No. 06-6911

In the Supreme Court of the United States

JAMES D. LOGAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

A prior conviction does not count as a sentencing predicate under the Armed Career Criminal Act of 1986, 18 U.S.C. 924(e)(1), if the defendant's civil rights were "restored." 18 U.S.C. 921(a)(20). The question is whether a State restores civil rights for purposes of that provision when it never deprives a defendant of those rights, and instead leaves the rights intact at all times.

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OPINION BELOW

The opinion of the court of appeals (J.A. 28-36) is reported at 453 F.3d 804.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2006. The petition for a writ of certiorari was filed on September 29, 2006, and was granted on February 20, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Federal law generally prohibits a person who has been "convicted in any court of * * * a crime punishable by imprisonment for a term exceeding one year" from possessing firearms. 18 U.S.C. 922(g)(1). Under the Armed Career Criminal Act of 1986 (ACCA), a per-

son convicted of that offense is subject to a mandatory minimum 15-year sentence if he has at least three prior convictions for violent felonies or serious drug offenses. 18 U.S.C. 924(e)(1) (Supp. IV 2004). The term "violent felony" generally refers to a violent crime that is "punishable by imprisonment for a term exceeding one year." 18 U.S.C. 924(e)(2)(B). But with respect to an offense classified by a State as a misdemeanor, Congress specified that such an offense may qualify as a "violent felony" (or a predicate for a felon-in-possession conviction) if it is punishable by more than two years of imprisonment. 18 U.S.C. 921(a)(20)(B).

In 1986, Congress amended Section 921(a)(20) to include, among other things, the following exemption:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction * * * unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Firearms Owners Protection Act (FOPA), Pub. L. No. 99-308, § 101(5), 100 Stat. 449.

2. On May 31, 2005, police officers responded to a domestic disturbance complaint by Asenath Wilson. Wilson told police that petitioner, her boyfriend, had punched her in the face. She also said that petitioner was outside her residence and that his car, which was parked in her garage, contained drugs and perhaps a handgun. After obtaining petitioner's consent to search the car, a police officer found a loaded pistol inside the glove compartment. The officer also found a switchblade knife and a device used for smoking crack cocaine. See J.A. 9; Gov't C.A. Br. 5.

3. Petitioner pleaded guilty to possessing a firearm after having been convicted of a felony (namely, unlawful possession of a controlled substance), in violation of 18 U.S.C. 922(g)(1). J.A. 9-12, 14-15. The district court sentenced petitioner under ACCA to 15 years of imprisonment because, in addition to the drug offense, petitioner had three prior state misdemeanor battery convictions that were punishable by a maximum of three years of imprisonment. See J.A. 16-17.

In sentencing petitioner, the court stated that 15 years of imprisonment was "necessary to satisfy the statutory purposes of sentencing under [18 U.S.C. 3553] which in this case is to physically incapacitate the defendant in order to protect the community from his undeterred and dangerous criminal conduct." J.A. 18. The court explained that petitioner's "criminal history dates back to his adolescent years," that petitioner was convicted of committing many crimes, and that petitioner "had a number of cases, many with active warrants, that were pending when he committed this offense." *Ibid.*

4. On appeal, petitioner argued that the Wisconsin misdemeanor convictions should be disregarded under Section 921(a)(20) because they did not result in the loss of his civil rights. The court of appeals rejected that contention and affirmed. J.A. 28-36.

The court of appeals held that Section 921(a)(20)'s exclusion of "any offense * * * for which a person * * * has had civil rights restored" applies only when a State deprives a defendant of civil rights and later restores them. J.A. 28-29 (internal quotation marks omitted). Because "[t]he word 'restore' means to give back something that had been taken away," the court explained that "the 'restoration' of a thing never lost or diminished is a definitional impossibility." *Ibid.* (quoting

McGrath v. *United States*, 60 F.3d 1005, 1007 (2d Cir. 1995), cert. denied, 516 U.S. 1121 (1996)).

The court of appeals explained that the absence of legislative history directly on point does not justify a departure from the statute's plain language because "[s]tatutes do not depend, for their force, on some statement in the legislative history along the lines of: 'We really mean it!'" J.A. 29. The court criticized petitioner's position as resting on "imaginative reconstruction —the idea that a court may implement what it is sure the legislature would have done (had it faced the question explicitly) rather than what the legislature actually did." J.A. 33. When Congress's expressed intent is plain, the court explained, courts are not free to act as "effective lawmakers." *Ibid.*

The court of appeals also noted that for purposes of 18 U.S.C. 922(g)(9), which proscribes the possession of firearms by persons convicted of a misdemeanor crime of domestic violence, "[a] person shall not be considered to have been convicted of such an offense" if he "has had civil rights restored (*if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense*)." 18 U.S.C. 921(a)(33)(B)(ii) (emphasis added); see J.A. 34. Thus, the court reasoned that when Congress specifically addressed the issue presented here in a related statute, it recognized that rights can be restored only if they had been lost. *Ibid.* As a result, the court explained, petitioner's "guess about what Congress 'would have done, had it thought' turns out to be wrong." *Ibid.*

Nor was the court persuaded that the statute's plain language produced an absurd result. J.A. 30. The court agreed with petitioner that "someone whose civil rights have not been revoked cannot have them restored," but

explained that "restoration of civil rights is just one of three ways to erase a conviction from one's record for purposes of federal law." J.A. 31. "The other two—expungement and pardon—are as available to people who never lost their rights to vote, hold office, and serve on juries, as they are to other offenders." *Ibid.*

The court of appeals recognized that Congress's decision to defer to state pardons, expungements, set asides, and restorations of rights "ensured that similarly situated people would be treated differently—for states vary widely in which if any civil rights a convict loses and whether these rights are restored." J.A. 32. Thus, the court concluded that disparate treatment is "inherent in the legislative choice to make federal sentences depend on" state law. J.A. 35-36. "What a federal court *can* do, as a uniform matter, is count all state convictions unless the state extends a measure of forgiveness" by "pardon, expungement, or a restoration of civil rights." J.A. 36.

SUMMARY OF ARGUMENT

A. Petitioner is subject to a 15-year mandatory minimum sentence under ACCA unless his civil rights were "restored." 18 U.S.C. 921(a)(20). Because petitioner never lost his civil rights, those rights were not (and could not have been) restored. The plain meaning of "restore" is to "give back," not to "leave alone."

B. The statute's structure confirms its plain meaning. Offenses that might otherwise qualify as felon-in-possession or ACCA predicates, but are nonetheless exempted by the very nature of the offense, are addressed in Section 921(a)(20)(A) and (B). The final sentence of Section 921(a)(20), which was added by FOPA, addresses subsequent actions that exempt a defendant

convicted of an offense that, absent the subsequent action, would qualify as a predicate offense. Petitioner's argument is, at bottom, that because his civil rights were not removed by virtue of his misdemeanor convictions, those convictions should not have qualified as predicate offenses. But Section 921(a)(20)(B) expressly addresses the circumstances in which state misdemeanors qualify as predicate offenses, and petitioner concedes that his offenses are not exempted by Section 921(a)(20)(B). The final sentence, under which petitioner seeks relief, structurally is addressed to subsequent acts, not exempting offenses in the first instance.

Section 921(a)(20) refers to a pardon, expungement, set aside, or restoration of rights. All of those actions change a defendant's legal status by extending a measure of forgiveness and relieving him of some or all of the consequences of his conviction. In contrast, a defendant who merely retains rights at all times does not receive a measure of forgiveness, and indeed does not receive any relief from the consequences of his conviction.

Section 921(a)(20) goes on to provide that the restoration-of-rights exemption does not apply if the "restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." The statute thereby contemplates a specific, formal change in the defendant's legal status that could be accompanied by an express proviso against gun possession—not a mere retention of rights at all times.

The restoration-of-rights provision does not, as petitioner contends, defer to a State's determination that an individual is sufficiently trustworthy to possess firearms. As this Court explained in *Caron* v. *United States*, 524 U.S. 308, 315 (1998), the very point of ACCA is to "keep guns away from all offenders who, the Fed-

eral Government feared, might cause harm *even if those persons were not deemed dangerous by States*" (emphasis added). Thus, while the statute defers to a State's express determination to change a defendant's legal status by pardon, expungement, set aside, or restoration of rights, it does not uniformly defer to a State's decision to allow a defendant to possess some firearms.

Nor is there merit to petitioner's contention that because Congress more expressly addressed the precise scenario of a defendant whose civil rights were never lost in another provision (18 U.S.C. 921(a)(33)(B)(ii)), and made clear that such defendants do *not* qualify for the exemption, that subsequent Congress must have intended Section 921(a)(20)'s exemption to extend to such defendants. For purposes of the related firearms prohibition for domestic violence misdemeanants, Section 921(a)(33)(B)(ii) carves out an exemption for a defendant who "has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under [the predicate] offense)." 18 U.S.C. 921(a)(33)(B)(ii). Congress enacted Section 921(a)(33) ten years after Section 921(a)(20)'s enactment and after some courts of appeals had questioned, in *dicta*, whether Congress had intended to exclude from Section 921(a)(20)'s exemption persons who had never lost their civil rights. Thus, the parenthetical's obvious import is to *clarify* the meaning of "restored" in the new statute, not to *change* the meaning of that term in the earlier statute. Moreover, Congress's decision to clarify that defendants, like petitioner, who never lost their civil rights do *not* qualify for an analogous exemption is fatal to petitioner's argument that such a result is absurd.

C. Petitioner resorts to the *absence* of legislative history directly on point in order to support his claim

that Congress could not have intended what it expressly said. But a law cannot be judicially amended because Congress did not confirm its plain meaning in legislative history.

D. While petitioner argues that it was absurd for Congress not to broaden the exemption to include retention of rights, even petitioner must concede that Congress did just that in Section 921(a)(33)(B)(ii). Petitioner is not at liberty to dismiss such an explicit congressional policy choice as absurd. Moreover, there is nothing irrational about Congress's decision first to determine the seriousness of a crime based on primarily federal criteria, and then to defer to a State's decision to change a defendant's legal status by relieving him of some or all of the consequences of a conviction. Doing so balances Congress's desire to enact tougher federal laws with its deference to States' determinations to set aside or otherwise forgive convictions. Defendants who are not eligible for restoration of rights may still apply for pardons.

Moreover, the primary anomaly identified by petitioner—that in some States, misdemeanants are not eligible for restoration while felons' civil rights and firearms rights are automatically restored—appears to arise only in three States. Even those States impose significant waiting periods or other restrictions that make restoration less than automatic. In contrast, petitioner's position creates its own anomaly—persons convicted of serious felonies in States that do not revoke civil rights would automatically be treated as having had their civil rights restored, while persons convicted of less serious crimes in other States would not. It would make little sense to overturn the clear statutory text and structure in order to choose one anomaly over another.

Congress understood that, in imposing federal consequences on state convictions, some complications would arise. Certainly the presence of an anomaly in three States would not justify ignoring the text that Congress chose.

ARGUMENT

THE RESTORATION-OF-RIGHTS EXEMPTION APPLIES ONLY WHEN THE CONVICTING JURISDICTION DEPRIVED A DEFENDANT OF CIVIL RIGHTS AND LATER GAVE THOSE RIGHTS BACK

Petitioner pleaded guilty to being a felon in possession of a firearm, in violation of Section 922(g)(1), and is therefore subject to a mandatory minimum 15-year sentence if he was previously convicted of three violent felonies or serious drug offenses. 18 U.S.C. 924(e)(1). There is no dispute that petitioner was previously convicted in Wisconsin of three battery offenses that facially qualify as violent felonies under Section 921(a)(20)(B) because, while Wisconsin classified those offenses as misdemeanors, the maximum punishment for each of them was more than two years of imprisonment. See J.A. 28; Pet. Br. 4.

Accordingly, the only question in this case is whether petitioner qualifies for the following exemption set forth in the final sentence of Section 921(a)(20):

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. 921(a)(20). While Section 921(a)(20) does not define the term "civil rights," the courts have held, and petitioner agrees, that the relevant civil rights are the rights to vote, hold public office, and serve on a jury. See, *e.g.*, Pet. Br. 13 n.10 (citing cases); cf. *Caron* v. *United States*, 524 U.S. 308, 316 (1998) (identifying, in *dictum*, the three civil rights).

Petitioner never received a pardon, set aside, or expungement. J.A. 36. And while petitioner relies on the restoration-of-rights provision, he concedes (Pet. Br. 5) that Wisconsin never deprived him of any of the rights in question. That is the beginning and end of this case because, as the court of appeals held, rights that were never lost cannot have been "restored." J.A. 29.

A. The Plain Meaning Of "Restore" Is To Give Back, Not To Leave Alone

1. The restoration-of-rights exception is unambiguously limited to restoration, not retention, of rights. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)).

That canon is dispositive because "restored" does not mean "retained." Rather, it means "[t]o give back (something which has been lost, or taken away); to make restitution of; to return." *Webster's New Int'l Dictionary of the English Language* 2125 (2d ed. 1958); see *Webster's Third New Int'l Dictionary of the English Language* 1936 (1993) ("[T]o give back (as something lost or taken away)."); *American Heritage Dictionary*

of the English Language 1538 (3d ed. 1992) ("To bring back into existence or use; reestablish."); *Oxford English Dictionary* 755-756 (2d ed. 1989) ("To give back, to make return or restitution of (anything previously taken away or lost)."); *Random House Dictionary of the English Language* 1222 (1966) ("[T]o bring back into existence, use, or the like; reestablish.").

Because the State did not take away petitioner's civil rights as a result of his misdemeanor battery convictions, it could not have "restored" those rights. J.A. 29. Instead, the State simply left the rights alone. As the court of appeals explained, "[t]he 'restoration' of a thing never lost or diminished is a definitional impossibility." *Ibid.* (quoting *McGrath* v. *United States*, 60 F.3d 1005, 1007 (2d Cir. 1995), cert. denied, 516 U.S. 1121 (1996)); accord *United States* v. *Brailey*, 408 F.3d 609, 612 (9th Cir. 2005); *United States* v. *Jennings*, 323 F.3d 263, 267 (4th Cir.), cert. denied, 540 U.S. 1005 (2003); see *United States* v. *Caron*, 77 F.3d 1, 3 (1st Cir. 1996) (en banc) (defining "restore" as "bring back to an original state or condition").

2. Neither petitioner nor his amici appear to dispute that dispositive textual point. See Pet. 7 ("The ordinary reading of the 'restored' provision would not seem to apply to [petitioner] because his civil rights were never taken away in the first place."); Pet. C.A. Br. 9-10 (same). Indeed, they offer *no* alternative definition of the term "restored," and petitioner's own usage of that term reflects the difference between restoration and retention of rights. Expressly juxtaposing rights "restored" or "regained" with rights "retained" or "attained" (Pet. Br. 15, 24), petitioner argues that "retention and restoration are indistinguishable" on policy grounds, and he criticizes the court of appeals' conclu-

sion that "restoration is somehow different" from retention. Pet. Br. 15, 33; see *id.* at 22. Petitioner thereby makes clear that his argument is a policy one at odds with the clear statutory text.

The only court of appeals that held in petitioner's favor on the question presented here likewise acknowledged that "[c]learly the ordinary reading of the word 'restored' supports the government," but concluded that the defendant's civil rights "should be *treated as* 'restored.'" *United States* v. *Indelicato*, 97 F.3d 627, 629, 631 (1st Cir. 1996) (emphasis added), cert. denied, 519 U.S. 1140 (1997). One of petitioner's amici likewise argues that a person who retained civil rights "should be *considered* as having civil rights restored." National Rifle Ass'n (NRA) Br. 2-3 (emphasis added). Of course, their need to treat a statutory requirement *as if* it were satisfied only serves to underscore that it is not in fact satisfied.

3. Contrary to petitioner's contention (Pet. Br. 14-16), the government and this Court did not adopt an atextual interpretation of the term "restored" in *Caron*, *supra*. In that case, Massachusetts had taken away and later automatically restored the defendant's rights to serve on a jury and to hold public office, and the defendant had retained his right to vote at all times. *Caron*, 77 F.3d at 1-2. The court of appeals held that the defendant "'had civil rights restored' within the meaning of" Section 921(a)(20), *id*. at 2, and the government agreed with that conclusion when the case reached this Court on a different issue, 524 U.S. at 313. But the conclusion that a defendant's civil rights are restored when two of those rights are taken away and later returned hardly suggests that mere retention of all three rights consti-

tutes restoration. Unlike the defendant in *Caron*, petitioner did not lose and recover *any* civil rights.

Petitioner also contends (Pet. Br. 24) that "if the process by which civil rights are *restored* is irrelevant" under *Caron* because they can be restored either on a case-by-case-basis or by operation of law, "then so too is the process by which civil rights are *attained*" (emphases added). That conclusion does not follow. It does not matter *how* rights were restored because what matters is *whether* they were restored. But it certainly matters whether rights were restored because that is the statutory test.[1]

B. The Statute's Structure Confirms Its Plain Meaning

If further evidence were needed of the plain meaning of the term "restored," the statutory context provides it.

1. Sections 921(a)(20)(A) and (B) address offenses that, Congress determined, should be exempted because of their very nature. Section 921(a)(20)(A) excludes

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[1] There is no merit to amicus NRA's argument (NRA Br. 29-30) that the government has inconsistently advocated a different understanding of the word "restored" as used in a different statute. Section 5845(c) of Title 26 defines a "rifle" to include a weapon "made" to be fired in a certain way, as well as a weapon that may be "readily restored" to fire in that way. In lower courts, the government initially argued in part that unassembled rifle parts qualified as a "rifle" under the "readily restored" prong of the statute even though the parts had not been previously assembled. But when the issue came before this Court, the government abandoned that position and relied instead on the "made" prong of the statute. U.S. Br. at 10, *Thompson/Center Arms Co.* v. *United States*, 504 U.S. 505 (1992) (No. 91-164). Indeed, the government described a "readily restor[able]" rifle as one requiring "*re*-assembly," *id.* at 18 (emphasis added)—*i.e.*, "[a] weapon that once was a rifle, but which now lacks some essential component," *id.* at 17-18. That plain-language interpretation of the term "restored" is fully consistent with the government's plain-language interpretation in this case.

some offenses that "relat[e] to the regulation of business practices," while Section 921(a)(20)(B) excludes misdemeanors that are not punishable by more than two years of imprisonment. In contrast, the final sentence of Section 921(a)(20), on which petitioner relies, addresses subsequent actions that exempt a defendant convicted of an offense that, absent the subsequent action, would qualify as a predicate offense. By arguing (Pet. 24, 31) that offenses for which defendants are not deprived of civil rights are not sufficiently serious to count as ACCA predicates, petitioner is invoking the considerations that underlie Section 921(a)(20)(B), *not* those that underlie Section 921(a)(20)'s last sentence. Section 921(a)(20)(B) expressly addresses the circumstances in which state misdemeanors qualify as predicate offenses, and petitioner's offenses qualify under that provision because they were punishable by more than two years of imprisonment. See J.A. 28; Pet. Br. 4.

Words in a list are generally known by the company they keep. *E.g.*, *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 36 (1990); *Beecham* v. *United States*, 511 U.S. 368, 371 (1994). Section 921(a)(20) refers to a pardon, an expungement or set aside of a conviction, or a restoration of civil rights. Pardon, expungement, and set aside all entail a change in a defendant's legal status by which the government extends a measure of forgiveness and relieves a convict of some or all of the consequences of his conviction. See Pet. App. 8-9; *McGrath*, 60 F.3d at 1007, 1008; see also *Schick* v. *Reed*, 419 U.S. 256, 266 (1974) ("The plain purpose of the [pardon] power * * * was to allow * * * the President to 'forgive' the convicted person."); *United States* v. *Potts*, 528 F.2d 883, 885 n.4 (9th Cir. 1975) ("[L]ike a pardon, [expunction] * * * forgives a crime."); *Doe* v. *Webster*, 606 F.2d

1226, 1233 n.20 (D.C. Cir. 1979) (a set-aside certificate is "a symbolic token of forgiveness").

A restoration of civil rights has that consequence because the State, through subsequent action, extends a measure of forgiveness by returning rights to a defendant that he had previously lost because of his conviction. In contrast, a defendant who merely retains his civil rights at all times does not receive a measure of forgiveness, and indeed does not receive any relief from the consequences of his conviction.

Moreover, Section 921(a)(20) goes on to provide that its exemption does not apply if the "restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." The statute thereby contemplates a specific, formal change in a defendant's legal status that could be accompanied by an express proviso against gun possession. In contrast, mere retention of rights does not entail any undertaking by the State that could include such an express proviso. *United States* v. *Ramos*, 961 F.2d 1003, 1006-1008 (1st Cir.), cert. denied, 506 U.S. 934 (1992), overruled by *Indelicato*, 97 F.3d at 628-629.

As already noted, in addition to containing the restoration-of-rights exemption, Section 921(a)(20) specifies in subsection (B) that misdemeanors punishable by more than two years of imprisonment are qualifying offenses. As a matter of the statute's structure, subsection (B)—not the restoration-of-rights provision—addresses the circumstances in which misdemeanor offenses do not qualify as predicate offenses. See pp. 13-14, *supra*. As a general matter, it is unusual for a State to deprive a misdemeanant of civil rights. See, *e.g.*, NACDL Lodging App. 1; *United States* v. *Barnes*, 295 F.3d 1354, 1368 (D.C. Cir. 2002). Thus, if retention of

civil rights qualified as restoration of those rights, Section 921(a)(20)'s restoration-of-rights exemption would come close to vitiating subsection (B)'s inclusion of misdemeanors punishable by more than two years of imprisonment. That unlikely result provides further contextual evidence that when Congress said "restoration," it did not mean "retention." See *Barnes*, 295 F.3d at 1368 (holding that the term "restoration" as used in similar provision of 18 U.S.C. 921(a)(33) does not include retention of rights for this reason); *United States* v. *Smith*, 171 F.3d 617, 623-624 (8th Cir. 1999) (same).

2. Petitioner argues (Pet. Br. 8, 16) that the restoration-of-rights provision is satisfied, not by an affirmative act of forgiveness that changes a defendant's legal status, but by a State's determination that an individual is sufficiently trustworthy to possess firearms. In his view, the statute "give[s] full effect to a state's determination whether a particular conviction is of the sort that should restrict an individual's right to possess a firearm." *Id.* at 8. That contention misperceives not only the plain meaning of "restored" and the statutory structure discussed above, but also the role of state law in the statutory scheme. As this Court has explained, Congress determined that state laws "provide[d] less than positive assurance that the person in question no longer poses an unacceptable risk of dangerousness." *Caron*, 524 U.S. at 315 (quoting *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 120 (1983)). Thus, Congress sought to "keep guns away from all offenders who, the Federal Government feared, might cause harm *even if those persons were not deemed dangerous by States*." *Ibid*. (emphasis added); see 18 U.S.C. 922(q)(1)(A) and (H) (finding that crime involving guns is a "pervasive, nationwide problem," in part because "even States, localities, and

school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures").

Contrary to petitioner's implication, state law does not play a controlling role in all aspects of the federal prohibition against firearms possession by convicts and the related sentence enhancement. Under ACCA, a defendant must have previously been convicted of three crimes that qualify as "violent felon[ies]" or "serious drug offense[s]" within *Congress's* definitions of those terms. 18 U.S.C. 924(e)(1) and (2) (Supp. IV 2004). State law determines what constitutes a "conviction" (as opposed to, for example, a deferred adjudication).[2] And the penalties imposed by a State are also relevant to whether the offense qualifies as a "violent felony" or "serious drug offense." 18 U.S.C. 921(a)(20), 924(e)(2). But those inquiries are far more specific than whether a State would consider a defendant sufficiently trustworthy to possess firearms.[3]

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[2] The Senate Report explains that the statute requires the existence of a "conviction" to be determined in accordance with state law in order "to accommodate state reforms * * * which permit dismissal of charges after a plea and successful completion of a probationary period, or which create 'open-ended' offenses, conviction for which may be treated as misdemeanor or felony at the option of the court." S. Rep. No. 583, 98th Cong., 2d Sess. 7 (1984); see *id.* at 7 n.16.

[3] In particular, Congress did not treat the State's label of an offense as a *misdemeanor* as sufficient to preclude the federal system from treating it as a violent *felony*. Instead, Congress gave some weight to that state label by requiring a sentence of more than two years—rather than the normal one year—for such misdemeanors. 18 U.S.C. 921(a)(20)(B). As noted, because misdemeanors generally do not involve the loss of civil rights, petitioner's argument ultimately cannot

If a defendant has been convicted of a violent felony or serious drug offense, Section 921(a)(20) respects a State's decision to pardon the defendant, set aside or expunge his conviction, or restore his civil rights, so long as the State does not concurrently restrict his firearms rights. But, as the court of appeals explained, those are the *only* ways a State can relieve a defendant of the consequences of a conviction for purposes of ACCA. J.A. 36. If the States' general trustworthiness determinations controlled who could possess firearms under federal law, the federal prohibition would be at most "a sentence enhancement" for the violation of state-law prohibitions against possession of firearms—"a result inconsistent with * * * congressional intent," as this Court recognized in *Caron*. 524 U.S. at 316.

Petitioner only underscores the lack of a textual basis for his argument by contending (Pet. Br. 30) that, if this Court reads Section 921(a)(20) according to its plain language, then "federal law, not state law, would control what is meant by 'trustworthiness,' or 'law abiding' in the context of the civil rights restored exemption and § 921(a)(20)." Neither "trustworthiness" nor "law abiding" appears in Section 921(a)(20). Instead, the statute uses the term "restored."

Petitioner's reliance (Pet. Br. 14 n.11, 22-23) on 18 U.S.C. 925(c) confirms his substitution of a general "trustworthiness" rationale for the statutory text in Section 921(a)(20). Section 925(c)—which Congress expanded at the same time it enacted the restoration-of-rights provision, see FOPA § 105, 100 Stat. 459—authorizes the Attorney General to grant relief from the federal fire-

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be squared with the congressional judgment reflected in subsection (B). See pp. 15-16, *supra*.

arm disability "if it is established to [the Attorney General's] satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." Petitioner correctly argues (Pet. Br. 23) that "*this provision* [Section 925(c)] squarely addresses a person's trustworthiness with respect to possessing a firearm" (emphasis added). But the trustworthiness assessment under Section 925(c) is a federal one. Far from supporting petitioner's position that a *state* determination of trustworthiness suffices, Section 925(c) only underscores that the determination is a *federal* one, aided only in specific, limited ways by the laws and actions of the States.

3. Petitioner erroneously argues (Pet. Br. 20-22) that Congress's explicit statement in another provision that civil rights can be restored only if they were once lost requires the conclusion that the term "restored" must mean something else in Section 921(a)(20).

In defining a "conviction" for purposes of Section 922(g)(9)'s bar on the possession of firearms by a person who had been convicted of a misdemeanor crime of domestic violence, Section 921(a)(33)(B)(ii) states that a person shall not be considered to have been convicted of such a crime if he "has had civil rights restored (*if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense*)" (emphasis added). That parenthetical does not diminish the clarity of Section 921(a)(20)'s language and statutory structure because Congress's explicit reference in Section 921(a)(33) to the loss of civil rights does not alter the meaning of "restored" standing alone. See *Limitiaco* v. *Camacho*,

127 S. Ct. 1413, 1419 (2007) ("explicit references" in one statute do not require other statute to be interpreted differently).

Petitioner (Pet. Br. 21) invokes the canon that "where Congress includes particular language [here, the parenthetical] in one section of a statute but omits it in another section of the same Act, it * * * acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). But that canon applies only where the two sections are parts of "the same Act." *Ibid.*; see *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452 (2002); *Bates* v. *United States*, 522 U.S. 23, 29 (1997). Congress enacted Section 921(a)(33) ten years after a different Congress had enacted Section 921(a)(20), and after some courts of appeals had questioned, in *dicta*, whether Congress had intended to exclude persons who had never lost their civil rights from Section 921(a)(20)'s exemption. See *United States* v. *Hall*, 20 F.3d 1066, 1069 (10th Cir. 1994); *United States* v. *Thomas*, 991 F.2d 206, 212 (5th Cir.), cert. denied, 510 U.S. 1014 (1993); *United States* v. *Cassidy*, 899 F.2d 543, 549 n.13 (6th Cir. 1990).[4] Against that backdrop, the parenthetical's obvious im-

[4] Although petitioner sometimes portrays those decisions as holdings on the question presented here (Pet. Br. 21-22), they are not. *Cassidy* held that the defendant was not entitled to the Section 921(a)(20) exemption because, while his rights were restored "after his release from prison," the State expressly precluded him from possessing a firearm. 899 F.2d at 550. *Hall* and *Thomas* held, in keeping with this Court's subsequent decision in *Caron*, 524 U.S. at 313, that rights could be restored automatically by operation of law. See *Hall*, 20 F.3d at 1069; *Thomas*, 991 F.2d at 213. In doing so, the *Hall* court recognized that "the word 'restored' certainly implies action of some kind by the state," which suggests that it would view mere retention of rights as insufficient to invoke the exemption. 20 F.3d at 1069.

port is to *clarify* the meaning of "restored" in the new statute, not to *change* the meaning of that term in the earlier statute, which Congress did not amend. That inference is further strengthened by Congress's use of a parenthetical phrase (a parenthetical, after all, being where one expects clarifying language). Cf. *Commissioner* v. *Connelly*, 338 U.S. 258, 261 (1949) (treating parenthetical as having clarifying effect).[5]

The surplusage canon invoked by petitioner is inapposite where, as here, the relevant language "performs a significant function simply by clarifying" the statute's meaning. *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2337 (2007); accord *O'Gilvie* v. *United States*, 519 U.S. 79, 89-90 (1996); *United States* v. *Vonn*, 535 U.S. 55, 71 (2002); *Amoco Prod. Co.* v. *Watson*, 410 F.3d 722, 734 (D.C. Cir. 2005) (Roberts, J.), aff'd *sub nom. BP Am. Prod. Co.* v. *Burton*, 127 S. Ct. 638 (2006). (Nor is it clear that the clarifying parenthetical is surplusage, because it might also be read to indicate that the restoration must relate to the underlying offense —*i.e.*, that a conviction by "the applicable jurisdiction" counts even if another jurisdiction revoked and restored the defendant's civil rights. 18 U.S.C. 921(a)(33); cf. *Beecham*, 511 U.S. at 370-371 (interpreting Section 921(a)(20) in that manner).) In any event, the surplusage canon is "not absolute," and yields to plain statu-

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[5] The sponsor of the legislation that became Section 921(a)(33) explained that its restoration-of-rights provision "mirrors similar language in current law that applies to those convicted of felonies." 142 Cong. Rec. 26,675 (1996) (remarks of Sen. Lautenberg). He further noted that because "[l]oss of these rights generally does not flow from a misdemeanor conviction," the restoration-of-rights provision "is probably irrelevant to most, if not all, of those offenders" who had been convicted of misdemeanor crimes of domestic violence. *Ibid.*

tory language like that at issue here. *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 536 (2004).

C. The Absence Of Legislative History Directly On Point Does Not Justify A Departure From The Statute's Plain Meaning

Petitioner argues (Pet. Br. 17-18) that the statute should not be read according to its terms because the legislative history is silent on the question presented here. That inversion of the normal rules of *statutory* construction is misplaced for numerous reasons.

1. Even if the legislative history specifically addressed the question presented, it could not override the unambiguous statutory text. *E.g.*, *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 567-568 (2005). If legislative history addressing a question cannot justify departing from a statute's unambiguous text, it would seem to follow *a fortiori* that the *absence* of such history certainly cannot do so, as the court of appeals observed. *Whitfield* v. *United States*, 543 U.S. 209, 216 (2005); J.A. 29. "[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of the statute." *Harrison* v. *PPG Indus.*, 446 U.S. 578, 592 (1980). Congress is, after all, undr no obligation to generate legislative history.

2. As the court of appeals explained, petitioner is therefore forced to argue not only that silence in the legislative history indicates that Congress did not consider the precise question before the Court, but also that this Court should amend the statute to address the question in the manner it thinks Congress would have "had it thought" more specifically about it. J.A. 33-34; see Pet. Br. 17.

a. No matter how much weight one would ordinarily give to legislative history, petitioner's approach—what the court of appeals called "imaginative reconstruction"—is "democratically illegitimate, for it sets up the judiciary as the effective lawmakers" contrary to Congress's clearly expressed intent. J.A. 33. In *Beecham*, for example, this Court acknowledged that a provision of Section 922(g) might have been an "accident[] of statutory drafting" and that Congress may have "never considered" the issue at all. 511 U.S. at 374. But the Court explained that "our task is not the hopeless one of ascertaining what the legislators who passed the law would have decided had they reconvened to consider petitioners' particular cases. Rather, it is to determine whether the language the legislature actually enacted has a plain, unambiguous meaning." *Ibid.*; accord J.A. 31, 33 (citing cases). In any event, even putting such methodological disputes to one side, Congress's approach to the issue in the analogous context addressed by Section 921(a)(33) strongly suggests that petitioner's "guess about what Congress 'would have done, had it thought' turns out to be wrong." J.A. 34.

Petitioner's reliance (Pet. Br. 18) on *Small* v. *United States*, 544 U.S. 385 (2005), is misplaced. In *Small*, the question was whether the phrase "convicted in any court" in Section 922(g)(1) includes convictions in foreign courts. The statutory text and legislative history were silent on that issue and there was "no reason to believe that Congress [had] considered [it]." *Id.* at 394. In that setting, this Court applied a variant of the "ordinary assumption" that a statute does not apply extraterritorially. *Id.* at 390-394. By contrast, petitioner does not ask this Court to interpret ambiguous statutory lan-

guage narrowly, and no canon analogous to the presumption against extraterritoriality applies here.

b. Moreover, it is inappropriate to presume that Congress was unaware that some affected defendants would retain their civil rights following state convictions. Absent "affirmative evidence" to the contrary, this Court presumes that "Congress is knowledgeable about existing law"—including state law—"pertinent to the legislation it enacts." *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988). That presumption is especially forceful where, as here, the very purpose of the amendment was to give effect to state-law pardons, expungements, set asides, and restorations of rights. By invoking all four of those options, Congress manifested a knowledge of the varying state procedures.

Indeed, Congress enacted the relevant amendment to Section 921(a)(20) partially in response to this Court's decision in *Dickerson*, which had held that a State's expungement of a conviction did not nullify the conviction for purposes of the firearms disability, 460 U.S. at 114-122. See *Caron*, 524 U.S. at 316; S. Rep. No. 583, *supra*, at 7 n.16. *Dickerson* reasoned in part that state expunction statutes "vary widely from State to State," 460 U.S. at 120, creating "nothing less than a national patchwork," *id.* at 122. The Court observed that not every State had enacted an expungement provision and that, among States that had done so, the provisions differed "in almost every particular." *Id.* at 121. In abrogating *Dickerson*, Congress obviously knew, as *Dickerson* had made clear, that state laws varied widely and that reliance on state law would produce anomalous outcomes. *Beecham*, 511 U.S. at 373; *Jennings*, 323 F.3d at 274; *Smith*, 171 F.3d at 625.

That conclusion is further buttressed by Congress's simultaneous amendment of Section 925(c), which, as discussed above, permits convicted persons to petition the Attorney General for removal of the firearm disability. Congress amended Section 925(c) to make it applicable to all crimes, including (for the first time) crimes involving firearms. See FOPA § 105(1)(A), 100 Stat. 459. According to the Senate Report, Congress broadened the Section 925(c) "safety valve" in order to protect "persons who might otherwise be more trustworthy than those eligible." S. Rep. No. 98-583, *supra*, at 26. In other words, Congress was aware that reliance on state law would produce anomalous outcomes, and it addressed that issue through the Section 925(c) "safety valve," not by broadening the Section 921(a)(20) exemption beyond its current form.[6]

D. The Canon Against Absurdities Is Inapposite

Petitioner invokes (Pet. Br. 24-34) the canon against absurdities, which applies when a statute's text would lead to "patently absurd consequences," *United States* v. *Brown*, 333 U.S. 18, 27 (1948), such that "the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819) (Marshall, C.J.); see *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 470-471 (1989) (Kennedy, J., concurring in judgment) (explaining that the canon applies

[6] While petitioner notes (Pet. Br. 23 n.15) that subsequent Congresses have declined to fund the Section 925(c) petition process, such that the safety valve has not been available in recent years, that is irrelevant to the intent of the enacting Congress or the structure of the statute it enacted.

only "where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone") (citation omitted). That canon is inapplicable here.

1. This Court has applied the canon against absurdities in interpreting ambiguous statutes that are susceptible to two or more interpretations because it is likely that Congress intended the non-absurd interpretation. See, *e.g.*, *Clinton* v. *City of New York*, 524 U.S. 417, 428-429 (1998); *United States* v. *Granderson*, 511 U.S. 39, 56 (1994). This Court has also read broad or general terms narrowly because it is unlikely that Congress foresaw an absurd application of general language, such as where a sheriff was prosecuted for obstructing the mails even though he was executing a warrant to arrest the mail carrier for murder, or where a medieval law against drawing blood on the streets was to be applied against a physician who had come to the aid of a man who had fallen down in a fit. *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 450-461 (1892) (citing cases); see *Public Citizen*, 491 U.S. at 455.

Petitioner's absurdity argument is an unusual one. His contention is not that what Congress did was absurd, but that it would be absurd for Congress to have done what it did without extending similar relief to petitioner. In other words, petitioner asserts (Pet. Br. 26-33) that it would be absurd to exempt defendants whose civil rights were restored and not defendants whose civil rights were retained. As discussed above, however, there is significant contextual evidence that Congress intended to do just that, and did so knowing that reliance on state law would produce anomalies. See pp. 13-16, 24-25, *supra*. As such, judicial broadening of the

exemption would be inconsistent with congressional intent.

In all events, Congress's approach to this issue in Section 921(a)(33) is clearly fatal to petitioner's absurdity argument. Congress expressly required, in that closely related context, the very result that petitioner now argues is absurd. See pp. 19-23, *supra*. Whatever petitioner might think of that policy choice, Congress's express adoption of it forecloses the argument that it is "quite impossible that Congress could have intended the result." *Public Citizen*, 491 U.S. at 471 (Kennedy, J., concurring in judgment).

2. Even setting those points to the side, petitioner has identified at most an anomaly, not an absurdity. There is a difference; mere anomalies are not absurdities. See *Carter* v. *United States*, 530 U.S. 255, 263 (2000). That point has particular force here because, as the court of appeals explained, anomalies are "inherent in the legislative choice to make federal sentences depend on the states' differing * * * approaches to revoking and restoring civil rights." J.A. 35-36; accord *McGrath*, 60 F.3d at 1009. In this context, therefore, anomalies are inevitable consequences of Congress's intent, not absurdities that call its intent into question.

a. Petitioner argues (Pet. Br. 23-24) that if a State permits persons to retain civil rights, it must view them as more trustworthy to possess firearms than persons it deprives of civil rights it later restores. That is not necessarily true—some States do not deprive misdemeants of the civil rights to vote, serve on juries, or hold public office, but do deprive at least some misdemeanants of the right to possess firearms. See, *e.g.*, Fla. Stat. § 790.06(3) (2007); Conn. Stat. 29-28(b)(2) (2003).

In any event, petitioner's point misperceives the statutory structure because it relates to the seriousness with which the State views the offense (the principal concern of, *inter alia*, Section 921(a)(20)(B)), not whether the State later extends a measure of forgiveness by changing the defendant's legal status (the issue addressed in the final sentence of Section 921(a)(20), on which petitioner relies). There is nothing irrational about Congress's two-step approach, which first considers the seriousness of the offense based on criteria other than retention or restoration of civil rights, and then defers to a State's determination to relieve a defendant of some or all of the consequences of his conviction.

b. If a defendant cannot invoke the restoration-of-rights provision because his rights were never revoked, he can still pursue a pardon, set aside, or expungement. As this Court explained in *Beecham*, Congress did not expect that "felons convicted by all jurisdictions [would] have access to all the procedures (pardon, expungement, set-aside, and civil rights restoration) specified in the exemption clause." 511 U.S. at 373. Rather, this Court recognized that a person convicted in federal court could not obtain restoration of civil rights because there is no federal procedure for restoring those rights. *Id.* at 372. The Court emphasized, however, that for purposes of Section 921(a)(20), "a person convicted in federal court is no worse off than a person convicted in a court of a State that does not restore civil rights." *Id.* at 373. Likewise, a person who was not deprived of civil rights is no worse off for this purpose than a person who was convicted in a State that deprived him of civil rights but did not restore those rights.

At a minimum, convicts appear to be able to seek pardons in all States. See NACDL Lodging App. 1.

Petitioner argues (Pet. Br. 27, 29) that in Wisconsin pardons are granted for misdemeanors only in extraordinary circumstances, and that pardons are rarely granted in some other States. But whether to forgive a defendant, by pardon or otherwise, rests with the State. If anything, the differing grant rates for pardons in different States only underscore that Congress was not focused on ensuring uniformity, but rather that its partial reliance on the States' determinations made anomalies inevitable.[7]

c. Moreover, neither petitioner nor his *amici* have identified any significant anomalies. They argue (NACDL Br. 12) that in six States, persons convicted of less serious crimes are treated the same as persons with more serious convictions because they must all seek pardons to benefit from Section 921(a)(20). But it is hardly an anomaly that federal law does not draw distinctions among sufficiently serious crimes based on their relative seriousness.

Amici also argue (NACDL Br. 12, 21) that in six jurisdictions—Florida, Iowa, Louisiana, North Dakota, South Dakota, and Wisconsin—persons convicted of less serious crimes are disadvantaged vis-a-vis those convicted of more serious crimes because at least some persons convicted of more serious crimes have their rights revoked and automatically restored, while at least some

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[7] Wisconsin eliminated any arguable anomaly prospectively because it no longer has misdemeanors punishable by more than two years of imprisonment, and thus no longer has any misdemeanors that qualify as ACCA predicates. Effective February 1, 2003, after petitioner was convicted of his misdemeanor battery offenses, Wisconsin reduced the maximum penalty for that crime to two years of imprisonment, thereby disqualifying that crime as an ACCA predicate. See Wis. Stat. § 939.62(1)(a) (2005), amended by Wis. Act 109 S.B. 1, § 562.

persons convicted of some less serious crimes do not lose their civil rights and thus may benefit from Section 921(a)(20) only if they obtain a pardon, expungement, or set aside. In three of those States, any such anomaly no longer exists. Iowa no longer restores felons' civil rights automatically. See Iowa Exec. Order No. 42 (2005). And Florida and Wisconsin no longer appear to have misdemeanors punishable by more than two years of imprisonment. See NACDL Lodging App. 1 at 18, 33-34; p. 29 n.7, *supra*.

Nor is there a significant anomaly in the other three States because most felons in those States lose the right to possess firearms under state law and there are significant restrictions on the restoration of that right. In South Dakota, for example, the right to possess firearms is restored only after 15 years, and only if the defendant has had no further convictions. S.D. Codified Laws § 22-14-15 (2006). Considering that South Dakota evidently grants approximately half of all pardon requests (see NACDL Lodging App. 3, at 18), misdemeanants may be able to receive pardons long before felons regain their firearms rights. In Louisiana, felons' firearm rights are restored only after ten years and only if a defendant had no further felony convictions. La. Rev. Stat. § 14:95.1(c) (2004). North Dakota also has a ten-year waiting period. N.D. Code § 62.1-02-01(1) (2003). And in all of those States, anyone may seek a pardon. See pp. 28-29, *supra*.[8]

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[8] In the District of Columbia, Colorado, Connecticut, Maryland, and Nebraska, felons and misdemeanants are on the same footing because felons are prohibited from possessing firearms under those States' laws unless they obtain a pardon. See NACDL App. 1, at 16, 17, 24, 27. Thus, felons and misdemeanants alike must obtain a pardon to take advantage of the Section 921(a)(20) exemption. When Wisconsin

Indeed, the adoption of petitioner's legal position would create greater anomalies than any he has identified in the court of appeals' interpretation. As the Second Circuit explained, "the most dangerous felons in a state that elected not to forfeit civil rights would be exempted from the federal prohibition, while those convicted of far less serious crimes in other states would not be exempted unless they were lucky enough to receive the benefits of an act of grace." *McGrath*, 60 F.3d at 1009. It appears that at least one State, Maine, does not deprive *any* convicted criminals of civil rights. See NACDL App. 1, at 23.[9] Under petitioner's position, therefore, *all* Maine crimes, including first-degree murder, would be treated as crimes for which civil rights had been restored, while much less serious crimes committed in other States would not. Even if the canon against absurdities otherwise applied in this case, it would make little sense to invoke the canon to choose one anomaly over another, especially considering the clarity of the statutory text and structure.

E. There Is No Basis For Resort To The Rule Of Lenity

Finally, petitioner's resort to the rule of lenity is misplaced. That rule applies only if, "at the end of the process of construing what Congress has expressed," including the use of ordinary tools of statutory construction, *Callahan* v. *United States*, 364 U.S. 587, 596 (1961),

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had misdemeanors punishable by more than two years, felons were likewise required to obtain a pardon to possess firearms. Wis. Stat. § 941.29(1), (2)(a), 5(a) (2005).

[9] In Maine, a defendant loses firearms rights upon conviction of a crime punishable by imprisonment for at least one year, but may apply for a firearm permit five years after completing his sentence. Me. Rev. Stat. tit. 15 §§ 393(1)(A-1)(1), 393(2).

"there is a grievous ambiguity or uncertainty in the statute." *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (internal quotation marks and citations omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity is * * * sufficient to warrant application of [the] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citations omitted).

There is no need to resort to the rule of lenity because no grievous ambiguity prevents the Court from making more than a guess about Congress's intent. Rather, as discussed above, the statute's text is clear and its plain meaning is buttressed by the statutory structure and context.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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