Nos. 09-479 and 09-7073

In the Supreme Court of the United States

KEVIN ABBOTT, PETITIONER

v.

UNITED STATES OF AMERICA

CARLOS RASHAD GOULD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 924(c) of Title 18 requires a five-year mandatory consecutive sentence for carrying, using, or possessing a firearm in connection with "any crime of violence or drug trafficking crime" "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law."

The question presented is whether the "except" clause exempts a defendant from any sentence for a Section 924(c) violation if the defendant is also subject to a greater mandatory minimum sentence on a different count of conviction charging a different offense.

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OPINIONS BELOW

The opinion of the court of appeals in *United States* v. *Abbott* (Abbott Pet. App. 1a-25a) is reported at 574 F.3d 203. The opinion of the district court (Abbott Pet. App. 26a-32a) is available at 2008 WL 540737. The opinion of the court of appeals in *United States* v. *Gould* (Gould Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 329 Fed. Appx. 569. An

earlier opinion of the court of appeals in *United States* v. *Gould* is reported at 529 F.2d 274.

JURISDICTION

The judgment of the court of appeals in *United States* v. *Abbott* was entered on July 28, 2009. A petition for rehearing was denied on August 31, 2009 (Abbott Pet. App. 33a-34a). The petition for a writ of certiorari was filed on October 19, 2009, and was granted on January 25, 2010. The judgment of the court of appeals in *United States* v. *Gould* was entered on July 29, 2009. A petition for rehearing was denied on August 28, 2009 (Gould Pet. App. 3a). The petition for a writ of certiorari was filed on October 16, 2009, and was granted on January 25, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 18 U.S.C. 924(c)(1), 18 U.S.C. 924(c)(1) (1994), and 18 U.S.C. 3559(c), are set forth at App., *infra*, 1a-8a.

STATEMENT

1. *No. 09-479.*

a. When executing a search warrant at a house in Philadelphia identified as the site of crack dealing, the police encountered Kevin Abbott standing in the doorway. Abbott slammed the door when the officers identified themselves. After breaking down the door, police arrested Abbott as he tried to escape through a kitchen window. Police recovered the following from Abbott: $617 in cash (including $20 in prerecorded buy money), a key to the building's front door, a bag of marijuana, and a false driver's license. A search of the building

uncovered narcotics, drug paraphernalia, and two handguns. Abbott Pet. App. 3a-4a.

A grand jury sitting in the Eastern District of Pennsylvania returned an indictment charging Abbott with conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. 846; possession with intent to distribute more than five grams of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and possession of a firearm after being convicted of a felony, in violation of 18 U.S.C. 922(g) and 924(e). Abbott Pet. App. 4a-5a. The government filed an information under 21 U.S.C. 851 that exposed Abbott to a mandatory minimum term of ten years of imprisonment on the drug trafficking charges because of prior convictions for felony drug offenses. See 21 U.S.C. 841(b)(1)(B); 2:05-cr-00333 Docket Entry No. 45 (filed Jan. 10, 2006). Abbott's criminal history also exposed him to a 15-year mandatory minimum sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), which requires such a sentence if the defendant has been convicted under 18 U.S.C. 922(g)(1) and has at least three prior convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. 924(e)(1). A jury found Abbott guilty on all counts. Abbott Pet. App. 26a.

b. At sentencing, the government noted that Abbott faced certain statutorily mandated terms of imprisonment: ten years in prison for each of the two drug trafficking convictions, 15 years in prison under the ACCA for the Section 922(g) conviction, and five years in prison for the Section 924(c)(1)(A) conviction. 2:05-cr-00333 Docket Entry No. 147, at 3-4 (filed Dec. 6, 2007). The

government further advised the court that, under Section 924(c), the term of imprisonment Abbott received for violating that statute had to run consecutively to the term of imprisonment for the Section 922(g) conviction and that Abbott therefore faced a minimum term of 20 years in prison. *Id.* at 4 & n.1; see 18 U.S.C. 924(c)(1)(D)(ii).

Abbott opposed such a sentence, arguing that the language of Section 924(c)(1)(A) exempted him from a consecutive five-year sentence for his Section 924(c) conviction. He relied on the statute's introductory "except" clause, which provides that a defendant who violates Section 924(c) must receive a five-year sentence "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. 924(c)(1)(A). Abbott contended that the 15-year term of imprisonment for the Section 922(g) conviction was a "greater minimum sentence" provided by "any other provision of law" for purposes of the "except" clause. He therefore argued that the district court could impose a concurrent sentence for violating Section 924(c) and urged the court to impose a term of imprisonment totaling 15 years in prison: 15 years for the Section 922(g) conviction under the ACCA, a concurrent ten-year term for the two drug trafficking convictions, and a concurrent five-year term for the Section 924(c) conviction. Dist. Ct. Dkt. 152, at 1-2; 2/5/2007 Tr. 8-11.[1]

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[1] In the district court, Abbott contended that the five-year term under Section 924(c) had to run consecutively to the mandatory ten-year term for his drug trafficking convictions, but that the resulting term of 15 years could run concurrently with the 15 years for the Section 922(g) conviction. See 2/5/2007 Tr. 8-11.

The district court sentenced Abbott to 20 years in prison. Judgment 2. The court concluded that, under the ACCA, Abbott was subject to a 15-year term of imprisonment for his Section 922(g) conviction. Abbott Pet. App. 28a-29a. The court imposed the ten-year statutory minimum on the two drug trafficking counts to run concurrently with each other and the 15 years on the ACCA sentence. Judgment 2. Finally, the court imposed a consecutive term of five years of imprisonment for the Section 924(c) conviction. *Ibid.*; Abbott Pet. App. 32a. The court rejected Abbott's interpretation of the statute's "except" clause, concluding that "[t]he plain language of [Section 924(c)] clearly and unambiguously mandates the district court to run any sentence under section 924(c) consecutive to all other sentences stemming from a crime of violence or drug trafficking in the same criminal proceeding." *Id.* at 29a.

c. The court of appeals affirmed. The court held that "the most cogent interpretation" of Section 924(c) "is that the prefatory clause refers only to other minimum sentences that may be imposed for violations of § 924(c), not separate offenses." Abbott Pet. App. 12a. For example, the court explained, if a defendant brandishes a short-barreled rifle during a drug trafficking offense or violent crime, "[t]he prefatory clause simply makes clear that the ten-year minimum [of Section 924(c)(1)(B)(i)] applies" instead of the seven-year minimum sentence of Section 924(c)(1)(A)(ii). *Id.* at 13a. The phrase "any other provision of law," the court held, refers to provisions outside of Section 924(c) that prescribe a sentence for violating the statute, "in the same way, for example, that 18 U.S.C. § 924 prescribes a sentence for violations of 18 U.S.C. § 922." *Ibid.*

The court rejected an interpretation of the "except" clause that would exempt a defendant from any sentence for violating Section 924(c) "when a predicate [drug trafficking offense or violent crime] carries a minimum sentence greater than the relevant minimum imposed by" Section 924(c). Abbott Pet. App. 14a. The court noted that such an interpretation would conflict with Section 924(c)'s mandate to impose the sentences prescribed in the statute "*in addition to* the punishment provided for" the predicate offense. *Ibid*. The court also concluded that such an interpretation would be inconsistent with Congress's goal in amending the statute in 1998 to "broaden the statute's reach" and would lead to anomalous results that Congress could not have intended. *Id.* at 14a-15a. The court likewise concluded that the "except" clause does not exempt a defendant from receiving a sentence for violating Section 924(c) if the firearm possession underlying that offense also gives rise to a mandatory minimum sentence under another firearm-specific statute such as the ACCA. The court thus "agree[d] with the majority of courts that the 'except' language connotes a comparison between alternative minimum sentences for a violation of [Section] 924(c), not between sentences for separate violations of [Section] 924(c) and another statute." *Id*. at 19a-20a.

2. *No. 09-7073.*

a. When executing a warrant to search petitioner Carlos Gould's house (the suspected site of cocaine distribution by Alfred Bryant), the police arrested Gould. In Gould's pockets, the police found approximately 29 grams of crack cocaine and 12 grams of powder cocaine. A search of the house uncovered ten grams of powder cocaine, 61 grams of crack cocaine, a quantity of marijuana, two firearms, multiple rounds of ammunition,

drug scales, and currency. In a car parked outside the house, police found Gould's social security card together with a military flak jacket, two nine-millimeter firearms, a sawed-off shotgun with an obliterated serial number, ammunition, and two grams of crack cocaine. Gould J.A. 11-12.

After his arrest, Gould told federal agents that he owned the house and that he used it primarily to sell crack cocaine. He said that Bryant also sold crack cocaine from the house and that Bryant had given him money to purchase firearms to protect the house. Gould stated that Bryant's role was to sell the crack cocaine and that Gould served as a security person, or "enforcer." 06-11058 Gov't C.A. Br. 4-5.

A grand jury sitting in the Northern District of Texas returned an indictment charging Gould with one count of conspiracy to possess with intent to distribute 50 grams or more of a mixture or substance containing cocaine base, in violation of 21 U.S.C. 846; one count of possession with intent to distribute 50 grams or more of a mixture or substance containing cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii); two counts of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); two counts of possession of a firearm after being convicted of a felony, in violation of 18 U.S.C. 922(g); and one count of possession of a firearm with an obliterated serial number, in violation of 26 U.S.C. 5861(g). C.A. R.E. Tab 3. Gould pleaded guilty pursuant to an agreement to the drug conspiracy count and one count of violating Section 924(c) in connection with that offense. *Id.* Tab 6; Gould J.A. 15-16.

b. At sentencing, the district court determined that the advisory Sentencing Guidelines range for Gould's

drug trafficking conviction, which carried a mandatory minimum term of ten years in prison, see 21 U.S.C. (b)(1)(A)(iii), was 110 to 137 months. 8/20/2008 Tr. 43-44. The court imposed a sentence at the top of that range, 137 months, to be followed by a consecutive five-year term for the Section 924(c) conviction. Gould J.A. 16. Gould unsuccessfully objected to the imposition of the Section 924(c) sentence, relying on the Second Circuit's decision in *United States* v. *Whitley*, 529 F.3d 150 (2008). 08/20/2008 Tr. 39-40. In *Whitley*, the Second Circuit construed the introductory language of Section 924(c) to mean that a defendant is exempt from any sentence for a Section 924(c) conviction when he is subject to a greater mandatory minimum sentence under the ACCA. 529 F.3d at 151.

c. The court of appeals affirmed. Gould J.A. 15-17. Rejecting Gould's arguments based on the "except" clause, the court concluded that its decision was controlled by the reasoning and holding of *United States* v. *Collins*, 205 Fed. Appx. 196, 197-198 (5th Cir. 2006) (per curiam), cert. denied, 551 U.S. 1170 (2007), which the court had recently adopted in a precedential opinion, *United States* v. *London*, 568 F.3d 553 (5th Cir. 2009), petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009). See Gould J.A. 16. In *Collins*, the court agreed with decisions of other courts of appeals that "the 'exception' clause of § 924(c)(1)(A) does not permit a district court to consider a sentence below the mandatory minimum simply because a defendant's predicate conviction carries a mandatory minimum sentence greater than the mandatory minimum sentence that applies under § 924(c)." 205 Fed. Appx. at 197. Construing the "except" clause "in the context of the language and design of the statute as whole," *id*. at 198 (citation and internal

quotation marks omitted), the court concluded that it was "reasonable to read the phrase 'any other provision of law' as referring to legal provisions outside the confines of § 924(c) that concern firearm possession in furtherance of a crime of violence or drug-trafficking crime," *ibid*.

SUMMARY OF ARGUMENT

The courts of appeals correctly upheld petitioners' sentences under Section 924(c). The statute's introductory "except" clause means that a defendant who commits a Section 924(c) offense is subject to the baseline five-year mandatory minimum sentence set forth in Section 924(c)(1)(A) unless Section 924(c) itself or any provision of law imposes a greater mandatory minimum for that offense. Contrary to petitioners' various interpretations, and consistent with the conclusion of the overwhelming majority of courts of appeals, a defendant is not exempt from any sentence for a Section 924(c) offense whenever he faces a higher mandatory minimum on a different count of conviction.

I. Section 924(c)(1)(A) provides for the imposition of specified minimum sentences "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law," 18 U.S.C. 924(c)(1)(A), but it does not explicitly state what offense may give rise to such a triggering sentence. As petitioners implicitly acknowledge, the clause must "have some understood referent to be intelligible." *United States* v. *Parker*, 549 F.3d 5, 11 (1st Cir. 2008) (emphasis omitted), cert. denied, 129 S. Ct. 1688 (2009). The natural referent of the "except" clause is the offense that immediately follows—using, carrying, or possessing a firearm in connection with a crime of violence or drug-

trafficking. All parties agree that the phrase "this subsection" means Section 924(c) and therefore refers to sentences for violation of that statute. Under the canon that general terms of a statute draw their meaning from neighboring words, the phrase "any other provision of law" similarly refers to sentences for violation of Section 924(c) that are contained elsewhere in the United States Code.

Petitioners contend that this reading of "any other provision of law" is incorrect because, in their view, Congress would not prescribe minimum sentences for violation of Section 924(c) in a separate statute. In fact, Congress has done exactly that in 18 U.S.C. 3559(c), which requires a mandatory minimum sentence of life imprisonment for a Section 924(c) offense committed by a defendant with a particularly serious criminal record. See 18 U.S.C. 3559(c)(1), (c)(2)(F). The drafting history of that provision provides compelling support for the decisions below: Congress amended Section 3559(c) to encompass additional Section 924(c) offenses in the same bill that added the "except" clause in 1998.

The purpose of Section 924(c) also supports the courts of appeals' interpretation of the "except" clause. The text and history of Section 924(c) make clear that Congress intended the statute to create a deterrent to employing firearms during certain crimes by providing that any defendant who does so must receive a consecutive minimum sentence in addition to any other applicable sentence. The interpretation applied in sentencing petitioners furthers that purpose because it ensures that a defendant will receive a sentence for Section 924(c) over and above any punishment for different counts of conviction, and thus that the same conduct will be punished more harshly when it involves a firearm.

II. Petitioners propose several mutually inconsistent interpretations of the "except" clause, but none is compatible with statutory text, purpose, or history. Although petitioners emphasize the breadth of the phrase "any other provision of law," they do not urge a literal reading of those words. Instead, they offer three different readings of the phrase: any provision of law that provides a minimum sentence available to the court at the time of sentencing on the Section 924(c) offense; any provision of law that is violated in the same criminal transaction giving rise to the Section 924(c) offense; or, finally, any provision of law that is violated by the possession of the same firearm at issue in the Section 924(c) offense.

None of those inventive interpretations finds support in either the statute's text or principles of statutory interpretation. Each interpretation would frustrate the purpose of Section 924(c) by entirely eliminating any sentence for a violation of that statute when a different count of conviction carries a higher mandatory minimum sentence. Under petitioners' readings, a defendant would face no sentence for violating Section 924(c) when he is also convicted under 21 U.S.C. 841(b)(1)(A) or when he qualifies as an armed career criminal under 18 U.S.C. 924(e). Because drug convictions and ACCA sentences are frequently paired with Section 924(c) convictions, petitioners' interpretations would render the statute irrelevant in a broad swath of cases.

Petitioners' interpretations create anomalies that Congress could not have intended. Under their view, a defendant convicted of a standalone substantive offense receives no sentence for that crime. Less culpable defendants would face a higher mandatory minimum sentence than more culpable offenders. And Gould's pro-

posed interpretation, which turns on whether the defendant faces a higher mandatory minimum on a different offense at the time he is sentenced for the Section 924(c) crime, would make the applicability of a sentence under Section 924(c) turn largely on the form of the government's charging instruments. Petitioners dismiss these anomalies primarily by saying that, when they arise, district courts may exercise their discretion under 18 U.S.C. 3553(a) to adjust the total sentence. But in 1998 (when the relevant language was added to Section 924(c)) Congress could not possibly have anticipated that this Court would make the Guidelines advisory. Nor is there any reason to believe that Congress decided to eliminate the Section 924(c) sentence but simultaneously invited courts to increase the sentence on the predicate offense when they disagreed with that decision, or, more generally, that Congress intended to rely on the court's discretion as an adequate substitute for the mandatory minimum scheme it prescribed in Section 924(c).

In addition, petitioner's arguments conflict with the legislative history of the "except" clause. Petitioners do not dispute that, under the pre-1998 version of Section 924(c), the mandatory sentence for violation of that provision would have applied even if the defendant faced a higher minimum sentence for another offense. Petitioners contend, however, that the 1998 amendments eliminated any sentence for violation of Section 924(c) in such circumstances. But as this Court recently explained in *United States* v. *O'Brien*, 130 S. Ct. 2169 (2010), Congress made only two significant substantive changes to Section 924(c) in 1998, and those revisions were intended to expand the scope of the statute and increase the penalties for its violation. Neither substantive change sug-

gests that Congress meant, by adding the "except" clause, to strip the statute of any effect in cases where its sentences previously applied.

III. Finally, there is no reason to resort to the rule of lenity in this case. The statutory text, purpose, and history make clear that the "except" clause refers to sentences for violation of Section 924(c), not for different counts of conviction. Because that clause does not suffer from any grievous ambiguity or uncertainty, the rule of lenity does not apply.

ARGUMENT

A DEFENDANT WHO VIOLATES SECTION 924(c) IS SUBJECT TO A FIVE-YEAR MANDATORY MINIMUM SENTENCE UNLESS SECTION 924(c) OR ANOTHER PROVISION OF LAW REQUIRES A HIGHER MINIMUM SENTENCE FOR THAT OFFENSE

Section 924(c) provides that a defendant convicted of using or carrying a firearm during and in relation to any drug trafficking crime or crime of violence, or possessing a firearm in furtherance of such a crime, shall, in addition to any other punishment, be sentenced to a minimum term of five years of imprisonment, "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. 924(c)(1)(A). Contrary to petitioner's various contentions, the "except" clause does not exempt a defendant from any sentence under Section 924(c) whenever he is subject to a higher mandatory minimum sentence for a different offense. Rather, as a majority of the courts of appeals to consider the question have reasoned, the provision applies to higher minimum sentences for the Section 924(c) offense itself.

I. The Text, Structure, Purpose, And History Of The "Except" Clause Make Clear That It Refers to Provisions Of Law Prescribing Minimum Sentences For Violating Section 924(c)

The "except" clause of Section 924(c) refers to other sentences for the offense defined in that statute—sentences that may be found either within Section 924(c) itself or elsewhere in the United States Code. That interpretation is the most natural reading of the "except" clause and, in particular, the phrase "any other provision of law." It also furthers the purpose of Section 924(c) to impose an additional, cumulative punishment on defendants who use or possess firearms in the commission of their crimes and thereby to provide an added deterrent to such conduct.

A. The "Except" Clause, Read Naturally, Refers To Other Sentences For Section 924(c) Violations

1. Section 924(c)(1)(A) provides that a defendant who engages in the described conduct must be sentenced to at least five years of imprisonment "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. 924(c)(1)(A). Although the "except" clause indicates that it is triggered when a defendant is subject to a "greater minimum sentence," the clause "does not say 'a greater minimum sentence' *for what*." *United States* v. *Parker*, 549 F.3d 5, 11 (1st Cir. 2008), cert. denied, 129 S. Ct. 1688 (2009). Construed literally and without consideration of context, the "except" clause would eliminate any sentence under Section 924(c) whenever the defendant faced a greater mandatory minimum sentence for state-law charges, for entirely unrelated counts, or for crimes that were the subject of a previous sentencing. Petitioners agree, however, that

the "except" clause cannot be "unbounded." *United States* v. *Williams*, 558 F.3d 166, 171 (2d Cir. 2009), petition for cert. pending, No. 09-466 (filed Oct. 20, 2009). Indeed, as petitioner Abbott notes, a purely literal construction of the clause would render Section 924(c) "meaningless," because it would eliminate any sentence under that statute "simply because a higher mandatory minimum sentence exists in the United States Code for a crime the defendant did not commit." Abbott Br. 19; see Gould Br. 14. Thus, the clause must "have *some* understood referent to be intelligible." *Parker*, 549 F.3d at 11.

The "understood referent" of the clause is the offense set forth in the language that immediately follows: using, carrying, or possessing a firearm in connection with a crime of violence or a drug trafficking crime. Eight courts of appeals have thus concluded that the "except" clause does not exempt a defendant from punishment under Section 924(c) whenever he faces a longer mandatory minimum sentence for another crime. See *United States* v. *Villa*, 589 F.3d 1334, 1345 (10th Cir. 2009), petition for cert. pending, No. 09-1445 (filed May 26, 2010); *United States* v. *Segarra*, 582 F.3d 1269, 1272-1273 (11th Cir. 2009) (per curiam), petition for cert. pending, No. 09-8536 (filed Jan. 8, 2010); Abbott Pet. App. 12a; *United States* v. *London*, 568 F.3d 553, 564 (5th Cir. 2009) (adopting reasoning of *United States* v. *Collins*, 205 Fed. Appx. 196 (5th Cir. 2006) (per curiam), cert. denied, 551 U.S. 1170 (2007)), petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009); *United States* v. *Pulido*, 566 F.3d 52, 65 & n.6 (1st Cir. 2009), petition for cert. pending, No. 09-5949 (filed Aug. 14, 2009); *United States* v. *Easter*, 553 F.3d 519, 526 (7th Cir. 2009) (per curiam), cert. denied, 130 S. Ct. 1281 (2010);

United States v. *Studifin*, 240 F.3d 415, 421-424 (4th Cir. 2001); *United States* v. *Alaniz*, 235 F.3d 386, 386-390 (8th Cir. 2000), cert. denied, 533 U.S. 911 (2001). Instead, as the Seventh Circuit has stated, the "except" clause means that "a defendant convicted under § 924(c)(1) shall be sentenced to a term of imprisonment set forth in § 924(c)(1)(A) unless subsections (c)(1)(B) or (c)(1)(C), or another penalty provision elsewhere in the United States Code, requires a higher minimum sentence for *that* § 924(c)(1) offense." *Easter*, 553 F.3d at 526.

This interpretation is "[t]he most natural reading of the relevant statutory text." See *United States* v. *Ressam*, 553 U.S. 272, 274 (2008). No one disputes that the phrase "this subsection" in the "except" clause refers to Section 924(c) and that a "greater minimum sentence * * * provided by this subsection" therefore means a greater minimum sentence for violating Section 924(c)(1)(A) as set forth in that provision. Specific subsections of Section 924(c) establish that in certain circumstances—for example, when the firearm involved is brandished or discharged—a defendant who possesses, uses, or carries a firearm in connection with a drug trafficking offense or crime of violence is subject to a penalty that exceeds the minimum five-year penalty set forth in Section 924(c)(1)(A)(i). Thus, if a defendant possessed a firearm in furtherance of a drug trafficking crime, that defendant is subject to a mandatory consecutive five-year sentence under Section 924(c)(1)(A)(i); *except* that if the firearm was brandished during the drug trafficking crime, the defendant is instead subject to the seven-year mandatory minimum sentence under Section 924(c)(1)(A)(ii); *except* that if the firearm is discharged during the crime, the defendant is instead

subject to a ten-year mandatory minimum sentence under Section 924(c)(1)(A)(iii); *except* that if the defendant has previously been convicted of violating Section 924(c)(1)(A), the defendant is instead subject to a minimum term of 25 years under Section 924(c)(1)(C)(i).

The meaning of "any other provision of law" is similarly straightforward. A "greater minimum sentence * * * provided by * * * any other provision of law" means a greater minimum sentence for violating Section 924(c) that is prescribed by a provision of the United States Code other than Section 924(c). See *Villa*, 589 F.3d at 1342-1343; Abbott Pet. App. 12a; *Easter*, 553 F.3d at 526; *Collins*, 205 Fed. Appx. at 198; *Studifin*, 240 F.3d at 423. That phrase makes clear that, if another provision of the United States Code mandates a punishment for using, carrying, or possessing a firearm in connection with a drug trafficking crime or crime of violence, and that minimum sentence is longer than the punishment applicable under Section 924(c), then the longer sentence applies.

This reading of the phrase "any other provision of law" accords with fundamental canons of statutory construction. This Court has emphasized that the language of a statute "cannot be interpreted apart from context." *Smith* v. *United States*, 508 U.S. 223, 229 (1993); see *Holloway* v. *United States*, 526 U.S. 1, 7 (1999) ("[T]he meaning of statutory language, plain or not, depends on context.") (citation omitted). The Court has also explained that when construing a statute, it does not "'look merely to a particular clause' but consider[s] 'in connection with it the whole statute.'" *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2317 (2008) (quoting *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974)). Similarly, a phrase should be "given more precise content by the neighboring words

with which it is associated." *United States* v. *Williams*, 553 U.S. 285, 294 (2008); see, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 486-487 (2006).

The surrounding language confirms that the phrase "any other provision of law" refers to statutes imposing a greater minimum sentence for violating Section 924(c). Those words constitute half of a phrase—"by this subsection or by any other provision of law"—denoting the sources of law that may provide a "greater minimum sentence" triggering the "except" clause. 18 U.S.C. 924(c)(1)(A). All parties agree that the other part of that phrase ("this subsection") refers to provisions that prescribe minimum sentences for the Section 924(c) crime. Under the most natural reading, "any other provision of law" likewise refers to provisions elsewhere in the United States Code that address the same offense. The prefatory "except" clause, moreover, "is followed directly by the specific types of conduct prohibited under § 924(c)." *Villa*, 589 F.3d at 1343. There is "no linguistic or contextual demarcation separating the prescribed conduct from the prefatory clause." *Ibid*. As a result, the "except" clause is most reasonably read to refer to a "higher minimum sentence" for the offense that follows—possessing, using, or carrying a firearm in connection with a drug trafficking crime or crime of violence.

2. Petitioners contend that this interpretation of the phrase "any other provision of law" is incorrect because it would be "utter[ly] and "startlingly implausible," (Abbott Br. 10, 22, 25), "exceedingly unlikely," (*id.* at 25), and "strange[]" (Gould Br. 5) for Congress to impose mandatory penalties for a Section 924(c) offense in a different provision of the United States Code. But in fact, Congress has done exactly that in 18 U.S.C.

3559(c). And the history of that provision—which was amended in order to track changes to Section 924(c) in the same bill that contained the "except" clause—leaves no doubt that Congress understood the relationship between the two statutes.

Section 3559(c)(1)(A) provides that a defendant convicted of "a serious violent felony shall be sentenced to life imprisonment" if the defendant has been convicted in state or federal court on separate occasions of either "2 or more serious violent felonies" or "one or more serious violent felonies and one or more serious drug offenses." 18 U.S.C. 3559(c)(1)(A). The statute defines "serious violent felony" to include "firearms possession (as described in section 924(c))" and "firearms use," 18 U.S.C. 3559(c)(2)(F)(i), which is in turn defined as "an offense that has as its elements those described in section 924(c) * * *, if the firearm was brandished, discharged, or otherwise used as a weapon and the crime of violence or drug trafficking crime during and in relation to which the firearm was used was subject to prosecution in" federal or state court, 18 U.S.C. 3559(c)(2)(D). The statute therefore provides a mandatory minimum sentence for defendants who violate Section 924(c) with particularly serious criminal histories. Thus, under the "except" clause, a defendant who possesses a firearm in furtherance of a drug trafficking offense or crime of violence is subject to a mandatory consecutive five-year sentence under Section 924(c)(1)(A)(i), *except* that if the defendant was previously convicted on separate occasions of two serious violent felonies, the defendant is instead subject to a term of life imprisonment under 18 U.S.C. 3559(c)(1)(A)(i).

The drafting histories of Sections 924(c) and 3559(c) demonstrate that Congress understood the relationship

between the two statutes and intended them to be linked. Section 3559(c) was originally enacted as a part of the Violent Crime Control and Law Enforcement Act of 1994. See Pub. L. No. 103-322, § 70001, 108 Stat. 1982. When first enacted, as now, that statute defined "serious violent felony" to include "firearms use." 18 U.S.C. 3559(c)(2)(D) (1994). But the original definition of "serious violent felony" did not encompass "firearm possession," just as Section 924(c) at the time did not include that term.

In 1998, when Congress added the "except" clause, it also expanded Section 924(c) to cover possession of a firearm in furtherance of a predicate offense thereby to "counteract" this Court's decision in *Bailey* v. *United States*, 516 U.S. 137, 150 (1995) (holding that the "use" provision in Section 924(c) required the defendant to "actively employ[]" the firearm and did not cover mere possession). See *United States* v. *O'Brien*, 130 S. Ct. 2169, 2180 (2010). At the same time that Congress made those changes to Section 924(c), it also revised Section 3559(c) to make parallel changes. In particular, in the same bill that amended 924(c) to add the "except" clause and to encompass firearms possession, Congress amended Section 3559(c)(2)(F)(i) by expanding the definition of "serious violent felony" to include "firearms possession (as described in section 924(c))." See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a) and (b), 112 Stat. 3469-3470.[2]

Thus, when Congress added the "except" clause, it also amended Section 3559 to provide that a defendant

[2] In the other significant change to Section 924(c) contained in that bill, Congress stepped up penalties when a firearm was "brandished" or "discharged"—concepts that were already present in, and that Congress borrowed from, Section 3559(c).

who possesses a firearm in violation of Section 924(c) must receive a mandatory minimum sentence of life if he has the requisite criminal history. These actions provide compelling evidence that Congress intended the phrase "[e]xcept to the extent that a greater minimum sentence is otherwise provided * * * by any other provision of law" to refer to sentences provided by other provisions of the United States Code, such as Section 3559(c), that impose greater minimum penalties for the 924(c)(1)(A) offense.[3]

3. In addition to providing instruction on how the amended Section 924(c) was intended to interact with other, existing provisions such as Section 3559(c), the phrase "any other provision of law" establishes a "safety valve" for future statutory provisions "that could impose an even greater mandatory minimum consecutive sentence for a violation of § 924(c)." *Collins*, 205 Fed. Appx. at 197-198 (finding convincing the reasoning of *Studifin*, 240 F.3d at 423 (interpreting language as a "safety valve" for future statutory provisions mandating

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[3] Section 3559(c) is not alone in imposing greater penalties for violation of Section 924(c). For example, 18 U.S.C. 924(j)(1)—a provision of law outside of "this subsection"—provides that a person who commits murder with a firearm in the course of a Section 924(c) offense may be sentenced to death. See, *e.g.*, *United States* v. *Battle*, 289 F.3d 661, 665-669 (10th Cir.) (concluding that Section 924(j)(1) sets forth a sentencing enhancement to the Section 924(c) offense analogous to increased punishments for brandishing or discharge), cert. denied, 537 U.S. 856 (2002); *United States* v. *Allen*, 247 F.3d 741, 769 (8th Cir. 2001) (holding that "§ 924(j) is fairly interpreted as an additional aggravating punishment for the scheme already set out in § 924(c)" because of "§ 924(j)'s explicit reference to § 924(c) and because each subsection of the statute is designed for the same purpose—to impose steeper penalties on those criminals who use firearms when engaging in crimes of violence"), vacated on other grounds, 536 U.S. 953 (2002).

penalties for the Section 924(c) offense)); see Abbott Pet. App. 13a.

Contrary to petitioner's contention, it is not "farfetched" or "implausible" that Congress would include language in Section 924(c) to allow for the possibility that it would later "create a longer mandatory minimum sentence for § 924(c) violations without making any mention of the new provision's interaction with § 924(c) itself." Abbott Br. 24; Gould Br. 21. As explained above, Sections 3559(c) and 924(j)(1) demonstrate that Congress has in fact enacted provisions outside of Section 924(c) establishing penalties for that offense.

More generally, there is nothing unusual about Congress prescribing mandatory minimum penalties for substantive offenses codified in other provisions. Section 3559 mandates a minimum term of life imprisonment not only for certain Section 924(c) offenses but also for violation of a range of other statutory provisions found elsewhere in the code, including 18 U.S.C. 1111 (murder), 49 U.S.C. 46502 (aircraft piracy), and 18 U.S.C. 2111, 2113, and 2118 (robbery). The ACCA is another familiar example of a provision that requires increased punishment for an offense that Congress defined earlier and elsewhere. Section 922(g)(1), which Congress enacted as a part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, sec. 902, § 922(e), 82 Stat. 230, makes it unlawful to possess a firearm after being convicted of an offense punishable by more than a year in prison. A defendant convicted of violating Section 922(g)(1) generally may be "imprisoned not more than 10 years." 18 U.S.C. 924(a)(2). In 1984, however, Congress provided in the ACCA that if a defendant who violates Section 922(g)(1) has been previously convicted of three or more violent

felonies or serious drug offenses, he is subject to a mandatory minimum sentence of 15 years. See Abbott Pet. App. 13a ("In referring to alternative minimum sentences, the prefatory clause mentions 'any other provision of law' to allow for additional § 924(c) sentences that may be codified elsewhere in the future—in the same way, for example, that 18 U.S.C. § 924 prescribes a sentence for violations of 18 U.S.C. § 922.").

4. Petitioners argue on a number of grounds that the interpretation of the "except" clause adopted by the courts below is inconsistent with the plain meaning of the statutory text. None of those contentions is persuasive.

a. First, petitioners and their *amici* emphasize the breadth of the word "any," arguing that construing the "except" clause as referring to statutes providing a greater mandatory minimum for violating Section 924(c) effectively "read[s] 'any' other provision of law to mean only 'some' other provisions of law." Amicus Br. for Nat'l Ass'n of Crim. Def. Lawyers 14 (NACDL Amicus Br.). In support of that contention, petitioners rely on cases such as *United States* v. *Gonzales*, 520 U.S. 1 (1997), which adopted an expansive interpretation of the word "any" to hold that the phrase "any other term of imprisonment" in Section 924(c) includes sentences imposed under state law. *Id.* at 5.

The problem with that reading is suggested by petitioners themselves. Neither petitioner actually urges this Court adopt a literal reading of "any provision of law" that would encompass all provisions of law. Indeed, as Abbott notes in explaining why such a literal reading is untenable, interpreting "any other provision of law" without "restrictions or qualifiers," NACDL Amicus Br. 14, would mean that the "except" clause is always trig-

gered "simply because a higher mandatory minimum sentence exists in the United States Code." Abbott Br. 19. Similarly, despite their invocation of *Gonzales*, neither petitioner contends that the phrase "any other provision of law" includes state law, such that a defendant would be exempt from any sentence under Section 924(c) if he were subject to a higher mandatory minimum on a state-law conviction. And neither petitioners nor any court has held that the "except" clause is triggered by sentences for unrelated crimes charged in separate indictments. To the contrary, the Second Circuit has held that the "except" clause is not triggered by sentences for unrelated crimes even if those unrelated crimes are charged in the same indictment as the Section 924(c) count at issue. See *United States* v. *Parker*, 577 F.3d 143, 147 (2d Cir. 2009) (holding that the "except" clause did not apply because the crime carrying a higher mandatory minimum was unrelated to the Section 924(c) offense).

Instead, petitioners agree that the phrase "[e]xcept to the extent a greater minimum sentence is otherwise provided by * * * any other provision of law" must be read to refer only to a subset of the universe of laws providing mandatory minimum sentences. See pp. 32-33, *infra*. The question in this case thus is not whether the phrase "any other provision of law" must be qualified, but rather what qualification Congress intended. "The word 'any' considered alone cannot answer this question." *Small* v. *United States*, 544 U.S. 385, 388 (2005); see, *e.g.*, *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.) ("[G]eneral words," such as the word "any," must "be limited" in their application "to those objects to which the legislature intended to apply them."); see also *Nixon* v. *Missouri Mun. League*,

541 U.S. 125, 132 (2004) ("any" means "different things depending upon the setting").[4]

b. Second, relying on *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009), petitioners contend that it is unlikely Congress would have used the expansive term "any other provision of law" to denote the limited category of present or future statutes that would trigger the "except" clause under the courts of appeals' interpretation. Abbott Br. 22-24; Gould Br. 22 (criticizing the courts of appeals' interpretation of the "except" clause on the ground that Congress would not "enact such broad language if it had a narrow set of statutes in mind").

Petitioners' reliance on *Nijhawan*, however, is misplaced. That case concerned the meaning of 8 U.S.C. 1101(a)(43)(M)(i), which provides that an alien is deportable as an aggravated felon if he is convicted of "an offense that * * * involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 129 S. Ct. at 2297 (emphasis omitted). The Court concluded that the phrase could not be limited to offenses that have as an element a victim-loss requirement of more than $10,000. The Court based that conclusion in part on the ground that few such offenses exist. *Id*. at 2301-2302. But the function of the provision at issue in *Nijwahan* fundamentally differs from that of the "except"

[4] Even if the phrase "any other provision of law" were given the most sweeping reading, the "except" clause would still be applicable only if, under any provision of law, a "greater minimum sentence is otherwise provided." That would leave the question of how to interpret the phrase "otherwise provided." Petitioners correctly concede that "otherwise provided" cannot be understood to mean "contained in any provision of the U.S. Code whether applicable to the defendant or not." Essentially for the reasons stated in this brief, the only plausible reading would be that the phrase means "otherwise provided for the violation of Section 924(c) at issue."

clause in Section 924(c). *Nijhawan* recognized that giving the scope-defining language of the statute the meaning the petitioner advanced would have frustrated Congress's purpose in including such offenses under the definition of "aggravated felony." In Section 924(c), by contrast, the "except" clause serves as a narrow *exception* to the general rule that a defendant who engages in the conduct described in 924(c)(1)(A) should receive a mandatory minimum five-year sentence. The government's interpretation of the exception thus advances, rather than frustrates, Congress's purpose in 924(c). See, *e.g.*, *Knight* v. *Commissioner*, 552 U.S. 181, 190 (2008) (Court is inclined, "[i]n construing provisions . . . in which a general statement of policy is qualified by an exception, [to] read the exception narrowly in order to preserve the primary operation of the provision") (brackets in original) (quoting *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989)). In addition, this Court rejected the petitioner's proposed interpretation in *Nijhawan* partly because it caused the statutory trigger to function in an irrational manner. See 129 S. Ct. at 2302 (noting seemingly random set of federal and state statutes that would trigger deportation under petitioner's interpretation). As explained below, however, the government's interpretation avoids the irrational results that petitioners' constructions would create. See pp. 39-43, *infra*.

c. Third, Abbott contends (Br. 25-26) that this Court's double-jeopardy precedents undermine the courts of appeals' interpretation of the "except" clause. In particular, Abbott argues that, construed only to prohibit multiple punishments for the same Section 924(c) offense, the phrase "any other provision of law" serves no purpose because it is redundant of the established

principle that "where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." *Whalen* v. *United States*, 445 U.S. 684, 692 (1980).

That contention is incorrect and conflicts with petitioners' own understanding of the "except" clause. Petitioners agree that Congress included the phrase "this subsection" in the "except" clause to ensure that courts impose only one of the mandatory minimum sentences set forth in Section 924(c) for a violation of that statute. See Abbott Br. 15; Gould Br. 9. But if Congress had chosen to rely on the interpretive presumption against duplicative punishments when it drafted the "except clause," it would have had no need to include that phrase or indeed to add the clause at all. That Congress chose to adopt such language demonstrates that, instead of relying on courts to apply a background interpretive presumption, Congress chose to make explicit that persons who engage in the conduct proscribed by Section 924(c) must receive the single highest minimum sentence provided for that offense, whether that sentence is contained in "this subsection" or "any other provision of law."

B. The Natural Interpretation Of The Text Furthers The Central Purpose Of Section 924(c)

The text and legislative history of Section 924(c) make clear that the statute was intended to deter criminals from using or possessing guns in the course of certain crimes by ensuring that they would face an additional mandatory minimum sentence if they did so. That purpose is served by construing the "except" clause to refer to higher mandatory minimum sentences for the

Section 924(c) offense but not for other counts of conviction.

"The best evidence of [Congress's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). Section 924(c) contains three central features that demonstrate its purpose to impose additional, cumulative mandatory minimum sentences on defendants who use, carry, or possess firearms in connection with crimes of violence or drug trafficking offenses and thereby create an added deterrent to committing such crimes with a firearm.

First, Section 924(c) specifies that the punishments it imposes "shall" be imposed "in addition to the punishment provided for" the underying "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). Second, the statute directs that its punishments apply even if the underlying crime of violence or drug trafficking offense "provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." Congress added that language to respond to this Court's decision in *Busic* v. *United States*, 446 U.S. 398 (1980), which held that "prosecution and enhanced sentencing under § 924(c) is simply not permissible where the predicate felony statute contains its own enhancement provision." *Id.* at 404; see *Simpson* v. *United States*, 435 U.S. 6, 15 (1978) (holding that courts may not impose a sentence under Section 924(c) in addition to a weapons enhancement for the underlying offense). "Congress [thus] made clear its desire to run § 924(c) enhancements consecutively to all other prison terms, regardless of whether they were imposed under firearms enhancement statutes similar to § 924(c)." *Gonzales*, 520 U.S. at 10. Third, Section 924(c)(1)(D)(ii)

makes explicit the requirement that the sentences for a violation of the statute must run consecutively to any other punishment. That provision states:

> Notwithstanding any other provision of law * * *, 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.

18 U.S.C. 924(c)(1)(D)(ii). The text of Section 924(c) thus leaves no doubt that Congress intended the statute to create mandatory minimum sentences that apply over and above any punishment that the defendant faces on other counts of conviction.

Section 924(c)'s legislative history supports that conclusion. Senator Helms, the sponsor of the legislation that added the "except" clause, noted the "commonsense" proposition that "[v]iolent felons who possess firearms are more dangerous than those who don't." *Violent and Drug Trafficking Crimes: The* Bailey *Decision's Effect on Prosecutions Under Section 924(c): Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. 3-4 (1996) (*1996 Hearings*) (statement of Sen. Helms). He therefore explained that the measure he supported "will ensure that future criminals possessing guns * * * will serve real time when they possess a gun in furtherance of a violent or drug trafficking crime." *Criminal Use of Guns: Hearing on S. 191 Before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. 3-4 (1997) (*1997 Hearings*) (statement of Sen. Helms). Representative McCollum, who introduced in the House the bill that added the "except"

clause, emphasized just before the bill's passage that the increased penalties it added are "enhancements on top of [any] underlying sentence for a crime that is committed with a gun." 144 Cong. Rec. 25,037 (1998) (statement of Rep. McCollum). Senator Biden captured the basic rationale of Section 924(c) in 1996 hearings about an earlier version of the bill that added the "except" clause:

> When we enhance penalties, whether they work or not, one of the underlying purposes—the rationale is we are trying to dissuade people from engaging in that activity. The bottom line here is what we intended was we don't want people carrying guns, committing crimes. We don't want people committing crimes, but if we have a choice, we want to penalize the person who thinks they may or may not need a gun, but nonetheless has it in their possession when they commit a crime—we want to punish that person more than the person who doesn't.

1996 Hearings 10 (statement of Sen. Biden).[5]

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[5] Abbott mischaracterizes the legislative history of the "except" clause in two significant respects. First, he contends that the government did not support inclusion of the "except" clause in the 1998 amendments and is now "asking this Court to provide it with a statute that Congress refused to enact." Br. 26-27. In fact, a Department of Justice representative testified before the Senate Judiciary Committee in both 1996 and 1997 that the Department supported in principle all of the bills under consideration, including those that contained the "except clause." *1996 Hearings* 7 (statement of Kevin Di Gregory, Deputy Asst. Att'y Gen.); *1997 Hearings* 9-13 (statement of Kevin Di Gregory, Deputy Asst. Att'y Gen.). The Department expressed "minor disagreement" with various aspects of the other bills, but it did not even mention—much less voice disapproval of—their introductory language. *Id.* at 10.

Second, Abbott describes (Br. 27-28) the amendments to Section

The natural reading of the "except" clause—to apply to other sentences for Section 924(c)—gives full effect to the deterrent purposes of Section 924(c). That interpretation requires imposition of the highest mandatory minimum penalty applicable to a Section 924(c) offense in addition and consecutive to the sentence for any other count of conviction. Consistent with Congress's intent, a defendant who commits a crime of violence or a drug trafficking offense with a gun will thus face an additional mandatory term of imprisonment as a result.

II. Petitioners' Interpretations Of The "Except Clause" Lack Any Basis In Statutory Text, Conflict With The Purpose And History Of Section 924(c), And Create Anomalies That Congress Could Not Have Intended

Contending that the interpretation of the "except" clause adopted by the majority of the courts of appeals is unreasonable, petitioners instead offer three conflicting readings of that provision. First, Abbott contends (Br. 15-21) that the clause refers to sentences for offenses that the defendant commits in the "same criminal transaction" giving rise to the Section 924(c) offense. Second, Abbott switches gears and argues (Br. 39-47) that the clause refers to sentences for other firearms-specific offenses arising from possession of the same gun

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924(c) that added the "except" clause as "fundamentally a compromise," arguing that the legislation was intended in part to mitigate increased punishments for armed criminals. That characterization is unfounded. The hearings on the bill reflected broad bipartisan support for expanding and increasing the punishments for possessing a gun in the course of predicate crimes. Remarking on that consensus, Senator Biden thanked the chairman "for being so vigilant and moving so rapidly on this" and stated: "This is an unusual day. The record should note that Biden, the Justice Department and Jesse Helms all agree on something." *1996 Hearings* 11-12 (statement of Sen. Biden).

involved in the Section 924(c) offense. Third, Gould disagrees with Abbott, contending instead (Gould Br. 4-5, 7-18) that the "except" clause refers to any sentence the court may impose for any crime at the time the defendant is sentenced for the Section 924(c) offense.

These interpretations are incorrect. Each depends on textual interpolations that find no support in the plain language of Section 924(c). In addition, all three interpretations frustrate the purpose of Section 924(c), contradict its legislative history, and create anomalies that Congress could not have intended when it amended Section 924(c) to add the "except" clause.

A. Petitioners' Interpretations Find No Support In The Text Of Section 924(c)

Petitioners purport to ground their interpretations of the "except" clause in the statute's plain language, contending that the courts of appeals' principal error was "depart[ing] from the 'except' clause's actual text" and "forc[ing] into the statute words that Congress did not include." Gould Br. 5. All of petitioners' interpretations, however, require this Court to infer from Section 924(c) various implausible qualifications that are nowhere contained in its "actual text." *Ibid.*

1. Both Abbott and Gould premise their positions on the words "any other provision of law," which they describe as an "expansive" and "open-ended" phrase that "means a provision of law, other than [Section] 924(c), selected without restriction." Abbott Br. 16-17 (emphasis omitted); Gould Br. 12-13. But petitioners' proposed interpretations require significant restrictions and qualifications on the reach of the phrase "any other provision of law." Abbott's primary position construes that phrase as if it read "any other provision of law that the defen-

dant violates in the same criminal transaction that gave rise to the Section 924(c) offense." Abbott's alternative argument converts "any other provision of law" into "'any other provision of law' * * * that imposes a 'greater minimum sentence' for the defendant's possession or use of the same firearm" involved in the Section 924(c) offense. Br. 39. And Gould's interpretation requires interpreting "any other provision of law" as if it read "any other provision of law" that imposes a greater mandatory minimum sentence "required for any of a defendant's counts of convictions at sentencing" on the Section 924(c) count. Br. 14. Thus, contrary to petitioners' contentions, their interpretations hardly "[r]ead[] 'any other provision of law' to mean what it says." Abbott Br. 17.

The qualifications petitioners propose, moreover, are textually implausible. Petitioners have provided no principle of statutory construction that explains why the phrase "any other provision of law" actually means laws violated as part of the same criminal transaction giving rise to the Section 924(c) violation; laws violated by the possession or use of the same firearm that was involved in the Section 924(c) offense; or laws that impose mandatory minimum punishments available to the court at the time of sentencing on the Section 924(c) crime. Abbott does not attempt to supply such an explanation based on specific aspects of the statutory text. And although Gould purports to locate support for his interpretation (Br. 14-15) in the present tense phrasing of the "except" clause and the words "is otherwise provided," that contention lacks merit. In common parlance, a punishment "is provided" by a statute even if that punishment does not apply at the sentencing of a particular defendant. The text of the "except" clause thus does not support

petitioners' positions. See *Parker*, 549 F.3d at 11 (noting that interpreting the referent of the "except clause" as "'any other crime related to this case' or 'the underlying drug crime or crime of violence' * * * require[s] reading into the clause a referent not literally expressed") (emphasis omitted); *Alaniz*, 235 F.3d at 389 ("We have scoured the statutory language, yet we find no support for the proposition * * * that subdivision (c)(1)(A)'s 'greater minimum sentence' clause applies to the predicate drug trafficking crime or crime of violence of which a particular defendant has been convicted").

B. Petitioner's Interpretations Frustrate The Purpose Of Section 924(c)

Petitioners also attempt to justify their interpretations on the basis of statutory purpose. The goals that petitioners attribute to Congress in enacting Section 924(c), however, cannot be squared with the text of that provision.

1. a. In support of his primary position, Abbott contends (Br. 20) that "[t]he reason is simple" that the "except" clause must be read to refer to sentences for other counts of conviction arising from the same "criminal transaction" as the Section 924(c) offense. That reason, he argues, is the "obvious purpose" of Section 924(c): "to ensure that a defendant receives at least five years in prison as a result of using or possessing a gun in connection with a violent crime or drug trafficking offense." *Ibid.* Thus, Abbott contends, "[i]f the same defendant receives more than five years' imprisonment because another statute, triggered by the same criminal transaction, imposes a higher mandatory minimum, the plain language and obvious purpose of [Section] 924(c) are satisfied." *Ibid.* Gould advances the same account of

the statute's purpose. See Br. 17 (contending that "Congress wanted to ensure that a defendant who commits a drug-trafficking or violent crime using, carrying, or possessing a firearm will spend at least 5 years in prison," and that "Congress reasonably believed that this purpose is served if that defendant is subject to a mandatory minimum sentence of more than 5 years for * * * the drug trafficking crime")

That contention is inconsistent with the text of Section 924(c). If Congress had intended only to ensure that a defendant convicted of Section 924(c) serves a total of at least five years in prison for all of his crimes, Congress easily could have accomplished that purpose by providing that the mandatory minimum sentence for the Section 924(c) offense should run concurrently with the sentences for other counts of conviction, including any sentence for the underlying drug trafficking offense or violent crime. But as explained above, Congress did precisely the opposite. It directed that the mandatory minimum sentence for the Section 924(c) must be imposed "*in addition to*" the sentence for any other crime, 18 U.S.C. 924(c)(1)(A) (emphasis added), and it separately instructed that the Section 924(c) sentence shall *not* "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." 18 U.S.C. 924(c)(1)(D).

Petitioners' explanations of the statute's purpose fail to account for these central aspects of its text. As the Fourth Circuit has explained, petitioners'

> construction of § 924(c) simply makes no sense in light of Congress's clear intent in § 924(c) to impose mandatory consecutive sentences, as opposed to

> choosing between one or the other sentence, and indeed would be patently inconsistent with the intent expressed in § 924(c)(1)(D)(ii) to require mandatory consecutive sentences against those who commit crimes of violence while using or carrying firearms in furtherance of their crimes.

Studifin, 240 F.3d at 423; see *Parker*, 549 F.3d at 11 ("[Defendant's] reading is suspect on its face because section 924(c)(1)(A)'s supplementary provision ([Section 924(c)(1)(D)])—by providing a five year sentence 'in addition to the punishment' for the predicate crime— self-evidently intends that one who carries a firearm in connection with a serious drug offense should serve a further consecutive sentence of five years.").

b. To support his alternative argument, Abbott mints an altogether different explanation of the purpose of Section 924(c) and its "except" clause. He contends that the "except" clause must be understood to refer to other offenses arising from the same firearm involved in the Section 924(c) count because that clause was intended to avoid "*double counting* the use or possession of the same firearm in the same transaction." Br. 39; *id.* at 45 ("except" clause represented "an effort to avoid duplicate punishments for firearm possession"); *ibid.* ("Congress wished to avoid a double increment for the same firearm") (citation omitted).

The suggestion that cumulative punishment would involve "double counting," however, overlooks the different functions of Section 924(c) and the ACCA. The ACCA punishes any possession of a firearm by a felon who has a particularly serious history of recidivism. Its focus is on the repeat offender, not on a particular use of a firearm. Section 924(c), in contrast, requires no criminal history, but instead punishes the injection of a fire-

arm into another crime. To substitute the recidivism enhancement in the ACCA for the separate Section 924(c) sentence effectively gives the defendant the use of a gun facilitating another crime for free.

The language Congress added to Section 924(c) in response to this Court's decision in *Busic*, moreover, refutes the notion that Congress viewed Section 924(c) as implicating double counting. In *Busic*, the Court held that "prosecution and enhanced sentencing under § 924(c) is simply not permissible where the predicate felony statute contains its own enhancement provision" for use of the firearm. 446 U.S. at 404; see *Simpson*, 435 U.S. at 15 (holding that a federal court may not impose sentences under both Section 924(c) and the weapon enhancement under the armed bank robbery statute, 18 U.S.C. 2113, based on a single criminal transaction). Repudiating that decision, "Congress amended § 924(c) so that its sentencing enhancement would apply regardless of whether the underlying felony statute 'provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.'" *Gonzales*, 520 U.S. at 10 (quoting Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1005(a), 98 Stat. 2138). "At that point, Congress made clear its desire to run § 924(c) enhancements consecutively to all other prison terms, regardless of whether they were imposed under firearms enhancement statutes similar to § 924(c)." *Ibid.* Given that history, Abbott cannot plausibly contend that Congress intended to prevent "double counting" for firearms offenses.

2. The true purpose of Section 924(c) renders petitioners' interpretations unreasonable. As explained above, the text and history of that statute make clear that Congress sought to create a deterrent to using or

possessing guns during predicate crimes by ensuring that any defendant who does so will receive an additional mandatory minimum sentence over and above other applicable sentences. All three of petitioners' interpretations, however, would eliminate any sentence for the Section 924(c) offense when the defendant faced a higher mandatory minimum on a different count of conviction.

Under Gould's position, a defendant would escape any sentence under Section 924(c) if, at the time of sentencing, he faces a mandatory minimum for any other offense, however unrelated to the Section 924(c) conduct. Under Abbott's primary position, a defendant would receive no separate sentence for using, carrying, or possessing a firearm if the underlying crime triggers the ten-year mandatory minimum set forth in the Controlled Substances Act (CSA). See 21 U.S.C. 841(b)(1)(A) (prescribing ten-year mandatory minimum for, *inter alia*, trafficking in more than five kilograms of cocaine or 50 grams of cocaine base). And under Abbott's alternative interpretation, a defendant who possesses a firearm in furtherance of a crime of violence or a drug trafficking offense would be exempt from any punishment for the Section 924(c) offense if he is also convicted of being a felon-in-possession and has three prior qualifying convictions under the ACCA. See 18 U.S.C. 924(e) (requiring a 15-year mandatory minimum if a defendant violates Section 922(g)(1) and has previously been convicted of three violent felonies or serious drug offenses).

Petitioners' interpretations of the "except" clause would thus frustrate the purpose of Section 924(c) in each of those situations. For the reasons petitioners' *amicus* emphasizes, moreover, the circumstances ad-

dressed by petitioners' interpretations are extraordinarily common. "The drug trafficking and firearms possession statutes that produce related counts of conviction account for almost all minimum sentences that could come into play under the 'except' clause." NACDL Amicus Br. 17 n.5; *id.* at 12 ("the two most likely sources of greater minimum sentences are the CSA and the ACCA"). Thus, under petitioners' interpretations, Section 924(c) would not achieve its purpose in precisely the circumstances for which it was intended and in which it is most commonly invoked.

C. Petitioners' Interpretations Create Sentencing Anomalies That Congress Could Not Have Intended

Petitioners' various readings of the "except" clause create anomalies that Congress could not have intended when it amended Section 924(c) in 1998.

1. a. Under all of petitioners' interpretations, a defendant convicted of violating Section 924(c) would receive no sentence for that offense when the "except" clause applies. See Gould Br. 33-34 (contending that, in circumstances triggering the "except" clause, a sentence for the Section 924(c) sentence "would never be imposed at all") (quoting *Williams*, 558 F.3d at 172). Petitioners' interpretations thus effectively treat Section 924(c) as a mere sentencing enhancement that can be displaced by some greater minimum for a different offense. Cf. *United States* v. *Whitley*, 529 F.3d 150, 151 (2d Cir. 2008) (describing Section 924(c) as a "sentencing statute"). "But [Section] 924(c) does not define an enhancement; it defines a standalone crime" of using, carrying, or possessing a firearm in connection with a drug or violent offense. *Easter*, 553 F.3d at 526; see *Dean* v. *United States,* 129 S. Ct. 1849, 1853 (2009) ("The princi-

pal paragraph [of Section 924(c)] defines a complete offense."); *Harris* v. *United States*, 536 U.S. 545, 553 (2002). The result required by petitioners' positions—a Section 924(c) conviction for which the defendant receives no sentence whatsoever—is highly anomalous. As the Seventh Circuit observed, "[a] determination of guilt that yields no sentence is not a judgment of conviction at all." *Easter*, 553 F.3d at 526.

b. Petitioners' interpretations would produce mandatory minimum sentences for less culpable defendants that are higher than those for more culpable defendants. As the court of appeals explained, that anomaly is illustrated by considering two defendants convicted of trafficking in cocaine—the first possessing 500 grams and therefore subject to a mandatory minimum sentence of five years under 21 U.S.C. 841(b)(1)(B), and the second possessing five kilograms (ten times the amount) and thus subject to a mandatory minimum of ten years under 21 U.S.C. 841(b)(1)(A). If the first defendant brandished a firearm in furtherance of his drug offense, all agree that the "except" clause would not apply and the defendant would be subject to two mandatory minimum sentences totaling 12 years: a five-year sentence under 21 U.S.C. 841(b)(1)(B) and a consecutive mandatory minimum sentence of seven years under Section 924(c)(1)(A)(ii). But if the second defendant brandished a firearm in furtherance of his much more serious drug offense, under Gould's and Abbott's principal position the "except" clause would apply, the seven-year mandatory minimum in Section 924(c)(1)(A)(ii) would disappear, and the defendant would be subject to a single mandatory minimum of ten years under 21 U.S.C. 841(b)(1)(A). Thus, the more culpable offender would face a lesser minimum sentence—precisely *because* his

underlying offense is more serious. It is inconceivable that Congress intended such a result. See Abbott Pet. App. 15a (discussing this and other sentencing anomalies and concluding that "[w]e are confident that Congress did not intend such a bizarre result").

c. Similar anomalies arise from Abbott's alternative argument, which interprets the "except" clause to apply to sentences under other firearms-specific statutes for possession of the same weapon involved in the Section 924(c) offense. Consider, for example, the relatively typical case of a defendant convicted of a drug trafficking offense carrying a ten-year mandatory minimum term, a Section 924(c) "brandishing" offense, and a Section 922(g) felon-in-possession offense. Under Abbott's alternative interpretation, if that defendant is subject to the ACCA on the Section 922(g) offense because he has an extensive criminal history, he would face a minimum of 15 years in prison, consisting of the mandatory minimum under 18 U.S.C. 924(e) running concurrently with the sentence for the drug conviction. That defendant would benefit from the "except" clause and face no penalty for violating Section 924(c). A defendant who committed all the same crimes, however, would face a higher mandatory minimum sentence if he were not subject to the ACCA. That defendant would be required to serve 17 years—two years longer than the identically situated armed career criminal—because he would be subject to a mandatory minimum term of ten years for the underlying drug crime plus seven consecutive years for the Section 924(c) violation. Thus, the first defendant is subject to a *less* severe statutory minimum because he has a *more* serious criminal history. This cannot be what Congress intended.

d. Gould's interpretation, which turns on what other minimum sentences are available to the court at the time of sentencing on the Section 924(c) offense, would create the additional anomaly that the form of the government's charging instruments determines the applicability of the "except" clause. Consider, for example, a defendant who committed three crimes: (1) a robbery in 2001; (2) discharge of a gun during that robbery (carrying a mandatory ten-year minimum under Section 924(c)(1)(A)(iii)); and (3) possessing a gun in 2005, after sustaining three prior violent felony or serious drug convictions, in violation of 922(g) and 924(e) (carrying a 15-year mandatory minimum under the ACCA). Under Gould's reading, if the defendant were charged with all of those crimes in a single indictment, the "except" clause would apply and the ten-year minimum sentence under Section 924(c) would disappear. Because he would be sentenced at the same time on the entirely unrelated ACCA offense, the defendant would escape any statutory penalty for having violated Section 924(c) four years earlier. By contrast, if the government charged the Section 924(c) offense separately from the unrelated ACCA offense, then under Gould's interpretation the "except" clause would not be triggered at sentencing and the defendant would be subject to multiple and consecutive mandatory minimums.

There is no logical reason why the applicability of a sentence under Section 924(c) should turn on how the government crafts its charging instruments. Indeed, this Court rejected a similar proposition in *Deal* v. *United States*, 508 U.S. 129 (1993), dismissing as implausible an interpretation of Section 924(c) that "would give a prosecutor unreviewable discretion either to impose or to waive the enhanced sentencing provisions of

§ 924(c)(1) by opting to charge and try the defendant either in separate prosecutions or under a multicount indictment." *Id.* at 133. The court declined "to give the statute a meaning that produces such strange consequences." *Id.* at 134. Like the construction rejected in *Deal*, Gould's "reading would confer the extraordinary new power to determine the punishment for a charged offense by simply modifying the manner of charging." *Id.* at 134 n.2 (emphasis omitted).

2. Petitioners contend on various grounds that these anomalies do not undermine their proposed interpretations of the "except" clause. Those contentions lack merit.

a. First, petitioners contend that these anomalies do not constitute the type of "absurdities" that would justify "disregard[ing] a statute's plain meaning based on the results such a reading would produce." NACDL Br. 25; Abbott Br. 30. For the reasons explained above, however, petitioners' interpretations do not reflect the plain meaning of Section 924(c), nor are they supported —much less compelled—by the statute's "plain text." Gould Br. 34. Rather, the anomalies created by petitioners' interpretations illustrate the conflict between the practical effect of those interpretations and the purposes of Section 924(c). They simply confirm what an analysis of statutory text and purpose make clear: petitioners' proposed interpretations of the "except" clause are unnatural and incorrect. See *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.").

b. Second, petitioners attempt to rationalize the anomalies on the ground that such outcomes concern only the applicable minimum sentence, not the total sen-

tence that any particular defendant will actually receive. Petitioners contend that, when the "except" clause applies, the district court may correct any anomaly or disparity in the minimum sentence by exercising its discretion under 18 U.S.C. 3553(a) to increase the sentence on the other offenses of conviction. But Congress added the "except" clause to Section 924(c) in 1998, seven years before this Court ruled in *United States* v. *Booker*, 543 U.S. 220 (2005), that district courts may vary from the Sentencing Guidelines based on Section 3553(a) to fashion an appropriate punishment in the particular case. Congress therefore could not have intended to rely on the discretion afforded by Section 3553(a) as a means of correcting anomalies resulting from the "except" clause. Abbott Pet. App. 18a ("Congress could not have intended to create such sentencing disparities with the clairvoyant expectation that seven years later the Supreme Court would * * * grant district judges the discretion to cure such injustices.") (citing *Booker*, *supra*); *Easter*, 553 F.3d at 526-527.

All of petitioners' arguments that rely on the discretion of the district court suffer from the obvious flaw that statutory mandatory minimums are designed specifically to limit a judge's sentencing discretion. In enacting Section 924(c), Congress intended to circumscribe the district court's ability to adjust sentences in cases in which defendants possessed, used, or carried a firearm in connection with predicate offenses by providing mandatory minimum sentences for that crime. It would make no sense for Congress to limit district court discretion in this way and simultaneously to rely on the exercise of sentencing discretion on other counts to effectuate the statute's purpose and avoid anomalous results.

c. Petitioners next contend (Abbott Br. 32-35; Gould Br. 29-30) that Congress intended for provisions of the Sentencing Guidelines in effect since 1998 to resolve the sentencing anomalies resulting from their interpretations of the "except" clause. They emphasize Guidelines provisions requiring a court to increase a defendant's offense level when the offense involves a firearm. See Sentencing Guidelines §§ 2D1.1(b)(1), 2K2.1(b)(6). They also point to a Guidelines provision, Sentencing Guidelines § 5K2.6, that allows district judges to depart upward from the applicable Guidelines range when an offense involves a firearm. This argument contravenes both statutory text and the congressional intent behind Section 924(c).

The text of Section 924(c) demonstrates that Congress did not consider firearm-related Guidelines enhancements to be an adequate substitute for the mandatory minimum penalties set forth in that statute. Section 924(c)(1)(A) provides that a defendant must receive a consecutive term of imprisonment for violating the statute even if the predicate drug trafficking crime or violent crime already "provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." 18 U.S.C. 924(c)(1)(A). As set forth above, Congress added that language to repudiate this Court's decisions in *Busic* and *Simpson*. See pp. 28, 37, *supra*; *Gonzales*, 520 U.S. at 10. In doing so, "Congress made clear its desire to run § 924(c) enhancements consecutively to all other prison terms, regardless of whether they were imposed under firearms enhancement statutes similar to § 924(c)." *Ibid.* If Congress rejected the view that statutory enhancements to a predicate offense were sufficient to punish a violation of Section 924(c), it follows that Congress did not believe

that the sentencing enhancements under the Guidelines for those predicate offenses could achieve its desire to impose incremental additional punishment for the Section 924(c) offense.

Petitioners' argument also runs counter to Section 924(c)'s legislative history. At the 1996 congressional hearings in response to the *Bailey* decision, Professor David Zlotnick urged reliance on the Guidelines' enhancement scheme. See *1996 Hearings* 46 (statement of David M. Zlotnick). But that is not the path Congress chose. Instead, as one witness summarized at the 1997 hearings, Congress made a judgment that the "enhancements [provided by the Sentencing Guidelines] are relatively minor and may have little or no impact on the sentence that is actually imposed. The Sentencing Guidelines are thus no substitute for the tough mandatory penalties of [S]ection 924(c)." *1997 Hearings* 34 (statement of Thomas G. Hungar).

d. Finally, petitioners argue (Abbott Br. 35-36; Gould Br. 34) that the anomalies resulting from their positions would arise only in "isolated hypothetical situation[s]" that are not representative of the "run of cases" in which Section 924(c) is charged. Abbott Br. 35 (quoting *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U.S. 32, 42 (1928) (Holmes, J., dissenting); Gould Br. 34 (describing the comparisons presenting anomalies as "imagined" and "fanciful hypotheticals") (brackets and citation omitted). That is incorrect. There is nothing remotely "fanciful" about federal prosecutions in which defendants are convicted of various permutations of offenses carrying different mandatory minimum sentences under Section 924(c), the CSA, and the ACCA. As petitioners' *amicus* notes, "indictments containing both CSA and Section 924(c) charges" are "routine." NACDL

Amicus Br. 13; *ibid.* (observing of the CSA and the ACCA that "it is common for one or both to be charged alongside" a Section 924(c) count).

D. Petitioners' Interpretations Are Unsupported By The Legislative History Of Section 924(c)

Petitioners' readings of the "except" clause find no support in the history of Section 924(c)(1)(A). Petitioners do not dispute that, under the pre-1998 version of that statute, a defendant convicted of violating Section 924(c) would have faced a mandatory sentence for that offense even if he also faced a higher mandatory minimum sentence for a different crime. They contend, however, that the effect of the 1998 amendments was to create a significant exemption in the statute by rendering a sentence for the Section 924(c) offense inapplicable in those circumstances. The legislative history of the 1998 amendments refutes that contention.

As this Court recently explained in *O'Brien*, Congress made "two [significant] substantive changes" in 1998 to the prior version of Section 924(c). 130 S. Ct. at 2179. First, Congress converted what were previously mandatory fixed sentences into mandatory minimum sentences. Thus, "[a] person convicted of the primary offense of using or carrying a firearm during a crime of violence was once to 'be sentenced to imprisonment for five years,' but under the current version he or she is to 'be sentenced to a term of imprisonment of not less than 5 years.'" *Ibid.* Second, in response to this Court's decision in *Bailey*, Congress expanded the reach of the statute by adding the word "possesses" in addition to "uses or carries" in the principal paragraph and by adding graduated minimum sentences for brandishing and discharging a firearm. *Ibid.*

The evident purpose and effect of these two changes was to expand and increase sentences for defendants who use, carry, or possess firearms in connection with other crimes. Petitioners' interpretations yield precisely the opposite effect, eliminating the Section 924(c) penalties altogether for the most serious offenders who commit predicate crimes carrying high minimum sentences. But as *O'Brien* indicates, the legislative history contains no support for that result. "Aside from shifting the mandatory sentences to mandatory minimums, and th[e] so-called *Bailey* fix, Congress left the substance of the statute unchanged" in the 1998 amendments. *O'Brien*, 130 S. Ct. at 2179. "Neither of these substantive changes suggests that Congress meant," by adding the "except" clause, to effect the profound change in the statute's operation that petitioners urge. *Ibid.*

III. The Rule of Lenity Does Not Apply

Petitioners contend that "[a]t the very least," "the statute is ambiguous as to its reach," and therefore the rule of lenity requires this Court to adopt one of their constructions. See Abbott Br. 37-38, 47-48; Gould Br. 36-39. There is no reason to resort to the rule of lenity here.

"The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961)). It is implicated only when, after "[a]pplying well-established principles of statutory construction," *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991), a court "can make no more than a guess as to what Congress intended." *Reno* v. *Koray*, 515 U.S. 50, 65 (1995) (internal quotation

marks and citation omitted); see *Smith*, 508 U.S. at 239 (the "rule [of lenity] is reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute") (quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971)) (internal quotation marks omitted). For the rule to apply, there must be "grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citation omitted), such that "the equipoise of competing reasons cannot otherwise be resolved," *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000).

For the reasons explained above, the meaning of the "except" clause is clear in light of established principles of statutory interpretation. "The text, context, purpose, and" history of that clause "all point in the same direction:" a defendant must be sentenced to the highest applicable minimum sentence for the Section 924(c) offense, whether that minimum sentence is set forth in "this subsection" or "any other provision of law." *United States* v. *Hayes*, 129 S. Ct. 1079, 1089 (2009). Because the "except" clause does not suffer from any "grievous ambiguity or uncertainty," *Muscarello*, 524 U.S. at 139 (quoting *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994)), the rule of lenity does not apply. See, *e.g.*, *Barber* v. *Thomas*, No. 09-5201 (Jun. 7, 2010), slip op. 17 (holding that the rule of lenity does not apply because the government's interpretation "reflects the most natural reading of the statutory language and the most consistent with its purpose"); *Dean*, 129 S. Ct. at 1856 (concluding that the discharge provision of Section 924(c)(1)(A)(iii) was not "grievously ambiguous" after considering "the statutory text and structure"); *Caron* v. *United States*, 524 U.S. 308, 316 (1998) (rejecting ap-

plication of the rule of lenity where the defendant's interpretation "is an implausible reading of the congressional purpose").

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 924(c)(1) (1994) provides:

Penalties

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release.[2] Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

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[2] See 1988 Amendment note below.

2. 18 U.S.C. 924(c)(1) provides:

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 second or subsequent conviction under this subsection, 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.

3. 18 U.S.C. 3559(c) provides:

Sentencing classification of offenses

(c) IMPRISONMENT OF CERTAIN VIOLENT FELONS.—

(1) MANDATORY LIFE IMPRISONMENT.—Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if—

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of—

(i) 2 or more serious violent felonies; or

(ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

(2) DEFINITIONS.—For purposes of this subsection—

(A) the term "assault with intent to commit rape" means an offense that has as its elements engaging in physical contact with another person or using or brandishing a weapon against another person with intent to commit aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242);

(B) the term "arson" means an offense that has as its elements maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive;

(C) the term "extortion" means an offense that has as its elements the extraction of anything of value from another person by threatening or placing that person in fear of injury to any person or kidnapping of any person;

(D) the term "firearms use" means an offense that has as its elements those described in section 924(c) or 929(a), if the firearm was brandished, discharged, or otherwise used as a weapon and the crime of violence or drug trafficking crime during and relation to which the firearm was used was subject to prosecution in a court of the United States or a court of a State, or both;

(E) the term "kidnapping" means an offense that has as its elements the abduction, restraining, confining, or carrying away of another person by force or threat of force;

(F) the term "serious violent felony" means—

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse

(as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense;

(G) the term "State" means a State of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States; and

(H) the term "serious drug offense" means—

(i) an offense that is punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(A)); or

(ii) an offense under State law that, had the offense been prosecuted in a court of the United

States, would have been punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(A)).

(3) NONQUALIFYING FELONIES.—

(A) ROBBERY IN CERTAIN CASES.—Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that—

(i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and

(ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person.

(B) ARSON IN CERTAIN CASES.—Arson shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that—

(i) the offense posed no threat to human life; and

(ii) the defendant reasonably believed the offense posed no threat to human life.

(4) INFORMATION FILED BY UNITED STATES ATTORNEY.—The provisions of section 411(a) of the Controlled Substances Act (21 U.S.C. 851(a)) shall

apply to the imposition of sentence under this subsection.

(5) RULE OF CONSTRUCTION.—This subsection shall not be construed to preclude imposition of the death penalty.

(6) SPECIAL PROVISION FOR INDIAN COUNTRY.—No person subject to the criminal jurisdiction of an Indian tribal government shall be subject to this subsection for any offense for which Federal jurisdiction is solely predicated on Indian country (as defined in section 1151) and which occurs within the boundaries of such Indian country unless the governing body of the tribe has elected that this subsection have effect over land and persons subject to the criminal jurisdiction of the tribe.

(7) RESENTENCING UPON OVERTURNING OF PRIOR CONVICTION.—If the conviction for a serious violent felony or serious drug offense that was a basis for sentencing under this subsection is found, pursuant to any appropriate State or Federal procedure, to be unconstitutional or is vitiated on the explicit basis of innocence, or if the convicted person is pardoned on the explicit basis of innocence, the person serving a sentence imposed under this subsection shall be resentenced to any sentence that was available at the time of the original sentencing.