No. 09-479

In the Supreme Court of the United States

KEVIN ABBOTT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Title 18 U.S.C. § 924(c)(1)(A) provides, in part, that a person convicted of a drug trafficking crime or crime of violence shall receive an additional sentence of not less than five years whenever he "uses or carries a firearm, or * * * in furtherance of any such crime, possesses a firearm" unless "a greater minimum sentence is * * * provided * * * by any other provision of law." The questions presented are:

1. Does the term "any other provision of law" include the underlying drug trafficking offense or crime of violence?

2. If not, does it include another offense for possessing the same firearm in the same transaction?

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The decision of the Third Circuit (Pet. App. 1a-25a) is reported at 574 F.3d 203. The district court's decision (Pet. App. 26a-32a) is available at 2008 WL 540737.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2009. J.A. 5. Petitioner timely filed a petition for panel rehearing and rehearing *en banc*, which was denied on August 31, 2009. J.A. 5. Petitioner timely filed a petition for a writ of certiorari, which was granted on January 25, 2010. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime be sentenced to a term of imprisonment of not less than 5 years.

Section 924(e)(1) provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years.

Section 922(g) provides, in pertinent part:

> It shall be unlawful for any person – (1) who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess in or affecting commerce[] any firearm or ammunition.

STATEMENT

This case concerns 18 U.S.C. § 924(c)(1)(A), which imposes a consecutive mandatory minimum sentence when a defendant employs a firearm "during and in relation to" a drug trafficking offense or crime of violence. The statute specifically provides, however, that the consecutive mandatory minimum sentence applies "[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) (emphasis added). This provision is commonly referred to as the "except" clause. The question in this case concerns the scope of the "except" clause and the meaning of the phrase "any other provision of law" within that clause.

A. The "Except" Clause

Section 924(c) provides a graduated set of minimum sentences for defendants who use or carry a firearm during and in relation to any crime of violence or drug trafficking offense, or who possess a firearm in furtherance of such a crime. 18 U.S.C. § 924(c)(1)(A). Generally, a defendant convicted under § 924(c) will receive a five-year minimum sentence. 18 U.S.C. § 924(c)(1)(A)(i). If the firearm is brandished, however, the minimum sentence is seven years, § 924(c)(1)(A)(ii), or if the firearm is discharged, ten years, § 924(c)(1)(A)(iii). Longer minimum sentences are provided for certain firearms and for repeat offenses, see §§ 924(c)(1)(B)-(C), and a sentence under § 924(c) must run consecutively to any other prison terms imposed, see § 924(c)(1)(D)(ii).

Under the "except" clause, these minimum sentences do not apply "to the extent that a greater minimum sentence is otherwise provided by" either "this subsection or by any other provision of law." 18 U.S.C. § 924(c)(1)(A). The first portion of the clause thus bars imposition of an additional mandatory minimum sentence if the defendant is subject to a longer mandatory minimum sentence under § 924(c). If, for example, a defendant both possesses and brandishes a firearm in connection with a drug trafficking offense or crime of violence, he is subject to the seven-year minimum sentence under § 924(c)(1)(A)(ii) for "brandishing" the firearm, but not also to the five-year minimum sentence under § 924(c)(1)(A)(i) for its "possess[ion]."

This case turns on the meaning of the second half of the "except" clause. That is, what does "any other provision of law" mean? More particularly, the issue here is whether this latter portion of the "except" clause is triggered by greater minimum sentences

provided for the underlying drug trafficking offense or crime of violence or, at the very least, greater minimum sentences provided for possessing the same firearm in the same transaction that gave rise to the § 924(c) conviction.

Congress added the "except" clause to § 924(c) in 1998. See Act to Throttle the Criminal Use of Guns, Pub. L. No. 105-386, 112 Stat. 3469 (1998) (codified as amended at 18 U.S.C. § 924(c)). The "except" clause first appeared in a bill Senator Jesse Helms introduced in March 1996. S. 1612, 104th Congress sec. 1 (Mar. 13, 1996). However, it was quickly eliminated from that bill, which ultimately failed in the House. Senator Helms included the "except" clause once again when he reintroduced his bill in January 1997. S. 191, 105th Congress (1997).

Within a month of this renaissance of the "except" clause, the Department of Justice submitted a position letter proposing its own amendments to § 924(c), which omitted the "except" clause entirely. See *United States* v. *Whitley*, 529 F.3d 150, 154 (2d. Cir. 2008) (citing Letter from Andrew Fois, Ass't Att'y Gen., Office of Legis. Affairs to Albert Gore, President of the U.S. Senate (Feb. 25, 1997)). But the "except" clause remained in the legislation that ultimately was adopted by both houses of Congress. 18 U.S.C. § 924(c)(1)(A).

Congress made several other changes to § 924(c) in 1998. The 1998 amendments were introduced primarily in response to *Bailey* v. *United States*, 516 U.S. 137 (1995), which held that convictions under § 924(c) required a showing of "active employment of the firearm by the defendant." *Id.* at 143 (emphasis omitted). See generally *Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the Judiciary*, 105th Cong. 1-4, 57-58 (1997); H.R. Rep.

No. 105-344, at 4-6 (1997). The 1998 amendments thus extended the scope of § 924(c) beyond active employment to cover any person "who, in furtherance of any such crime, possesses a firearm." § 1, 112 Stat. at 3469. At the same time, Congress also added offenses for brandishing or discharging the firearm and raised the prison term for repeat offenders from twenty years to twenty-five years. *Ibid.* The language of what is now subparagraph (D) was also changed to account for the fact that federal law no longer permitted suspended sentences. *Id.* at 3469-3470. Congress further provided that the terms imposed under § 924(c) were mandatory minimums.

B. The Charges And The District Court Decision

On September 23, 2004, officers of the Philadelphia Police Department made a controlled purchase of crack cocaine from Michael Grant outside a house that they suspected to contain a drug stash. Pet. App. 3a-4a. During Grant's arrest, the police saw petitioner Kevin Abbott standing in the doorway of the house. *Id.* at 4a. Upon noticing the police, petitioner went inside and slammed the door. Officers then broke down the door, entered the house, and arrested petitioner as he attempted to escape through a kitchen window. *Ibid.* Petitioner was in possession of $617 in cash, a key to the house, a small bag of marijuana, and a false driver's license. *Ibid.* Upon a search of the house, the officers found drugs, drug paraphernalia, and two guns, one hidden in a closet and one behind furniture. *Ibid.*

Grant and Abbott were indicted on four counts: (1) conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. § 846; (2) possession of more than five grams of cocaine base

with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), and 18 U.S.C. § 2; (3) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1) and (c)(2); and (4) possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g) and 924(e). Pet. App. 4a-5a. Grant pleaded guilty. Petitioner Abbott went to trial and was convicted on all four charges. *Id.* at 5a.

The district court sentenced petitioner to twenty years' imprisonment. Pet. App. 6a. It imposed a fifteen-year mandatory minimum sentence for violating the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) ("ACCA"), because petitioner had three previous convictions for violent felonies or serious drug offenses. *Ibid.* Over petitioner's objection, the court then imposed a five-year mandatory minimum sentence under § 924(c), which was to run consecutively to the fifteen-year sentence, pursuant to § 924(c)(1)(D)(ii). *Ibid.*[1]

C. The Court of Appeals Decision

Petitioner appealed, challenging, among other things, the legality of imposing the five-year minimum sentence under § 924(c). Pet. App. 2a-3a. The Third Circuit affirmed the sentence, holding that § 924(c)'s "except" clause "refers only to other minimum sentences that may be imposed for violations of § 924(c), not separate offenses." *Id.* at 12a.

The court of appeals acknowledged that "it is obvious that the prefatory clause has some limiting

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[1]The district court also imposed two ten-year mandatory minimum sentences for counts one and two, pursuant to 21 U.S.C. §§ 846 and 841(b)(1)(B), which the court ordered to run concurrently with the fifteen-year ACCA sentence. Pet. App. 6a.

effect." Pet. App. 19a. The court held that the limiting effect of the phrase "any other provision of law" was "to allow for additional § 924(c) sentences that may be codified *elsewhere in the future*." *Id.* at 13a (emphasis added). In support of that reading, the court relied on *United States* v. *Collins*, 205 Fed. Appx. 196 (5th Cir. 2006), which held that the "except" clause "provides a safety valve that would preserve the applicability of any other provisions that could impose an even greater minimum consecutive sentence for a violation of § 924(c)." Pet. App. 13a (quoting *Collins*, 205 Fed. Appx. at 197-198). According to the Third Circuit, reading "any other provision of law" to refer to future enactments "ameliorates confusion arising from Congress' failure to state explicitly the offenses to which the prefatory clause refers." *Ibid.*

The court expressly rejected two alternative readings of the "except" clause. First, the court dismissed the argument that "any other provision of law" includes greater minimum sentences imposed for the underlying drug trafficking offense or crime of violence. Pet. App. 14a-15a. The court emphasized that the first part of the "except" clause "refers to, *inter alia*, greater minimum sentences 'provided by this subsection,' not for predicate offenses," *id.* at 14a, and that the minimum sentences in § 924(c) apply "'*in addition to* the punishment provided for' a predicate offense." *Ibid.* Ultimately, the court was hesitant to read "any other provision of law" to cover predicate offenses for fear that this reading "would narrow the scope of § 924(c)" while Congress intended "to broaden the statute's reach through the 1998 amendment." *Id.* at 14a-15a. Therefore, the court concluded that the "except" clause "requires a comparison between the minimum sentences specified in §§ 924(c)(1)(A)(i)-(iii) and (B)-(C), and, *at*

a minimum, others associated with using, carrying, or possessing a firearm—not the predicate offense itself." *Id.* at 14a (emphasis added).

Ultimately, however, the court also refused to read the "except" clause to cover offenses for possessing the same firearm in the same transaction giving rise to the § 924(c) conviction. Pet. App. 16a-20a. The court acknowledged that such a reading would "avoid[] some of the problems" that it had identified with the predicate-offense reading, *id.* at 16a, and that "it would be logical for Congress to 'provide[] a series of increased minimum sentences [under § 924(c)] and also to [make] a reasoned judgment that where a defendant is exposed to two minimum sentences * * * only the higher minimum should apply." *Ibid.* (quoting *Whitley*, 529 F.3d at 155) (alteration in original).

Nevertheless, the court asserted that such a reading leads "to highly anomalous results." Pet. App. 16a. While the court conceded that this reading would not cause an anomalous result on the facts of this case, *id.* at 17a, it believed that an anomaly would result if petitioner had brandished a firearm. Under those hypothetical circumstances, "a defendant situated identically to Abbott but who was not an armed career criminal would be subject to a harsher minimum sentence than Abbott—ten years for the drug offense plus at least seven consecutive years under § 924(c)." *Ibid.* (emphasis omitted). In making this hypothetical comparison, the court of appeals did not consider Abbott's two additional ten-year mandatory minimum sentences for drug trafficking, under 21 U.S.C. §§ 841 and 846, presumably because the district court—at its discretion—directed those sentences to run concurrently with the others. The court thus reiterated

its conclusion that the "except" clause refers only to "alternative minimum sentences for violations of § 924(c)." *Id.* at 19a-20a.

Petitioner timely filed a petition for rehearing en banc, which was denied on August 31, 2009. Pet. App. 33a-34a.

SUMMARY OF ARGUMENT

I. This case requires only the straightforward application of a bedrock principle of statutory construction: The plain meaning of statutory language should control. The "except" clause in 18 U.S.C. § 924(c) clearly exempts defendants from the mandatory minimum sentences provided in § 924(c)(1) if those defendants receive a higher mandatory minimum sentence under either another subsection in § 924(c) or "any other provision of law." The Third Circuit concluded, in accord with the government's argument, that the phrase "any other provision of law" describes *no* currently existing statutes but instead refers to "§ 924(c) sentences that may be codified *elsewhere in the future.*" Pet. App. 13a (emphasis added). The question in this case, ultimately, is thus whether "any other provision of law" means what it says or whether it essentially means next to nothing, as the court of appeals held and the government advocates.

To ask that question is to answer it. This Court, not surprisingly, has in past decisions held that the term "any" has an expansive meaning, especially when used in the phrase "any other provision of law." There is no reason to believe that Congress meant to give that phrase an exceedingly cramped and highly unusual meaning in the "except" clause. The same phrase is used several places elsewhere in the same

statute, always with a broader meaning in line with its plain language.

Read within the context of § 924(c), the "except" clause clearly encompasses any mandatory minimum sentences that are imposed on defendants because of the criminal transaction that triggered § 924(c) in the first place. Holding that predicate offenses and other firearms offenses trigger the "except" clause would give effect to the plain language of the clause and the obvious purpose of § 924(c) as a whole. That purpose, which is readily apparent from the statutory language, is to ensure that all defendants who use or possess a gun in connection with drug trafficking offenses or crimes of violence receive at least five years in prison.

The court of appeals failed to follow the plain meaning of the "except" clause. It instead construed the simple phrase "any other provision of law" as merely a "safety-valve," with no present application to any existing statutes. The provision, in the court of appeal's view, is simply insurance against the exceedingly remote possibility that Congress might in the future not only create an additional sentence for a § 924(c) offense but do so elsewhere in the United States Code. Thus, "any other provision of law," according to the court of appeals, actually means either "no provision of law" or "a highly specific and unusual provision of law that does not yet exist and may never be enacted." This reading of the statute is startlingly implausible and renders the phrase "any other provision of law" largely meaningless.

The court justified its departure from the plain meaning by asserting the need to avoid some hypothetical sentencing anomalies that might arise when a more culpable defendant receives a lower mandatory minimum sentence than a less culpable

defendant. Avoiding anomalies, however, is not a justification for rewriting a statute or ignoring its plain language. Courts have neither the responsibility nor the proper authority to correct what they might perceive as drafting errors or to improve, in their eyes, the effectiveness of the statutes that Congress has actually passed. Following the plain language of the "except" clause, in any event, does not require anomalous results for the simple reason that only *minimum* sentences are involved, and district courts have always had the ability to increase the sentences of the more culpable defendants to eliminate any imagined or potential anomalies.

The plain language supports petitioner in this case. Even if it did not, the most that could be said in the government's favor is that the statutory language is ambiguous. One could not seriously claim that the phrase "any other provision of law" *unambiguously* refers *only* to laws that might or might not be enacted in the future, which is the interpretation proffered by the government below and accepted by the court of appeals. Because the government's interpretation, to put it mildly, is not unambiguously correct, the rule of lenity must be applied if this Court does not agree that the plain language supports the petitioner's position in this case. Applying the rule of lenity leads to the same outcome that petitioner believes is commanded by the plain language: The "except" clause must apply to all sentences that arise from the same criminal transaction.

II. If the "except" clause is not read to apply to all sentences that arise from the same criminal transaction that triggered § 924(c), at the very least it must apply to all other mandatory minimum sentences for firearms offenses, such as petitioner's fifteen-year sentence for firearm possession under 18

U.S.C. § 924(e). Section 924(c) is a firearms statute, which punishes the use or possession of a firearm in connection with a drug trafficking offense or a crime of violence. It follows, as most courts of appeals that have addressed this issue have recognized, that the "except" clause naturally applies to sentences imposed by other firearms statutes.

Applying the "except" clause to other firearms statutes, including the frequently prosecuted § 924(e), prevents "double counting" by ensuring that defendants are not punished twice for using or possessing the same firearm in the same transaction. Limiting the reach of the "except" clause to other firearms statutes also avoids any and all potential anomalies because every defendant would receive the longer mandatory minimum sentence for the use or possession of a firearm, regardless of the sentence received for the predicate offense.

Application of the "except" clause to firearm offenses gives a far more natural reading to the phrase "any other provision of law" than the interpretation favored by the government and the court below. Even were the government's reading of the clause plausible, surely it is not unambiguously correct. One could not fairly conclude that other firearms offenses are unambiguously excluded from the "except" clause. The most one could say, therefore, is that the statute is ambiguous, in which case the rule of lenity should apply and petitioner should prevail.

ARGUMENT

I. THE "EXCEPT" CLAUSE OF 18 U.S.C. § 924(c)(1)(A) SHOULD BE ENFORCED ACCORDING TO ITS PLAIN TERMS, WHICH EXEMPT DEFENDANTS SUBJECT TO LONGER MANDATORY MINIMUMS

This Court has held "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) (citations omitted). It has repeatedly explained that "[i]n determining the scope of a statute, we look first to its language, giving the words used their ordinary meaning." *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (internal quotation marks and citations omitted); *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). This Court has similarly made clear that courts have a "duty to give effect, if possible, to every clause and word of a statute" so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (citing *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001); *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955); *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883)) (internal quotation marks omitted).

This Court has repeatedly followed these basic principles when interpreting this very statute and has concluded that the plain language of the statute must control. See, *e.g.*, *United States* v. *Watson*, 552 U.S. 74 (2007) (interpreting the word "use"); *United States* v. *Gonzales*, 520 U.S. 1, 4 (1997) (interpreting the word "any"); *Bailey* v. *United States*, 516 U.S. 137 (1995) (same); *Deal* v. *United States*, 508 U.S. 129

(1993) (interpreting the word "conviction"). Until now, the government has strongly endorsed this approach, arguing in *Gonzales*, for example, that "[t]he language of Section 924(c) is dispositive" and that "where, as here, the statutory language is plain, 'the sole function of the courts is to enforce it according to its terms.'" U.S. Br. at 11-12, *Gonzales*, 520 U.S. 1 (No. 95-1605) (internal quotations omitted).

In this case, however, the government has proffered an interpretation of § 924(c) that distorts the plain language of the text and renders a portion of the statute insignificant at best and superfluous at worst. The Third Circuit agreed with the government's argument below that the phrase "any other provision of law" does not mean what it says but instead refers to "§ 924(c) sentences that may be codified *elsewhere in the future*." Pet. App. 13a (emphasis added); U.S.C.A. Br. 35-36. In other words, according to the Third Circuit's holding, "any other provision of law" actually means either: (1) "no provision of law" or (2) "a highly specific and unusual provision of law that does not yet exist and may not ever be enacted." This cannot be correct.

A. The Text of § 924(c) Clearly Establishes That A Defendant Already Facing A Greater Minimum Sentence For The Same Criminal Transaction Should Not Receive Additional Mandatory Punishment Under § 924(c)(1)(A)

1. "Any Other Provision Of Law" Means What It Says

The Third Circuit's strained and highly implausible interpretation is especially puzzling because the meaning of the "except" clause is quite plain. Section 924(c)(1) provides that a defendant who uses or possesses a firearm in relation to a drug trafficking crime or crime of violence will serve at least five years in prison, more if he brandishes or discharges the weapon. By virtue of the "except" clause, however, the mandatory minimum sentences imposed by § 924(c)(1) simply do not apply if "a greater minimum sentence is otherwise provided by this subsection or by any other provision of law."

This clause contains nothing but simple phrases. It is devoid of technical legal terms. And it uses only words that have well-understood meanings. Indeed, the first half of the "except" clause, which includes its most arguably legalistic aspect—"this subsection"—is not even in dispute. It has rightly been taken to mean the other provisions of § 924(c). See Pet. App. 12a-13a. See generally *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 60 (2004). For example, a criminal who brandishes a firearm will not receive both the seven-year sentence prescribed by § 924(c)(1)(A)(ii) and the five-year sentence under § 924(c)(1)(A)(i) for possessing the same firearm.

The second half of the clause—"or any other provision of law"—should present no more difficulty. The word "or" is a "function word to indicate * * * choice between alternative things, states, or courses." Webster's Third New International Dictionary 1585 (1976). The word "any" means "one selected without restriction." *Id.* at 97. Therefore, the phrase "or any other provision of law" means a provision of law, *other than* § 924(c), selected without restriction. Put differently, it means every other law *but* § 924(c).

In *Gonzales*, this Court interpreted a similarly straightforward provision in § 924(c) and concluded that the statute should be enforced according to its plain terms. 520 U.S. at 5-11. The question in that case concerned the meaning of 18 U.S.C. § 924(c)(1)(D)(ii), which provides that a defendant's § 924(c) sentence "shall [not] run concurrently with *any other term of imprisonment* imposed on the person." In interpreting the meaning of "any other term of imprisonment," this Court made clear that the term "any * * * [r]ead naturally * * * has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Gonzales*, 520 U.S. at 5 (citing Webster's Third New International Dictionary 97 (1976)); *Collector* v. *Hubbard*, 79 U.S. (12 Wall.) 1 (1870)). The Court went on to conclude, essentially, that "any" means "any," agreeing with the government that the word "leaves no doubt as to the Congressional intention to include all members of the category identified by the enactment." U.S. Br. at 11-12, *Gonzales*, *supra* (No. 95-1605) (citing, *inter alia*, *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 589 (1980); *NAACP* v. *New York*, 413 U.S. 345, 353 (1973); *United States* v. *Rosenwasser*, 323 U.S. 360, 363 (1945)) (internal quotation marks omitted).

This Court reached the same conclusion more recently, when interpreting the precise phrase at issue in this case. See *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2189 (2009). In *Beaty*, this Court considered 28 U.S.C. § 1605(a)(7) and concluded that "the word 'any' (in the phrase 'any other provision of law') has an 'expansive' meaning, giving us no warrant to limit the class of provisions." *Ibid.* (internal citations omitted). There is no reason to believe that Congress intended to give the word "any" a less expansive meaning in § 924(c), particularly given the contrast between that open-ended term and the reference to "this subsection" that immediately precedes it.

Reading "any other provision of law" to mean what it says would also comport with the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Gustafson* v. *Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) (citing *Dep't of Revenue of Ore.* v. *ACF Indus., Inc.*, 510 U.S. 332, 342 (1994); *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932)) (internal quotation marks omitted); see also *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 86 (2006) ("Generally, 'identical words used in different parts of the same statute are * * * presumed to have the same meaning.'") (quoting *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005)). The phrase "any other provision of law" is used six times in § 924, three times within § 924(c) alone.[2] There is no indication that the phrase is ever used to express anything other than what it plainly says.

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[2]See 18 U.S.C. §§ 924(a)(4) (using the phrase twice), (c)(1)(A), (c)(1)(D), (c)(5), and (e)(1).

Section 924(c)(1)(D), for example, provides that a defendant's sentence under § 924(c) must run consecutively to a defendant's other sentences, "[n]otwithstanding *any other provision of law*." There is no reason to believe that "any other provision of law" in § 924(c)(1)(D) actually means either "no provision of law" or "a highly specific and unusual provision of law that does not yet exist and may not ever be enacted." The same is true of § 924(c)(1)(A).

It is especially appropriate in this case to presume that Congress meant the word "any" in the phrase "any other provision of law" to have the same expansive meaning given the word in *Gonzales*, because Congress created the "except" clause within months of the Court's decision in that case, which interpreted the same statute. See *Merrill Lynch*, 547 U.S. at 85-86 (reasoning that the presumption of consistent meaning is particularly powerful when Congress adopts the term subsequent to judicial interpretation of the same statute). In 1998, Congress knew that, unless it specifically declared otherwise, "any" meant "any."

2. Defendants Who Receive Higher Minimum Sentences For Offenses Committed During The Same Criminal Transaction Are Covered By the "Except" Clause

As the Second Circuit has recognized, enforcing the plain meaning of the phrase "any other provision of law" does not leave the "except" clause "unbounded." *United States* v. *Williams*, 558 F.3d 166, 171 (2d Cir. 2009). The "except" clause refers to "a greater minimum sentence" that is "*otherwise provided*" by "any other provision of law." See 18 U.S.C. § 924(c)(1)(A) ("Except to the extent that a

greater minimum sentence is *otherwise provided* by this subsection or by any other provision of law") (emphasis added). The phrase "otherwise provided" confirms what common sense suggests, namely that the "except" clause is not triggered by the mere existence of other laws establishing mandatory minimum sentences that are higher than those imposed by § 924(c).

A defendant would not be exempt from § 924(c), for example, simply because a higher mandatory minimum sentence exists in the United States Code for a crime the defendant did not commit. Indeed, if that were the case, § 924(c) would effectively be meaningless, because higher minimum sentences than those mandated by § 924(c) existed within the United States Code when the "except" clause was added to the statute. The "except" clause must therefore refer to sentences that could actually be applied to a defendant subject to § 924(c); the higher minimum sentence "otherwise provided," in other words, must be a sentence "provided" by a law that applies to *this* defendant.

Read in the context of the entire statute, moreover, the phrase "otherwise provided * * * by any other provision of law" naturally encompasses those sentences that apply to defendants as a result of the conduct described in § 924(c). Put differently, the "except" clause, as the Second Circuit has concluded, certainly applies when a defendant faces a longer mandatory minimum for a crime committed in the same criminal transaction that triggered § 924(c) in the first place. See *Williams*, 558 F.3d at 171-172 (concluding that the "except" clause applies to defendants who receive longer mandatory minimums

for counts "arising from the same criminal transaction or operative set of facts").[3]

The reason is simple. The language of § 924(c) as a whole, including the "except" clause, makes clear its purpose: 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. If 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 § 924(c) are satisfied. It follows, therefore, that higher mandatory minimum sentences imposed for the use or possession of firearms, drug trafficking offenses, or crimes of violence all trigger the "except" clause.

The Second and Sixth Circuits have both recognized as much and have given the terms of the "except" clause their plain meaning. In a case very similar to this one, the Second Circuit held "the consecutive minimum ten-year sentence * * * inapplicable to [defendant] Whitley because he was subject to a higher fifteen-year minimum sentence as an armed career criminal." *United States* v. *Whitley*, 529 F.3d 150, 151 (2008); see also *Williams*, 558 F.3d

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[3]The Second Circuit's transactional approach, see *Williams*, 558 F.3d at 171-172, follows the ordinary understanding of sentencing policy as it existed when Congress was drafting the "except" clause. By 1998, when the "except" clause was added to § 924(c), the Guidelines had already long required a sentencing judge to consider the criminal transaction that brought the defendant before her, including both the defendant's charged and uncharged conduct. Sentencing Guidelines Ch. 1, Pt. A (1997). As such, it would make sense for Congress to have instructed that judge not to apply an additional five-year sentence when the defendant is subject to another mandatory minimum for another crime within the same transaction.

at 170-175. Earlier this year, the Sixth Circuit similarly held that the "statutory language plainly forbade the imposition of the mandatory minimum contained in the firearm statute [§ 924(c)] in conjunction with another greater mandatory minimum sentence." *United States* v. *Almany*, 598 F.3d 238, 242 (6th Cir. 2010). Both courts thus held that if a longer mandatory minimum was "otherwise provided" for a particular defendant, § 924(c) did not require that an additional mandatory five years be added to that longer sentence.

B. The Third Circuit's Interpretation Of The "Except" Clause Distorts The Plain Meaning Of The Statute And Renders Half Of The "Except" Clause Surplusage

The Third Circuit's opinion below pays lip service to the notion that "[a]s in all cases of statutory interpretation," the "inquiry begins with the language of the statute." Pet. App. 8a. But it goes on to treat a deliberately drawn statutory provision as "a slip of the legislative pen, * * * the result of inartful draftsmanship," rather than "a conscious and not irrational legislative choice." *Bifulco* v. *United States*, 447 U.S. 381, 400-401 (1980). Indeed, the court of appeals ignored both the language of the "except" clause itself and this Court's command that "a rule nowhere contained in the text" should not "do the bulk of that provision's work, while a proviso accounting for * * * [much] of that text would lie dormant in all but the most unlikely situations." *TRW Inc.*, 534 U.S. at 31.

The court below asserted that "[r]ead in context, the most cogent interpretation is that the ["except"] clause refers only to other minimum sentences that

may be imposed for violations of § 924(c), not separate offenses." Pet. App. 12a. This interpretation is clearly correct for the first half of the "except" clause, which refers to greater minimum sentences "provided by this subsection." But it gives no meaning to the second half of the "except" clause, which refers to "any other provision of law."

The Third Circuit's response to this obvious problem was that the "except" clause serves as a mere "'safety-valve,'" to allow "for additional §924(c) sentences that may be codified *elsewhere in the future*." Pet. App. 13a (quoting *United States* v. *Studifin*, 240 F.3d 415, 423 (4th Cir. 2001)) (emphasis added). In other words, the sole purpose of the "except" clause, according to the court of appeals, is to guard against the possibility that Congress *might*, sometime in the *future*, create a longer mandatory minimum sentence for § 924(c) offenses but do so *somewhere else* in the United States Code. This reading of the statute is startlingly implausible.

1. For starters, just last Term, this Court unanimously refused to read an analogous statutory trigger in a way that left the provision "with little, if any, meaningful application." *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2299, 2301 (2009); see also *TRW*, 534 U.S. at 31 (noting a court's obligation to construe a statute so its language is not "insignificant"). In *Nijhawan*, 129 S. Ct. at 2297, the Court interpreted a statutory provision that defined an "aggravated felony" for purposes of a deportation statute. Offenses that counted as "aggravated felonies" thus triggered deportation, much like sentences that arise from "any other provision of law" trigger the "except" clause in this case.

This Court squarely rejected a reading that would have resulted in the statutory trigger applying,

somewhat awkwardly, to just a few existing federal statutes and to eight state laws. *Nijhawan*, 129 S. Ct. at 2301-2302 (observing further that the rejected reading of the statutory trigger made it apply most naturally to "nonexistent statutes"). The Court refused to "believe Congress would have intended [the statutory trigger] to apply in so limited and so haphazard a manner." *Id.* at 2302; accord *United States* v. *Hayes*, 129 S. Ct. 1079, 1087-1088 (2009) ("Given the paucity of state and federal statutes targeting *domestic* violence, we find it highly improbable that Congress meant to extend [18 U.S.C.] § 922(g)(9)'s firearm possession ban only to the relatively few domestic abusers prosecuted under laws rendering a domestic relationship an element of the offense.").

Notably, the government in *Nijhawan* argued against construing statutory language in a way that would give the relevant provision very little present effect. The government colorfully stressed that such an interpretation "would effectively mean that Congress had used an elephant-sized hole to house a mouse." U.S. Br. at 30, *Nijhawan*, *supra* (No. 08-495); see also *Whitman* v. *American Trucking Ass'ns, Inc.*, 931 U.S. 457, 468 (2001) ("Congress * * * does not, one might say, hide elephants in mouseholes."). That conclusion would apply *a fortiori* to the government's proposed construction in this case.

By its own reckoning—and that of the Third Circuit as well—the "safety-valve" interpretation would apply the statute not to "a handful" of federal offenses, U.S. Br. at 11, *Nijhawan*, 129 S. Ct. 2294 (No. 08-495), but to *no* offenses currently on the books. Pet. at 12-13, *United States* v. *Williams* (2009) (No. 09-466). Given that the phrase "any other provision of law" is even more generic than

"aggravated felony," effectively the government is now arguing that Congress used a whale-sized hole to house a mouse that may or may not exist at some point in the future. Put another way, the phrase "any other provision of law" is simply too broad an instrument for the very limited purpose ascribed to it by the government and the Third Circuit.

2. More fundamentally, the Third Circuit read the simple phrase "any other provision of law" to have a remarkably complicated—not to mention convoluted—meaning. For the Third Circuit's "safety-valve" interpretation to be correct, in 1998 Congress must have anticipated not only that at some point its successors would create a new, duplicative penalty for a "violation[] of § 924(c), not separate offenses," but that a future Congress would do so somewhere other than in § 924(c) itself. Pet. App. 12a. Under this farfetched scenario, the 1998 Congress would have simultaneously amended the well-established and oft-revisited statutory framework of § 924(c) while imagining that future legislators might well abandon this framework by effectively amending § 924(c) somewhere else in the United States Code.

But that is not all. For the "safety-valve" interpretation to make sense, in 1998 Congress must also have anticipated that this future Congress would create a longer mandatory minimum sentence for § 924(c) violations without making any mention of the new provision's interaction with § 924(c) itself.[4] It is hard to imagine the 1998 Congress endorsing such a

[4]If a future Congress *were* to indicate clearly how its new provision interacted with § 924(c), its wishes would control and the "except" clause would be irrelevant. See *Washington* v. *Miller*, 235 U.S. 422, 428 (1914) (citing *Townsend* v. *Little*, 109 U.S. 504 (1883)); 2A N. Singer, *Sutherland on Statutory Construction* § 47.13 (2007).

robust view of future legislative incompetence by insuring so heavily against the remote possibility of future error.

The utter implausibility of this interpretation becomes even clearer when one considers the constitutional norms that already serve the purpose ascribed to the "except" clause by this "safety-valve" interpretation. Recall that the Third Circuit asserts that the "except" clause refers "only to other minimum sentences that may be imposed for violations of § 924(c), *not separate offenses*." Pet. App. 12a (emphasis added). The Double Jeopardy Clause, U.S. Const. amend. V, cl. 2, however, already prevents Congress from carelessly creating such duplicative punishments.

This Court's double jeopardy precedents make clear that for this hypothetical future Congress to subject a defendant to multiple punishments for both § 924(c) and its later-born clone, Congress would have to "specially authorize[]" duplicative punishment. *Missouri* v. *Hunter*, 459 U.S. 359, 366-367 (1983); *Whalen* v. *United States*, 445 U.S. 684, 693 (1980); *United States* v. *Universal C.I.T. Corp.*, 344 U.S. 218, 221-222 (1952). If Congress made clear its intent to authorize duplicative punishment, the "except" clause would effectively be overridden. If, on the other hand, Congress enacted the new penalty but remained silent about the old law, the defendant could not be sentenced under both the old and new versions of the same § 924(c) offense, which would mean that the "except" clause would be irrelevant. Thus, under the "safety-valve" reading, not only does one half of the "except" clause currently have no meaning, it is also exceedingly unlikely to have any meaning in the future. Indeed, for the "except" clause ever to have any meaning at all under the Third

Circuit's "safety-valve" reading, Congress would somehow have to refer back to § 924(c) so as to "specially authorize[]" the duplicative punishment, without in the process explaining how the two statutes interacted.

In sum, the "safety-valve" reading of the statute would reduce the phrase "any other provision of law" to an unnecessary precaution against vanishingly unlikely future legislative action. Just as in *Nijhawan*, 129 S. Ct. at 2302, this Court should reject a statutory construction that would leave the relevant provision with "little, if any, meaningful application."

C. Enforcing The Plain Language Of The "Except" Clause Is Consistent With The Legislative History

Given that the text of § 924(c) is unambiguous, it is not necessary for this Court to examine the provision's legislative history. *Gonzales*, 520 U.S. at 6. Nonetheless, doing so demonstrates that the government is asking this Court to provide it with a statute that Congress refused to enact.

1. The Justice Department never supported including the "except" clause in § 924(c). It sought to amend § 924(c) to cover possession of a firearm in furtherance of a crime of violence without exception. See *Whitley*, 529 F.3d at 154 (citing Letter from Andrew Fois, Ass't Att'y General, Office of Legis. Aff., to Albert Gore, President of the U.S. Senate (Feb. 25, 1997)). But the "except" clause remained in the

legislation that was ultimately adopted by both houses of Congress.[5]

The government has sought for ten years to reverse this legislative choice by attempting to persuade courts to essentially remove the "except" clause from § 924(c). The government has, over time, offered a variety of reasons as to why the "except" clause should be excised. It has claimed, for example, that the clause was included merely as a grammatical necessity given the other changes made in the 1998 amendments. *Whitley*, 529 F.3d at 153-154. The Second Circuit correctly rejected that explanation as patently wrong—not to mention in serious tension with the fact that the government's proposed amendments did not include an "except" clause. *Ibid.*

2. The government has also suggested that the "except" clause is inconsistent with the purpose behind the 1998 amendments. This, too, is incorrect. To begin, "[t]he best evidence of [Congress'] purpose is the statutory text adopted by both houses of Congress and submitted to the President." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). Further, the premise of the government's argument—that Congress sought only to increase penalties—is simply unproven. Indeed, the premise effectively assumes the answer to the question.

A closer look at the legislative history indicates, as does the plain language of the "except" clause, that Congress was not acting with the single-minded

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[5]This was just one of several proposals to amend § 924(c) considered in during this period, all of which were aimed at a similar purpose but were rejected in favor of S. 191. *Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the Judiciary*, 105th Cong. 10 (1997) (listing four separate Senate bills (S. 362, S. 3, S. 191 and S. 15) without discussing other corresponding proposals circulating in the House).

purpose of increasing minimum sentences to the hilt. To the contrary, the immediate motivation for the amendments was to respond to this Court's holding in *Bailey* v. *United States*, 516 U.S. 137 (1995). Congress sought to clarify its intent that § 924(c)'s minimum penalties extended to possession of a weapon in furtherance of a crime of violence or drug trafficking. See, *e.g.*, 144 Cong. Rec. H10330 (1998) (statement by Rep. McCollum). Including an "except" clause obviously does not interfere with the accomplishment of this purpose, nor is it inconsistent with it.

Rather, the legislative history shows that the inclusion of the "except" clause was an integral part of a measured approach to § 924(c). The 1998 bill as adopted was fundamentally a compromise. 144 Cong. Rec. H10330 (1998) (statement of Rep. McCollum) (describing the bill as "considerably different from the House version and different from the Senate version as well"). Over its two-year journey, the bill went through a host of changes, but the mandatory minimums and the "except" clause travelled in tandem. S. 1612, 104th Congress sec. 1 (Mar. 13, 1996) (including both a sentencing table and the "except" clause); S. 1612, 104th Congress sec. 1 (Oct. 4, 1996) (including neither); cf. *Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the Judiciary*, 105th Cong. 38 (1997) (statement of Thomas G. Hungar, former Ass't to the Solicitor General) (stating that the "except" clause in the reintroduced version eliminates "any potential inconsistency with other statutes"). Nevertheless, up to the very date of passage, there was concern that even with the "except" clause, § 924(c) could cause minor drug dealers to be sentenced more harshly than those convicted of aggravated assault, voluntary

manslaughter, and rape. 144 Cong. Rec. H10330 (1998) (statement of Rep. Scott).

This history shows Congress undoubtedly wanted to send the signal to defendants that "[i]f you possess a gun in any way to further your violent criminal behavior, you get a minimum of five years in the slammer." *Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Sen. Helms); see also 144 Cong. Rec. H10330 (1998) (statement of Rep. Myrick) ("S. 191 clarifies that a criminal who possesses a gun while committing a violent crime or a drug crime will face *a* mandatory sentence.") (emphasis added). But there are likewise indications that Congress sought to avoid excessive punishment, and even the court below acknowledged that "it would be logical" for Congress to make a judgment not to impose duplicative minimum sentences. Pet. App. 16a. Adopting the plain meaning of the "except" clause discussed above accomplishes Congress's goal of punishing firearm possession and use without undoing a carefully drawn legislative compromise.

D. Avoiding Hypothetical Sentencing "Anomalies" Does Not Justify Ignoring The Plain Meaning Of § 924(c)

The court of appeals reasoned that "anomalous" results would occur if predicate offenses were included within the "except" clause, and it relied on those supposed anomalies to justify applying the clause only to *future codifications* of § 924(c) offenses. Pet. App. 15a-16a. The court offered the hypothetical case of two defendants, *A* and *B*. *A* commits a drug trafficking offense with a minimum sentence of seven years; *B*, meanwhile, commits a more serious drug

trafficking offense with a minimum sentence of ten years. *Id.* at 15a. Should both *A* and *B* brandish firearms in the course of their offenses in violation of § 924(c), the court reasoned, *A* would be sentenced under both minimums for a total sentence of fourteen years, while the "except" clause would subject the more culpable *B* to only ten years' imprisonment. *Ibid.* For several reasons, the Third Circuit's reasoning is flawed.

1. First, a court may depart from the plain meaning of a statute only when such a reading would yield *absurd* results, not merely *anomalous* ones. *Hubbard* v. *United States*, 514 U.S. 695, 703 (1995) (stating that a "patent absurdity" might justify departure from plain language); see *Clinton* v. *City of New York*, 524 U.S. 417, 429 (1998) (finding a result to be "absurd" when supported by "no plausible reason"). The court of appeals, however, suggested that the absurdity canon was implicated if the results were merely anomalous, which is simply not correct. See Pet. App. 16a-18a.

In doing so, the court below ignored this Court's consistent distinction between mere anomalies and true absurdities—and its admonishment that when merely the former arise, it falls to Congress to correct them. For instance, in *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U.S. 546 (2005), the Court acknowledged that a seeming anomaly resulting from its interpretation of 28 U.S.C. § 1367 may have been the result of an "unintentional drafting gap," but explained that "if that is the case, it is up to Congress rather than the courts to fix it. The omission may seem odd, but it is not absurd." *Id.* at 565; see also *Shady Grove Orthopedic Assocs., P. A.* v. *Allstate Ins. Co.*, No. 08-1008 (Mar. 31, 2010), slip op. 21 n.13 (opinion of Scalia, J.) ("The possible

existence of a few outlier instances does not prove [a prior decision]'s interpretation is absurd. Congress may well have accepted * * * anomalies as the price of a uniform system of federal procedure.").

The sentences resulting from a natural reading of the "except" clause hardly are without "plausible reason." As the Second Circuit has correctly explained, while one purpose of § 924(c) is to increase penalties for firearms offenses, it is not "inconsistent with that purpose for Congress to have provided a series of increased minimum sentences and also to have made a reasoned judgment that where a defendant is exposed to two minimum sentences, some of which were increased by the 1998 amended version, only the higher minimum should apply." *Whitley*, 529 F.3d at 155. This, in fact, would be an "eminently sound" and logical scheme. *Ibid*.[6] The scheme is not rendered illogical by the fact that in some "outlier instances," *Shady Grove*, slip op. 21 n.13 (opinion of Scalia, J.), some less culpable defendants might receive a higher mandatory *minimum* sentence, for the simple reason that the more culpable defendants can still receive a longer total sentence. See *infra* at 30-32.

Moreover, sentencing schemes need not possess precisely tuned gradients. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("That distributors of varying degrees of culpability might be subject to the

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[6]Giving § 924(c) its natural reading also would comport with congressional intent in prior amendments to § 924(c). As this Court has explained, Congress has not sought to lengthen penalties "to the hilt" in prior amendments, which "set a variety of limits * * * on the available punishment." *Busic* v. *United States*, 446 U.S. 398, 408 (1980). The addition of the "except" clause in 1998 similarly reflects this "not unbounded" desire to deter firearms abuses. *Ibid;* see *supra* at 24-27.

same sentence does not mean that the penalty system for LSD distribution is unconstitutional."); *Harmelin* v. *Michigan*, 501 U.S. 957, 1007 (1991) (Kennedy, J., concurring in part and concurring in the judgment) ("The debate [over the wisdom of mandatory sentencing statutes] illustrates that * * * arguments for and against particular sentencing schemes are for legislatures to resolve."). A sentencing scheme, for example, "does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality." *City of Dallas* v. *Stanglin,* 490 U.S. 19, 26-27 (1989). Indeed, just as the Sentencing Guidelines do not "work deductively to establish a simple and perfect set of categorizations and distinctions," Sentencing Guidelines Ch. 1, Pt. A, intro. comment, neither must statutory minimum sentences.

Even if the Third Circuit's hypothetical would produce the suggested result (which, as we explain below, is a dubious proposition), that anomaly is at best a mild one and of the sort that exists in other statutes, not to mention in § 924(c) itself. Compare 18 U.S.C. § 924(c)(1)(A) (providing a longer mandatory minimum sentence for defendants who discharge rather than simply possess a firearm) with 18 U.S.C. § 924(c)(1)(B) (failing to provide a longer mandatory minimum sentence for those who discharge rather than simply possess a short-barreled rifle). Following the plain language of the statute here thus does not bring one even close to the threshold of absurdity.

2. In any event, the natural reading of § 924(c) does not, in fact, require anomalous results. That is because the sentences enumerated in § 924(c) are *minimums* rather than maximums. As the Second

Circuit has explained, "no court would be *required* to sentence" the more culpable defendant to the shorter sentence. *Whitley*, 529 F.3d at 155. Under the hypothetical scenario laid out by the court below, trial courts could simply exercise their authority under 18 U.S.C. § 3553(a) to increase the sentence for the predicate offense committed by the more culpable defendant, up to the applicable statutory maximum. *Ibid.*[7]

The purported anomaly thus rests on an improper comparison between the two hypothetical offenders' *statutory minimum* sentences. But the statutory minimum is only the beginning point of criminal sentencing. The proper comparison is between their total sentences, which would include the more culpable offender's enhancements under the Sentencing Guidelines. For example, the guidelines in effect when petitioner was sentenced, just like the guidelines today, specify a two-level increase in the base offense level for drug trafficking offenses when the defendant possesses a firearm. See Sentencing Guidelines § 2D1.1(b)(1) (2006); accord § 2D1.1(b)(1) (2009). Once this enhancement is considered, the purported anomaly evaporates. See also Sentencing Guidelines § 2K2.1(b)(6) (2009) (providing a four-level enhancement for defendants who use or possess a firearm during a crime of violence).

Consider an offender who has a base offense level of 30 and falls into Category VI, resulting in a guidelines sentence of 168 to 210 months. A firearms

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[7]Where, as here, the defendant is convicted of multiple offenses, a trial court may also avoid anomalies by ordering the sentences for those offenses to run consecutively rather than concurrently. See 18 U.S.C. § 3584. If the "except" clause is interpreted alternatively to apply only to firearms statutes such as ACCA, such multiple offenses will always be present. See *infra* at 43-44.

enhancement would place him at level 32 for a sentence of 210 to 262 months. If the district court sentences at the top of the guidelines range on the assumption that this defendant is (as the hypothetical presumes) more culpable than similarly situated defendants who will receive longer minimum sentences, the enhancement generates up to an additional 52 months of imprisonment—more than enough to offset the four-year "anomaly" in the Third Circuit's hypothetical.[8] And as the base offense level increases, the purported anomaly becomes even less of an issue because of the greater terms of imprisonment at higher base levels.

The court below suggested that leaving the possibility of additional prison terms to sentencing judges cannot shed light on Congress's intent in 1998 because sentencing judges lacked such discretion until this Court's subsequent decision in *United States* v. *Booker*, 542 U.S. 220 (2005). Pet. App. 18a. But that argument fails to account for the Sentencing Guidelines that were in place in 1998. First, the above-mentioned sentencing enhancements for firearm possession existed in 1998. See Sentencing Guidelines §§ 2D1.1(b)(1), 2K2.1(b)(5) (1998). Second, the Guidelines, as they existed in 1998, provided that "[i]f a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range." Sentencing Guidelines § 5K2.6 (1998). Thus, even if the enhancements did not themselves eliminate a sentencing disparity, the court could do so by an upward departure. This policy statement is still in

[8]This example utilizes the 2006 guidelines, under which petitioner was sentenced.

place today. See Sentencing Guidelines § 5K2.6 (2009).

Reading the "except" clause by its plain terms therefore asks no more of trial courts than the Sentencing Guidelines already do. Indeed, the government itself argued in favor of a similar scheme in *Chapman*, pointing out that the penalty scheme for LSD distribution is "not * * * draconian or inflexible" because departures under the Sentencing Guidelines "can soften the effects of a rigid sentencing structure" in appropriate cases. U.S. Br. at 36-37, *Chapman*, 500 U.S. 453 (No. 90-5744).

3. Even without considering the sentencing discretion of trial courts, the purported anomaly rarely would materialize in practice. Before such an anomaly could come about, at least three conditions must be present. First, the defendant's predicate offense must be one with at least two gradients of severity—this is necessary to create the possibility of two different sentences for two different defendants. Second, the sentence for the less serious version of the offense must be equal to or less than the § 924(c) sentence—otherwise, both offenses would trigger the "except" clause. And third, the sentence for the more serious version of the offense must be greater than the § 924(c) sentence—otherwise, neither offense would trigger the "except" clause.

The reasoning of the court below rests on the unique situation in which all three conditions occur. Yet statutes are designed to operate in the run of cases, and this Court should not twist the plain language of the statute to account for the isolated hypothetical situation the court below imagined. Cf. *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U.S. 32, 41-42 (1928) (Holmes, J., dissenting) ("If [a statutory scheme] is right as to the run of cases, a possible

exception here and there would not make the law bad."). Indeed, this Court's most recent pronouncement on this very statute warns against the use of "[f]anciful hypotheticals" as a reason to "contort[] and stretch[] the statutory language." *Dean* v. *United States*, 129 S. Ct. 1849, 1854 (2009) (declining to insert into § 924(c)(1)(A)(iii) a separate proof of intent requirement for the discharge of a firearm).

4. "In any event," as the Second Circuit has rightly explained, "this purported anomaly results from what, in our view, is a plain reading of the statutory text. 'If, at the end of the day, Congress believes we have erred in interpreting [the statute], it remains free to correct our mistake.'" *Williams*, 558 F.3d at 175 (quoting *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 246 (1995) (O'Connor, J., concurring in part and dissenting in part)). It is not this Court's "province to rescue Congress from its drafting errors, and to provide for what we might think * * * is the preferred result." *United States* v. *Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring). The argument that Congress did not foresee anomalous applications of § 924(c) is no answer to this point: "[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States* v. *Locke*, 471 U.S. 84, 95 (1985).[9]

[9]See also *Comm'r* v. *Corell*, 339 U.S. 619, 625 (1950) ("[W]e cannot reject the clear and precise avenue of expression actually adopted by the Congress because in a particular case we may know, if the bonds are disposed of prior to our decision, that the public revenues would be maximized by adopting another statutory path.").

E. Any Remaining Ambiguity Must Be Resolved In Favor Of The Defendant

The plain language of the statute supports petitioner. Even if did not, however, it can hardly be said that the *government's* reading of the statute is obviously correct, as the government has implausibly argued that the statutory provision at issue is essentially meaningless. Indeed, the government itself has offered different interpretations of the "except" clause over time, see *infra* at 37-39, and has acknowledged the possibility "that no reading of the statute's language is actually plain." See U.S. C.A. Br. at 37. Unless "the Government's position is unambiguously correct [this Court] applies the rule of lenity," *Granderson*, 511 U.S. at 54, and must resolve any ambiguities in favor of petitioner. It is a "presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell* v. *United States*, 349 U.S. 81, 83 (1955).

Though ignored by the decision below, the rule's relevance to this case is clear. Two circuit courts have relied on the plain meaning of § 924(c) to hold that the "except" clause includes predicate offenses. *Almany*, 598 F.3d at 242; *Williams*, 558 F.3d at 170-174, 176. Two other circuit courts, in contrast, have relied on the statute's plain language to hold that it does not include predicate offenses. *United States* v. *Segarra*, 582 F.3d 1269, 1271 (11th Cir. 2009); *United States* v. *Alaniz*, 235 F.3d 386 (8th Cir. 2000). A circuit split alone does not prove ambiguity, obviously, though it is noteworthy that four courts have disagreed so sharply on what the plain statutory language commands. More importantly, the fact that two courts of appeals have relied, persuasively, on the plain language of the statute to conclude that the

"except" clause includes predicate offenses makes it quite difficult to conclude that the government's reading of the clause, which would exclude such offenses, is unambiguously correct.

Further, the decision below respects neither of the fundamental values served by the rule of lenity. Lenity stresses that criminal defendants should receive "fair warning * * * of what the law intends to do if a certain line is passed." *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyl*e v. *United States*, 283 U.S. 25, 27 (1931)). In addition, given the "seriousness of criminal penalties * * * legislatures and not courts should define criminal activity." *Ibid.*

If § 924(c) is taken to impose an additional mandatory minimum for criminal defendants already subject to a higher minimum, the "common world" would not have had fair warning. *Bass*, 404 U.S. at 348 (quoting *McBoyle*, 283 U.S. at 27). Even if this Court concludes that there is ambiguity, the common world would have seen clear language eliminating § 924(c)'s mandatory minimum. What is more, to clarify any congressional ambiguity and subject a defendant in petitioner's position to an additional mandatory minimum would be to impose judicially an additional punishment that Congress failed to set forth clearly.

Whatever else the rule of lenity means, surely it requires that courts not *create* an ambiguity and then resolve it *to the detriment* of criminal defendants. See *Whitley*, 529 F.3d at 156 (noting the oddity of "rejecting the literal meaning of statutory language to the detriment of a criminal defendant"). This would turn the rule of lenity on its head.

II. AT A MINIMUM, "ANY OTHER PROVISION OF LAW" REFERS TO STATUTES THAT PROVIDE MANDATORY MINIMUM SENTENCES FOR POSSESSING THE SAME FIREARM IN THE SAME TRANSACTION

The only plausible alternative reading of the "except" clause is that it refers to "any other provision of law" outside of § 924(c) that imposes a "greater minimum sentence" for the defendant's possession or use of the same firearm. That interpretation gives effect to the phrase "any other provision of law" and would further the provision's purpose, evident from its text, of punishing firearm use or possession without *double counting* the use or possession of the same firearm in the same transaction. Even among courts of appeals that have concluded that "any other provision of law" does not include predicate offenses, most have acknowledged that the phrase naturally includes offenses based on possession of the same firearm at issue in the § 924(c) count. See, *e.g.*, *United States* v. *Parker*, 549 F.3d 5, 11 (1st Cir. 2008); *Alaniz*, 235 F.3d at 389.[10]

[10]The government has recognized that the question whether the "except" clause refers to firearm-related offenses is distinct from the issue whether it applies to predicate offenses. See U.S. Supp. Br. at 8, *Williams*, 558 F.3d 166 (No. 07-2346-cr) ("[R]egardless of whether the 'except' clause should be read to apply to all firearms offenses (as *Whitley* holds) or to the narrower subset of firearms offenses set forth in Section 924(c) (as the Government has argued), it should not be extended to apply to [predicate offenses].").

A. The Text Of The "Except" Clause Dictates That The § 924(c) Minimum Sentence Does Not Apply When A Defendant Is Subject To A Greater Mandatory Minimum Sentence For Possession Of The Same Firearm

At a minimum, it is "obvious" that the phrase "a greater minimum sentence * * * otherwise provided by * * * any other provision of law" can easily be read to encompass minimum sentences imposed for possessing the same firearm. See *Parker*, 549 F.3d at 11. Most of the courts of appeals that have addressed this issue agree that because § 924(c) provides a minimum term of imprisonment for possessing a firearm, the "except" clause naturally includes such offenses codified outside of § 924(c). As the First Circuit explained:

> Section 924(c) dictates an additional minimum sentence for an underlying offense *because* of the presence of the firearm; thus, if "a greater minimum sentence is otherwise provided" *on account of the firearm*, then under the "except clause" that greater minimum might supercede the otherwise applicable *section 924(c)* adjustment.

Ibid. (emphasis added); accord *Whitley*, 529 at 158; *United States* v. *Jolivette,* 257 F.3d 581, 586-587 (6th Cir. 2001); *Alaniz*, 235 F.3d at 389.

Indeed, the government itself previously read the "except" clause to apply broadly to firearms offenses, at least so long as the sentences for those offenses were consecutive to those imposed for the predicate

offense. In *Whitley*, the government argued that "if some other statutory provision—whether within Section 924(c)(1) *or elsewhere*—provides for an even higher minimum consecutive sentence *for a firearms offense*, then that higher minimum consecutive sentence becomes the mandatory minimum sentence under Section 924(c)." U.S. Br. at 25-26, *Whitley*, 529 F.3d 150 (No. 06-0131-cr) (emphasis added); accord *id.* at 29 (stating that Congress intended "to impose *consecutive* minimum sentences" "for *firearm-related* conduct") (second emphasis added). The *Whitley* court correctly concluded, in rejecting the government's interpretation, that "the word 'consecutive' does not appear in the text of the 'except' clause." 529 F.3d at 153. Nonetheless, the government's interpretation of § 924(c) in *Whitley*—a case decided just two years ago—rightly acknowledges that the "except" clause is naturally read to refer to a variety of existing firearm offenses that carry mandatory minimum sentences.

Application of the "except" clause to firearm offenses gives a far more natural reading to the phrase "any other provision of law" than the government's most recent interpretation. The government now maintains that the expansively worded phrase actually refers to *no* other provision of law, or at least none currently in existence. It reads the "except" clause to apply only to a "greater minimum sentence [aside from § 924(c)] for using, carrying, or possessing a firearm in connection with a crime of violence or a drug offense." Pet. at 11-12, *Williams*, *supra* (No. 09-466); see also U.S. Pet. for Reh'g En Banc at 7-8, *Whitley*, *supra* (No. 06-0131-cr) (taking same position, and noting that "there is presently no other statutory provision, apart from § 924(c), that contains penalties" to which the "except" clause would apply). This reading would

give the second half of the "except" clause no effect; and as noted above, *supra* at 22-23, because of the presumption against cumulative punishments, its proposed reading would give the clause no effect *even if* a future Congress were to enact a separately codified § 924(c) clone. There is no warrant for giving the expansive phrase "any other provision of law," which has such a broad meaning elsewhere in § 924(c), an interpretation that would apply it in a "limited and * * * haphazard" manner. *Nijhawan*, 129 S. Ct. at 2302; accord *Hayes*, 129 S. Ct. at 1087-1088.

B. The Existence Of Statutes That Impose Greater Mandatory Minimums Than § 924(c) For Possession Of The Same Firearm In The Same Transaction Confirms That This Interpretation Is The Most Plausible Alternative Reading Of The Statutory Text

The conclusion that the "except" clause applies to firearms offenses is borne out by reviewing the provisions of the United States Code outside of § 924(c) that impose longer mandatory minimum sentences for possession of a firearm than could be applied under the corresponding provision within § 924(c). At least three statutes impose a mandatory minimum sentence in excess of the five-year minimum established by § 924(c), and thus would qualify as "other provision[s] of law" that trigger the "except" clause. Like the offenses currently listed in § 924(c), they describe a series of offenses that are graduated in seriousness and severity of punishment, and, but for the "except" clause, a criminal defendant could receive a mandatory minimum consecutive sentence under one of these statutes in addition to

the § 924(c) sentence. See generally 18 U.S.C. § 924(c)(1)(D)(ii).

The most relied upon of these three statutes is ACCA, which is codified at 18 U.S.C. § 924(e). ACCA provides a fifteen-year mandatory minimum sentence for felons who possess a gun in violation of 18 U.S.C. § 922(g)(1) and have three previous convictions for serious drug offenses or violent felonies—most of which could serve as § 924(c) predicate offenses. See 18 U.S.C. §§ 922(g)(1) & 924(e). Unsurprisingly, the courts of appeals have singled out § 924(e) as an obvious candidate for inclusion among the "other provision[s] of law" that trigger the "except" clause. The Second Circuit, for example, concluded that "[r]ead literally, as we believe the 'except' clause of 924(c)(1)(A) should be, the clause exempts [a criminal defendant] from the consecutive [§ 924(c)] minimum sentence * * * because he is subject to the higher fifteen-year minimum sentence provided by section 924(e)." *Whitley*, 529 F.3d at 158.

Section 924(e), which is closely related to the offenses in § 924(c) and is frequently prosecuted,[11] starkly poses the risk of "double counting" by imposing a separate minimum sentence for possession of the same firearm. The First Circuit, for example, identified § 924(e) as a provision that would pose a "double counting danger" but for the "except" clause's bar against the imposition of multiple mandatory minimum sentences for the same firearm. *Parker*, 549 F.3d at 11. Even the Third Circuit below recognized that Abbott's case is "complicated" by the

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[11]In fiscal year 2008, there were 2778 counts of conviction for § 924(c) and 749 counts of conviction for § 924(e). See U.S. Sentencing Comm'n, *Overview of Statutory Mandatory Minimum Sentencing*, App. B (2009), *available at* http://www.ussc.gov/MANMIN/man_min.pdf.

fact that he received a sentence under § 924(e) for firearm possession, in addition to a separate § 924(c) sentence *for possessing the very same gun*. Pet. App. 16a.

Two other offenses, which are prosecuted much less frequently than § 924(e),[12] also impose greater mandatory minimum sentences than § 924(c) that could result in multiple sentences for using the same firearm in the same transaction. Section 3559(f)(3) of Title 18 imposes a ten-year mandatory minimum sentence when a defendant uses a dangerous weapon during and in relation to a crime of violence against children. Section 930(c) of that title, by reference to § 1111, imposes a minimum sentence of life imprisonment for first-degree murder involving the use of a firearm or other dangerous weapon in a federal facility. Like § 924(c)'s provisions, these statutes involve conduct beyond mere possession or use of a firearm. But although these statutes, like § 924(c), provide mandatory minimum sentences for firearm use in connection with crimes of violence, both the Third Circuit and the government take the position that these statutes do not come within the sweep of the "except" clause. See Pet. App. 12a; Pet. at 12, *Williams*, *supra* (No. 09-466); U.S. Pet. for Reh'g En Banc at 7-8, *Whitley, supra* (No. 06-0131-cr).

Reading "any other provision of law" to apply to other firearms offenses outside of § 924(c) would sensibly construe the second half of the "except" clause to perform the same basic function as the first half of the clause, which applies only to firearms

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[12]In Fiscal Year 2008, there was one count of conviction involving § 3559(f)(3), and no counts of conviction involving § 930(c). See *Overview of Statutory Mandatory Minimum Sentencing*, *supra*, App. B.

offenses within § 924(c). Both halves of the same clause would work together to prevent the imposition of multiple minimum sentences for possession or use of the same firearm. Just as the "except" clause avoids imposition of separate minimum sentences under § 924(c) for simple possession and for brandishing a firearm, see Pet. at 11, *Williams*, *supra* (No. 09-466), it is sensibly read to avoid imposition of separate minimum sentences for simple possession and for possession by a convicted felon, see 18 U.S.C. §§ 922(g) & 924(e).

As the First Circuit has recognized, it is reasonable to conclude that the 1998 amendments added the "except" clause because "[c]onceivably, Congress wished to avoid a double increment for the same firearm." *Parker*, 549 F.3d at 11; see also Pet. App. 16a ("[I]t would be logical for Congress to 'provide[] a series of increased minimum sentences [under § 924(c)] and also to [make] a reasoned judgment that where a defendant is exposed to two minimum sentences * * * only the higher minimum should apply.'") (quoting *Whitley*, 529 F.3d at 155) (brackets in original). When Congress created the "except" clause, it would have been aware that the sort of violent or drug-related firearm use that made many defendants eligible for a mandatory minimum under § 924(c) also would have exposed them to even higher mandatory sentences under related statutes, especially the commonly invoked § 924(e). Congress naturally would have considered statutes like these when it drafted the "except" clause in an effort to avoid duplicate punishments for firearm possession.

C. Supposed "Anomalies" Do Not Justify Disregarding The Plain Meaning Of The Text And The Rule Of Lenity

The court below recognized that "it is obvious that the language [of the "except" clause] has some limiting effect." Pet. App. 19a. The court recognized that statutes such as § 924(e), "for purposes of § 924(c), might be construed as 'a greater minimum sentence[] otherwise provided by this subsection or by any other provision of law.'" Pet. App. 16a. The court rejected this reading of § 924(c), however, because of concerns that it would yield anomalous sentences in some unlikely situations—even as it acknowledged that such anomalies were "not readily apparent" on the facts of this case. Pet App. 17a. But as noted above, *supra* at 27-30, there is no "anomalous results" canon empowering courts to redraft statutory language, and in any event, those concerns are unwarranted.

As explained above, the anomalies that concerned the court of appeals are illusory because the sentences at issue are only *minimum* sentences. District courts can almost always avoid any perceived discrepancies among different offenders by increasing a sentence appropriately to reflect the seriousness of the offense, or by ordering sentences to run consecutively rather than concurrently. See *supra* at 30-32 & n.7; *Whitley*, 529 F.3d at 155; *Williams*, 558 F.3d at 174-175.

Moreover, as the Second Circuit cogently explained, "th[is] apparent anomaly" vanishes entirely "if the 'except' clause is limited to higher minimums contained only in firearms offenses." *Whitley*, 529 F.3d at 155. Limiting the application of the "except" clause to firearms offenses would make

offenders subject *both* to a sentence for the predicate offense (drug trafficking or crime of violence) *and* to whatever higher mandatory minimum sentence could be imposed for the use or possession of the firearm in the same transaction. See *id.* at 155-158. The supposed anomaly in minimum sentences hypothesized by the Third Circuit would thus disappear completely. See *ibid.*

The phantom of anomalous sentences in hypothetical cases caused the Third Circuit to overlook a very real anomaly in the case before it: Under its reading, a defendant receives *two consecutive* mandatory minimum sentences for the single use of a single firearm. This Court has warned against departing from a statute's plain meaning when the alternative reading "would correct one potential anomaly while creating others." *Logan* v. *United States*, 552 U.S. 23, 33 (2007). This principle applies with additional force here because the anomaly created by the Third Circuit's reading is far more odious than the supposed anomalies it feared. Unlike the hypothetical anomalies it sought to avoid, this true anomaly cannot be mitigated through adjustments by the sentencing judge because both sentences would be statutory minimums.

Even if the application of the "except" clause to other firearms offenses were unclear, it is impossible to say that the "except" clause clearly does *not* apply to such offenses. The weight of opinion from the courts of appeals illustrates as much. See *supra* at 37-38 (describing how most courts of appeals to have reached the issue have concluded that the "except" clause applies to firearms offenses codified outside of § 924(c)). At the very least, therefore, the statute is ambiguous as to its reach, which means that the rule

of lenity would apply and require that any ambiguities be resolved in favor of the defendant.

Concerns about fairness, which underlie the rule of lenity, are particularly acute in this case because of the draconian results of the Third Circuit's reading. The Third Circuit's interpretation of § 924(c) would impose multiple mandatory, consecutive criminal sentences for the possession or use of the same firearm in the same transaction. This case therefore squarely implicates one of the core concerns animating the rule of lenity—the "instinctive distaste against men languishing in prison unless the law-maker has clearly said they should." *Bass*, 404 U.S. at 348; see also *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion) ("[N]o citizen should be * * * subjected to punishment that is not clearly prescribed."); *Granderson*, 511 U.S. at 53-54.

Applying the rule of lenity in this instance also "places the weight of inertia upon the party that can best induce Congress to speak more clearly"—the government. *Santos*, 128 S. Ct. at 2025 (plurality opinion). Prosecutions under § 924(c) are a staple of federal criminal practice, and prosecutors frequently charge § 924(c) in addition to other firearms offenses with mandatory minimums. The implications of a contrary reading of the statute therefore will have far-reaching punitive consequences. See Pet. at 23-24. If Congress truly wishes for Kevin Abbott—and future defendants like him—to serve an additional five years in prison for possession of a firearm, on top of the fifteen years he is already serving for possession of the same firearm in the same transaction, that is obviously a policy choice for Congress to make. But surely it is not asking too much to require Congress to say so in unmistakable terms.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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