need for such a constraint on judicial discretion and instead permitted a higher possible penalty. See 18 U.S.C. 924(j). The court of appeals' observation that a sentencing court "'cannot follow' both schemes as written in imposing a single sentence," Pet. App. 62a (quoting *Lora*, 599 U.S. at 459), simply reinforces that the defendant may be punished for one or the other, but not both.

## CONCLUSION

The judgment of the court of appeals should be vacated in part and the case remanded for further proceedings.

Respectfully submitted.

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# APPENDIX

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## APPENDIX

1. U.S. Const., Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. 924 provides in pertinent part:

**Penalties**

* * * * *

(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.

* * * * *

(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.

* * * * *