

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

All agree 18 U.S.C. § 924(c)(1)(A) defines “a lesser-included offense of section 924(j),” Amicus Br. 16, meaning the crimes are “the ‘same’ for purposes of double jeopardy.” *Brown v. Ohio*, 432 U.S. 161, 168 (1977). “Accordingly,” the statutes “are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.” *Whalen v. United States*, 445 U.S. 684, 692 (1980).

Court-appointed Amicus has identified no such indication, failing to “overcome” the “presumption against allowing multiple punishments.” *Rutledge v. United States*, 517 U.S. 292, 303 (1996).

He cites no text in either § 924(c)(1)(A) or § 924(j) allowing punishment under both. Nor does legislative history support imposing cumulative penalties for lethal use of regular ammunition: Congress rejected a proposal to do that. *See* 140 Cong. Rec. S12496-01, *S12553. Only where “armor piercing ammunition” causes death, § 924(c)(5), has Congress permitted cumulative penalties.

Amicus stresses that § 924(c)(1)(A) and § 924(j) are “separate statutory offenses for which punishments are separately provided.” *Whalen*, 445 U.S. at 690. But this has never “rise[n] to the level of the clear statement necessary” for “multiple punishments.” *Rutledge*, 517 U.S. at 304 n.14. The rape and murder crimes in *Whalen*, for example, were punished differently in different laws and are “separate evil[s]” in layman’s terms. Amicus Br. 11. Yet for double jeopardy purposes, they are the “same offense” given that one is a lesser included of the other. 445 U.S. at 692. So too for “possess[ing] a gun, § 924(c)(1)(A), and using it to “kill[],” § 924(j)— as Amicus acknowledges.

“In *Lora*,” he nonetheless claims, “this Court held that sections 924(c) and 924(j) are standalone, separate offenses.” Amicus Br. 12. Not at all: “We express no position” on whether “Section 924(j) amounts to the “same offense” as Section 924(c) for purposes of the Double Jeopardy Clause.” *Lora v. United States*, 599 U.S. 453, 461 (2023) (citation omitted). The Court’s holding was that § 924(j) doesn’t “incorporate[] subsection (c)’s penalties.” *Id.* at 462.

Amicus also cites *Garrett v. United States*, 471 U.S. 773 (1985), but the Court there “allow[ed] multiple punishment in light of Congress’ ‘plainly expressed’ view.” *Rutledge*, 517 U.S. at 303 (quoting *Garrett*, 471 U.S. at 779). There is none here.

And “Congress intended” a truly “separate criminal offense” in *Garrett*. 471 U.S. at 779. Yet § 924(c) has, like § 924(j), always punished fatal handgun use. Section 924(c)’s penalty in 1994, however, was a fixed “five years.” Dissatisfied, Congress wrote § 924(j) to increase the penalty for a deadly “violation of subsection (c).” But it specifically rejected the call for *cumulative penalties*, choosing a “different approach to punishment in subsection (j) than in subsection (c).” *Lora*, 599 U.S. 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. Congress did not intend someone sentenced to death under § 924(j), or up to life in prison, to get § 924(c)’s “five years” on top. Thus, when it comes to “subsections (c) and (j) . . . nothing joins their penalties.” *Lora*, 599 U.S. at 461.

Because Congress has not “specially authorized” the double punishment the Circuit ordered, *Whalen*, 445 U.S. at 693, the Court should reverse.

ARGUMENT**AMICUS HAS FAILED TO OVERCOME THE PRESUMPTION AGAINST PUNISHMENT UNDER BOTH § 924(J) AND § 924(C)(1)(A)**

Every fatal “use of a firearm,” § 924(j), includes its “possess[ion].” § 924(c)(1)(A). “That overlap is enough to conclude, absent more, that Congress did not intend to allow punishments for both.” *Rutledge*, 517 U.S. at 304 n.14. And Amicus has identified no “more,” failing to “overcome” the “presumption against allowing multiple punishments.” *Id.* at 303. Authority to twice punish the one offense here is not “clear from the face of the statute or the legislative history.” Amicus Br. 17 (quoting *Garrett*, 471 U.S. at 779).

A. Amicus Identifies No Textual Authorization for Double Punishment

Sections 924(j) and 924(c)(1)(A) are “creatures of Congress’s own creation. How they relate to each other is up to Congress, and the best evidence of Congress’s intent is the statutory text.” *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519, 544 (2012).

“By its terms,” Amicus asserts, “section 924 authorizes cumulative punishments for violations of sections 924(c) and 924(j).” Amicus Br. 17. But he doesn’t actually identify any such “terms.”

“No one disputes,” he recognizes, “that section 924(j) itself does not include consecutive-sentence or cumulative-punishment language.” *Id.* at 40 n.7. Consequently, § 924(j) doesn’t help him.

Neither does § 924(c). Amicus cites its saying a “defendant ‘shall’ be sentenced” to a “mandatory-minimum prison term[],” depending on the facts of the

case. *Id.* at 17 (quoting § 924(c)(1)(A)). Yet this “shall” clause is no clear direction to punish under § 924(j) too.

“Congress does not create criminal offenses having no sentencing component.” *Ball v. United States*, 470 U.S. 856, 861 (1985). All crimes carry punishment, and some mandate minimum terms of imprisonment. That is not enough to twice punish the “same offence.” U.S. Const. amend. V.

Rutledge, for example, violated 21 U.S.C. § 846 by conspiring to distribute “in excess of 5 kilograms of cocaine.” *Rutledge v. United States*, Joint Appendix, 1995 WL 17013933, *4aa. The law then required, as now, that “such [a] person shall be sentenced to a term of imprisonment which may not be less than 10 years.” § 841(b)(1)(A) (1990). *See also* § 846 (providing the “same penalties” for conspiratorial and substantive drug crimes). Rutledge also violated § 848, the continuing criminal enterprise (“CCE”) statute. It said then, as now, that a perpetrator “shall be sentenced to a term of imprisonment which may not be less than 20 years.” § 848(a) (1990).

Despite these “shall” clauses mandating minimum prison terms, the Court held “[o]ne of [petitioner’s] convictions . . . is unauthorized punishment for a separate offense’ and must be vacated.” 517 U.S. at 307 (brackets in *Rutledge*; quoting *Ball*, 470 U.S. at 864). “[W]e presume that ‘where two statutory provisions proscribe the “same offense,” a legislature does not intend to impose two punishments.’” *Id.* at 297 (quoting *Whalen*, 445 U.S. at 692). And “we have often concluded that two different statutes define the ‘same offense,’ typically because one is a lesser included offense of the other.” *Id.* “A guilty verdict on a § 848 charge necessarily includes a finding that the

defendant also participated in a conspiracy violative of § 846,” a “lesser included offense of CCE.” *Id.* at 307. Thus, as Congress had not “clearly indicate[d]” a wish to double-punish, *id.* at 303, the Court “adhere[d] to the presumption that Congress intended to authorize only one punishment.” *Id.* at 307.

The Court reached the same conclusion in *Ball* despite the “same” crimes there also requiring punishment, *see* 470 U.S. at 866-67, and in *Whalen* despite one of the “same” crimes there requiring imprisonment for at least “20 years.” 445 U.S. at 686.

In none of these cases did the requirement of punishment – even a minimum punishment – “rise to the level of the clear statement necessary for us to conclude . . . Congress intended to allow *multiple* punishments.” *Rutledge*, 517 U.S. at 304 n.14 (emphasis added).

Likewise, § 924(c)(1)(A)’s saying a minimum punishment “shall” be imposed fails to show *two* punishments for the “same” crime have been “specially authorized by Congress.” *Whalen*, 445 U.S. at 693.

Amicus next notes § 924(c)(1)(A)’s saying its punishment must be imposed “in addition to the punishment provided for [the underlying] crime of violence or drug trafficking crime.” Amicus Br. 19.

But this hurts Amicus’s case: Congress, having ordered punishment for gun possession “in addition to” that for the underlying crime, decided against punishment for gun possession “in addition to” that for fatally pulling the trigger. And “judicial supplementation is particularly inappropriate” where “Congress has shown that it knows how to adopt the omitted language.” *Lackey v. Stinnie*, 145 S. Ct. 659, 669-70 (2025) (citation omitted).

When Congress wrote § 924(c)(1)(A) in 1998, carefully setting out the different penalties for gun “possess[ion],” “brandish[ing]” and “discharge[],” and specifying they apply “in addition to” those for the underlying crime, Pub. L. No. 105-386 § 1(a)(1), 112 Stat. 3469, it conspicuously omitted any language indicating they also apply “in addition to” those for a lethal shooting. That’s because Congress had in 1994 “designed subsection (j)’s penalties to account for the seriousness of the offense by themselves, without incorporating penalties from subsection (c).” *Lora*, 599 U.S. at 463 n.5. “[S]ubsection (j) supplies its own comprehensive set of penalties that apply instead of subsection (c)’s.” *Id.* at 460.

Amicus nonetheless cites § 924(c)(1)(A)’s saying it applies even if the underlying crime “provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon.” Amicus Br. 19.

Yet this is just a specification of the clause above. Requiring punishment for gun possession and the underlying crime – even one with its own extra penalty for being armed – still doesn’t clearly authorize two punishments for one fatal shooting.

Last, § 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 imposed on the person.” Amicus Br. 19.

This clause, which requires a § 924(c) sentence to run consecutively to others, kicks in only if a § 924(c) sentence is “imposed on a person.” But that’s the question here: *May* a § 924(c) sentence be imposed for a lethal shooting punished under § 924(j)? As to that, § 924(c)(1)(D)(ii) is silent. And “congressional silence lacks persuasive significance.” *Brown v. Gardner*,

513 U.S. 115, 121 (1994) (citation omitted). This clause’s saying nothing about the question here doesn’t “clearly indicate[] that [Congress] intended to allow courts to impose” two punishments for what is the “same crime.” *Rutledge*, 517 U.S. at 303. “Mere silence, in this context, cannot suffice to establish a ‘clear and manifest purpose’” to double-punish. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607 (1991) (citation omitted).

The law requires no “magic words,” Amicus Br. 3, 13, 36, 41, and Barrett has asked for none. The words required to twice punish one crime needn’t be magic; but they must be “clear.” *Rutledge*, 517 U.S. at 303. And Congress needn’t “repeat” a wish to “cumulatively punish,” Amicus Br. 3, but such punishment must once, somewhere, be “specially authorized.” *Whalen*, 445 U.S. at 693.¹

Amicus has cited nothing in the text of § 924(j) or § 924(c) clearly allowing double punishment here, which is no surprise: as the Court’s already noted, “nothing joins their penalties textually.” *Lora*, 599 U.S. at 461.

¹ Amicus faults Barrett for citing the “clear-statement rule” in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023), a “sovereign immunity” case. Amicus Br. 36. Yet many areas of law require congressional clarity for a court to upset “historically or constitutionally grounded norms.” *Jones v. Hendrix*, 599 U.S. 465, 492 (2023). Sovereign immunity is one, and double jeopardy is another. *See, e.g., Rutledge*, 517 U.S. at 303; *Whalen*, 445 U.S. at 692-93.

As Amicus thus acknowledges, license to double-punish must appear with “clarity.” Amicus Br. 17. It must be “clear from the face of the statute or the legislative history.” *Id.* (quoting *Garrett*, 471 U.S. at 779).

B. Amicus’s “Structure” Argument is Foreclosed by Precedent and Legislative History

Per Amicus, “section 924’s statutory ‘structure’” shows Congress “intended to create separate crimes” in subsections (j) and (c)(1)(A). Amicus Br. 23.

But the Court has long held that greater and lesser included crimes being “separate statutory offenses for which punishments are separately provided,” *Whalen*, 445 U.S. at 690, “does not rise 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. Also, § 924 is part of Chapter 44, “Firearms,” and, “[i]f anything, the proximity of” these subsections “indicates that Congress understood them to be directed to similar, rather than separate, evils.” *Rutledge*, 517 U.S. at 304 n.14.

Amicus disagrees. He claims the subsections each “punish a separate evil,” Amicus Br. 11, saying § 924(j) “focuses on the harm done to the victim,” *id.* at 22, while § 924(c)’s concerns are “the type of firearm, how it was used, and the defendant’s recidivism.” *Id.* at 24. “[H]arm to a victim is irrelevant.” *Id.* at 10.

Yet the fact that loss of life is not an *element* of § 924(c) – “irrelevant,” Amicus says – doesn’t mean deadly shootings are an evil § 924(c) doesn’t punish. Such shootings are punishable by up to life in prison under § 924(c). And no judge at sentencing deems a homicide “irrelevant.”

As today, the statute in 1994 punished people who “use[d] or carrie[d]” a handgun during a violent or drug crime and fatally shot someone. § 924(c)(1) (1994). But Congress found the penalty at that time – exactly “five years” – too lenient. So it wrote § 924(j).

Congress wanted to authorize “the death penalty for gun murders during Federal crimes of violence and drug trafficking crimes.” 140 Cong. Rec. S6018-02, *S6071 (statement of Sen. Domenici). “[V]iolent crime that is being committed with the use of guns is going up and going up dramatically.” *Id.* “Those who commit murder in the course of violations of Federal criminal law must face the penalty of death.” *Id.* at *S6072. “[C]ommitting a crime that results in the death of an individual through the use of a gun” must make one “eligible for the death penalty.” *Id.* (statement of Sen. Biden). Congress thus passed the provision titled “DEATH PENALTY FOR GUN MURDERS DURING FEDERAL CRIMES OF VIOLENCE AND DRUG TRAFFICKING CRIMES,” which also allowed “imprisonment for any term of years or for life.” Pub. L. No. 103-322 § 60013, 108 Stat. 1973.

This history, which Amicus ignores, refutes his claim that Congress in § 924(j) created a “new, separate offense” for double jeopardy purposes. Amicus Br. 25. It instead created greater penalties for an existing offense – “gun murders during Federal crimes of violence and drug trafficking crimes,” 140 Cong. Rec. S6018-02, *S6071 – that Congress decided § 924(c) punished too lightly.

Section 924(j) also makes this plain: “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” for murder be sentenced to death or up to life in prison. Congress thus allowed *a greater punishment* for a fatal “violation of subsection (c).” But it did so “without incorporating penalties from subsection (c),” *Lora*, 599 at 463 n.5, or otherwise allowing *two punishments*.

Indeed, in 1994 “Congress specifically considered and rejected” a call to “place[] subsection (j) within subsection (c).” *Id.* at 463 & n.6. This would have required the punishment for a deadly shooting to be “in addition to the punishment” for the lesser included “crime of violence or drug trafficking crime.” 140 Cong. Rec. S12496-01, *S12553. But this proposal to double-punish fatal gun use, as § 924(c)(1)(A) does simple possession, was “left on the cutting-room floor.” *Id.* at *S12551 (statement of Sen. Dole).

Amicus says this shows “Congress intended the two subsections to be separate offenses.” Amicus Br. 24. As discussed, however, the appearance of offenses in different statutory sections does not mean they are “separate” for double jeopardy purposes.

“The established test” in this area “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,” moreover, “the lesser offense [] requires no proof beyond that which is required for conviction of the greater.” *Id.* at 168. “The greater offense is therefore by definition the ‘same’ for purposes of double jeopardy as any lesser offense included in it.” *Id.* This is so even if the crimes are “separate statutory offenses for which punishments are separately provided.” *Whalen*, 445 U.S. at 690.

Amicus agrees the crimes here “do not satisfy the *Blockburger* elements test because section 924(c) is a lesser-included offense of section 924(j).” Amicus Br. 16. But, citing *Garrett*, he notes “*Blockburger* is ‘not

controlling” if a congressional wish to double-punish is “clear.” *Id.* at 16-17 (quoting *Garrett*, 471 U.S. at 779). No argument there.

Yet *Garrett* doesn’t help Amicus. The Court detailed how the “language, structure, and legislative history” of the CCE statute “show in the plainest way that Congress intended . . . a separate criminal offense which [i]s punishable in addition to, and not as a substitute for, the predicate offenses.” 471 U.S. at 779. Thus, the “*Blockburger* presumption” against twice punishing one crime had to “yield to [that] plainly expressed contrary view.” *Id.* But there’s no “plainly expressed” congressional wish here to punish both lethal gun use and the lesser included gun possession.

Congress’s nixing the 1994 call to cumulatively punish fatal shootings, *see supra* at 10, is, in fact, a pretty clear sign it decided not to cumulatively punish fatal shootings. It decided punishment under § 924(j), which can be life in prison or even death, is punishment enough: “Congress designed subsection (j)’s penalties to account for the seriousness of the offense by themselves, without incorporating penalties from subsection (c).” *Lora*, 599 at 463 n.5.

And Congress knew it had to speak up if it desired multiple punishments: “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). Knowing gun possession is a lesser included offense of deadly use, Congress knew it had to say something – and something clear – to allow double punishment.

But it said nothing at all in 1994. It wrote no multiple-punishment clause for lethal shootings. It rejected the proposal to make § 924(j) part of § 924(c)’s multiple-punishment scheme. And it offered no hint

(let alone a clear indication) that it wanted someone sentenced to death per § 924(j), or up to life in prison, to get “five years” on top pursuant to § 924(c).

Not until 2005 did Congress allow multiple punishments for a fatal shooting— and only where “armor piercing ammunition” is used. § 924(c)(5). In such cases, “15 years” for having that ammunition, “and” a sentence for “murder” or “manslaughter” for using it to kill, must be imposed. Yet there is no provision in § 924 to cumulatively punish lethal use of a gun firing regular bullets.

Amicus says Barrett’s citation of § 924(c)(5) is just a “variation on [his] . . . magic-words requirement.” Amicus Br. 41. Putting aside that he’s not called for “magic words,” § 924(c)(5) shows how Congress directs punishment for a fatal shooting and lesser included offense. The fact that it did so in § 924(c)(5) but not in § 924(j) or § 924(c)(1)(A) is further proof it has not licensed double punishment here: “when ‘Congress includes particular language in one section of a statute but omits it in another,’” the “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)).

Finally, Amicus cites no useful legislative history. The authors of the 1998 “Bailey Fix Act,” Pub. L. No. 105-386 § 1(a)(1), 112 Stat. 3469, expressed no desire to twice punish one lethal shooting. And the history that predates the 1994 creation of § 924(j), *see* Amicus Br. 26-27, obviously sheds no light on how § 924(c) and § 924(j) “relate to each other,” *National Federation*, 567 U.S. at 544, or whether Congress wanted to punish deadly gun use under both § 924(c) and § 924(j): § 924(j) didn’t exist yet.

In sum, the Court has “often concluded that two different statutes define the ‘same offense,’ typically because one is a lesser included offense.” *Rutledge*, 517 U.S. at 297 (citing, at n.6, *Ball*, *Whalen* and *Brown*). That’s the case here, and Congress has nowhere “specially authorized” two punishments. *Whalen*, 445 U.S. at 693. “Congress intended that there be only one offense— that is, a defendant could be convicted under either [§ 924(c)(1)(A) or § 924(j)] for a single act [of fatal gun use], but not under both.” *Garrett*, 471 U.S. at 778.

This “end[s] the double jeopardy analysis.” *Id.* Amicus has not “overcome” the “presumption against [] multiple punishments.” *Rutledge*, 517 U.S. at 303.

Barrett nonetheless addresses Amicus’s claims about precedent and policy below.

C. The Cases Amicus Cites Don’t Help Him

“In *Lora*,” Amicus asserts, “this Court held that sections 924(c) and 924(j) are standalone, separate offenses.” Amicus Br. 12. Not so. The Court held only that “subsection (j) neither incorporates subsection (c)’s penalties nor triggers the consecutive-sentence mandate.” 599 U.S. at 462. The Court pointedly took “no position” on whether “Section 924(j) amounts to the “same offense” as Section 924(c) for purposes of [] Double Jeopardy.” *Id.* at 461 (citation omitted).

Still, *Lora* favors Barrett. His view that “someone cannot receive both subsection (c) and subsection (j) sentences for the same conduct . . . aligns with . . . our view that subsection (j)” does not “incorporate[] subsection (c)’s penalties.” *Id.* at 461-62.

Indeed, Amicus’s view that a fatal shooting must be punished under both § 924(j) and § 924(c) is in tension with – if not precluded by – the Court’s

unanimous determination that “subsection (j) supplies its own comprehensive set of penalties that apply instead of subsection (c)’s.” *Id.* at 460. Because “nothing joins their penalties,” *id.* at 461, Amicus identifies no authority for combining them.

Further, *Lora* saw nothing “anomalous,” Amicus Br. 46 (quoting Pet. App. 62a), or “implausible” about cumulatively punishing gun possession but not the “more serious offense” of fatal use. 599 U.S. at 462. “Congress plainly chose a different approach to punishment in subsection (j) than in subsection (c).” *Id.* And § 924(j)’s “flexibility [is not] incompatible with the seriousness of subsection (j) offenses,” which are punishable by the “maximum penalty possible: death.” *Id.* at 463.

Amicus turns to *United States v. Gonzales*, 520 U.S. 1 (1997), but the question there was whether a § 924(c) sentence may “run concurrently with a state-imposed sentence.” *Id.* at 2. The Court said no, citing what’s now § 924(c)(1)(D)(ii): a § 924(c) sentence had been “imposed on” *Gonzales*, so it had to run consecutively to the state term.

Here, of course, the question is whether a § 924(c) sentence may be “imposed on” *Barrett at all* if he is punished under § 924(j) for the “same offence.” U.S. Const. amend. V. As nothing in *Gonzales* says anything about that, it’s of no help to Amicus.

Ditto *Abbott v. United States*, 562 U.S. 8 (2010). Amicus cites its describing § 924(c) as “‘command[ing]’ that ‘all § 924(c) offenders shall receive additional punishment.’” Amicus Br. 30 (quoting 562 U.S. at 25). But, as discussed, that clause says the punishment for gun possession “‘shall’ be imposed ‘in addition to’ the penalty for the predicate offense,” 562 U.S. at 25

(quoting § 924(c)(1)(A))— not “in addition to” the penalty for using the gun to kill. Like *Gonzales*, moreover, *Abbott* says nothing about double jeopardy.

Amicus next cites *Castillo v. United States*, 530 U.S. 120 (2000), another decision in which the words “double jeopardy” do not appear. But Amicus claims that, as the Court held the “prohibition on using a ‘machinegun,’” now at § 924(c)(1)(B)(ii), is a “‘separate offense’ from section 924(c)(1)(A)’s simple prohibition on using a ‘firearm,’” a fatal shooting must be too. Amicus Br. 31 (quoting *Castillo*, 530 U.S. at 121).

Yet *Castillo* held machinegun use is an “an element of a separate offense” in the sense that it must be “determined by a jury.” 530 U.S. at 121. But *Castillo*’s jury found use only of “a firearm.” *Id.* at 122. The Court thus held he was wrongly subjected to § 924(c)’s then-extant “mandatory 30-year prison sentence” for machinegun use: the jury never found such use. *Id.*

There is no suggestion in *Castillo* that, for double jeopardy purposes, machinegun use is a “separate offense” from gun use. Amicus Br. 31. It plainly isn’t: having a “firearm,” § 924(c)(1)(A), is a lesser included offense of having a “machinegun.” § 924(c)(1)(B)(ii).

And just as there was no sign in *Castillo* that the 30-year penalty for machinegun use could be imposed on top of the 5-year one for regular gun use, there is no sign § 924(j)’s penalty may be added to § 924(c)’s.

Turning finally to “this Court’s double-jeopardy precedents,” Amicus Br. 33, Amicus invokes *Garrett*. As discussed, however, it doesn’t help him given the lack of a “plainly expressed” congressional wish to double-punish here. 471 U.S. at 779.

Garrett also hinged on “significant differences” between the multi-state, multi-year CCE there and

“classically simple situation” here. *Id.* at 789. Unlike a CCE, which entails far more than a “single course of conduct,” *id.* at 788, § 924(j) is limited to fatal gun use “in the course of a violation of subsection (c).” And Dore shot Dafalla within minutes (if not seconds) of robbing his compatriots. *See* Barrett Br. 12-13.

Garrett “merely adhered,” moreover, “to our understanding that legislatures have traditionally perceived a qualitative difference between conspiracy-like crimes” like CCEs “and the substantive offenses upon which they are predicated.” *Rutledge*, 517 U.S. at 300 n.12. “No such difference is present here.” *Id.*

This is also not a case like *Diaz v. United States*, 223 U.S. 442 (1912), which endorsed one prosecution for assault and one for homicide after the victim died. “At the time of the trial for the [assault] the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that.” *Id.* at 449.

“Should a victim of a section 924(c) offense later die,” *Diaz* suggests a “later section 924(j) conviction” would be permissible. Amicus Br. 35. But that is not the posture here. Unlike *Diaz*, Barrett was in one trial placed in jeopardy for both homicide and a lesser included offense. And as Congress has not “specially authorized” two convictions, *Whalen*, 445 U.S. at 693, one must be “vacate[d].” *Ball*, 470 U.S. at 865.

The only other case Amicus cites is *Missouri v. Hunter*, 459 U.S. 359 (1983). Yet that simply endorsed Missouri’s version of § 924(c). The “legislature had expressed its clear intent that a defendant should be subject to conviction and sentence under the armed criminal action statute in addition to any conviction and sentence for the underlying felony.” *Id.* at 363-64.

That’s also how § 924(c)(1)(A) works; but Congress did not there “express[] its clear intent,” *id.* at 363, to cumulatively punish a fatal shooting. It did so only in § 924(c)(5).

In sum, Amicus’s cases don’t help him, and the Court’s double jeopardy rulings – especially *Whalen* – favor Barrett decisively. *See* Barret Br. 24-25, 30-32.

Amicus claims *Whalen* did not involve “a statute with express indications of congressional intent” to double-punish. Amicus Br. 45. Yet it did: the statute set a default rule that a sentence for an offense had to “run consecutively to any other sentence imposed . . . whether or not the offense . . . requires proof of a fact which the other does not.” 445 U.S. at 691 (citation omitted; emphasis added).

The Court refused a “literal reading” of this law, as it would “be at odds with the evident congressional intention of requiring federal courts to adhere to the *Blockburger* rule.” *Id.* at 691 n.6. And as *that* law – which literally allowed double punishment – wasn’t sufficiently clear, then neither is § 924, which says not a word about punishing both a § 924(j) violation and the lesser included § 924(c)(1)(A) offense.

D. Amicus’s Policy Arguments are Meritless

Amicus worries that endorsing Barrett’s view – the prevailing one since 2011, *see* Pet. 8-11 – will allow “courts to ‘impose a lower sentence on a defendant whose firearms use caused death’” than one “whose firearms use in similar circumstances did not cause death.” Amicus Br. 46 (quoting Pet. App. 62a).

But this is not a realistic concern— as confirmed by Amicus’s inability to cite even one example of this ever happening, including since *Lora* clarified § 924(j) does not “incorporate[] subsection (c)’s penalties.” 599 U.S.

at 462. In practice, § 924(j) does the work of § 924(c). Endorsing Barrett’s view will therefore produce no “[u]ntenable [r]esults.” Amicus Br. 46. Homicide is, and will continue to be, punished harshly.

Unable to cite a real-word example, Amicus invokes *Lora*’s hypothetical of someone convicted of “voluntary manslaughter using a machinegun.” 599 U.S. at 459. The minimum for machinegun use is “30 years,” § 924(c)(1)(B)(ii), yet the maximum for voluntary “manslaughter,” § 924(j)(2), is “15 years.” § 1112(b). Under Barrett’s view, Amicus claims, if the person is punished under § 924(j) he “could not be subject to the mandatory-minimum sentence” for machinegun use and “would receive a lower sentence than a defendant convicted of the ‘lesser’ section 924(c) offense whose machinegun use did not cause death.” Amicus Br. 47.

There are a couple of problems with this. First, these crimes might pass the *Blockburger* test. Section 924(j) requires a “death,” which § 924(c)(1)(B)(ii) does not, and § 924(c)(1)(B)(ii) requires “machinegun” use, which § 924(j) does not: any “firearm” will do. If the crimes aren’t the “same offence,” U.S. Const. amend V, there’s no double jeopardy bar to double punishment. And second, if the crimes are the same – on the view that a jury finding machinegun use in a homicide case necessarily finds that was the “firearm” used to kill, see *Whalen*, 445 U.S. at 694 – the defendant can be punished under § 924(c) and receive up to life in prison if there’s any fear a § 924(j) sentence would fail to do justice. There’s also the safeguard of appellate review of punishment said to be too light.²

² These points apply equally to Amicus’s other hypothetical. See Amicus Br. 47 n.8.

Finally, Barrett’s reading does not “flout[]” anything in § 924(c), as it creates no “escape hatch from the otherwise mandatory sentence that would be imposed under section 924(c).” Amicus Br. 49. People subject to § 924(c)’s “otherwise mandatory” penalty will continue to receive it— including Barrett if he’s ultimately punished under § 924(c) instead of § 924(j).

But that “otherwise mandatory” penalty may not be imposed if Barrett is punished under § 924(j) for the “same offence.” U.S. Const. amend. V. Fatal gun use in violation of § 924(j), and the lesser included possession in violation of § 924(c)(1)(A), undisputedly are the “same offence.” And double punishment has not been “specially authorized by Congress.” *Whalen*, 445 U.S. at 693.

Because license to twice punish this one crime “nowhere clearly appears,” *id.* at 695, the “presumption against allowing multiple punishments” has not been “overcome.” *Rutledge*, 517 U.S. at 303.

CONCLUSION

The Second Circuit's judgment should be reversed.

Respectfully submitted,

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