American Bar Association
www.supremecourtpreview.org

Nos. 09-479 & 09-7073

IN THE

Supreme Court of the United States

KEVIN ABBOTT,
Petitioner,

v.

UNITED STATES
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

CARLOS RASHAD GOULD,
Petitioner,

v.

UNITED STATES
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JOSHUA L. DRATEL
CO-CHAIR, NACDL
AMICUS COMMITTEE
2 Wall Street
Third Floor
New York, NY 10005
(212) 732-0707
JDratel@joshuadratel.com

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MEstrada@gibsondunn.com

Counsel for Amicus Curiae

QUESTION PRESENTED

Title 18 U.S.C. § 924(c)(1)(A) provides that "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 one of a number of mandatory 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."

Does the term "any other provision of law" in Section 924(c)(1)(A) include federal drug trafficking offenses and federal firearms offenses?

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE.......................... 1

STATEMENT 2

SUMMARY OF ARGUMENT.................................. 6

ARGUMENT 10

I. UNDER THE EXPRESS STATUTORY LANGUAGE, THE MINIMUM CONSECUTIVE IMPRISONMENT TERMS SPECIFIED IN SECTION 924(C)(1)(A) DO NOT APPLY WHERE A COURT SENTENCES THE DEFENDANT TO A GREATER MINIMUM SENTENCE UNDER ANOTHER FEDERAL STATUTE. 10

A. Section 924(c)(1)(A)'s "Except" Clause Is Not Confined To Other Provisions Of Law That Set Penalties For The Precise Conduct That Violates Section 924(c)(1)(A). 10

B. An Interpretation That Limits The Application Of § 924(c)(1)(A) To "Some" Other Provisions Of Law Violates Cardinal Rules Of Statutory Construction. 17

C. An Interpretation That Limits The "Except" Clause To Only Some Other Provisions Of Law Violates The Rule Of Lenity.. 23

II. GIVING § 924(C)(1)(A) ITS PLAIN AND STRAIGHTFORWARD MEANING WOULD AUTHORIZE COURTS TO IMPOSE SENTENCES SUFFICIENT, BUT NOT GREATER THAN NECESSARY, TO ACHIEVE THE PURPOSES OF PUNISHMENT. 25

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

Cases

Bifulco v. United States, 447 U.S. 381 (1980) 24

Blockburger v. United States, 284 U.S. 299 (1932)..........21

Busic v. United States, 446 U.S. 398 (1980)..........24

Castillo v. United States, 530 U.S. 120 (2000) 2

Clinton v. City of New York, 524 U.S. 417 (1998)..........25

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992)..........12

Custis v. United States, 511 U.S. 485 (1994)..........32

Dean v. United States, 129 S. Ct. 1849 (2009) 1

Duncan v. Walker, 533 U.S. 167 (2001)..........18

Harris v. United States, 536 U.S. 545 (2002)..........2

Huddleston v. United States, 415 U.S. 814 (1974)..........24

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999)..........12

Koon v. United States, 518 U.S. 81 (1996)..........29

Lopez v. Gonzales, 549 U.S. 47 (2006) 2

Marchetti v. United States, 390 U.S. 39 (1968)..........22

McBoyle v. United States, 283 U.S. 25 (1931)..........24

Moskal v. United States, 498 U.S. 103 (1990)..........23

Rita v. United States, 551 U.S. 338 (2007)..........33

Rutledge v. United States, 517 U.S. 292 (1996) 21

United States v. Abbott, 574 F.3d 203 (3d Cir. 2009)...19

United States v. Alaniz, 235 F.3d 386 (8th Cir. 2001)..14, 15

United States v. Almany, 598 F.3d 238 (6th Cir. 2010)...14

United States v. Bass, 404 U.S. 336 (1971) 24

United States v. Booker, 543 U.S. 220 (2005).......9, 29

United States v. Collins, 205 Fed. Appx. 196 (5th Cir. 2006)..14, 19

United States v. Easter, 553 F.3d 519 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1281 (2010)...........14

United States v. Gonzales, 520 U.S. 1 (1997) 6, 23

United States v. London, 568 F.3d 553 (5th Cir. 2009)...5, 14, 19

United States v. Parker, 549 F.3d 5 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 1688 (2009)...........14

United States v. Pool, 937 F.2d 1528 (10th Cir. 1991)...29

United States v. R.L.C., 503 U.S. 291 (1992) 24

United States v. Reese, 92 U.S. 214 (1875)..............23

United States v. Santos, 128 S. Ct. 2020 (2008).......24

United States v. Studifin, 240 F.3d 415 (4th Cir. 2001)..14, 15, 19

United States v. Whitley, 529 F.3d 150 (2d Cir. 2008)...4, 14

United States v. Williams, 128 S. Ct. 1830 (2008)....................12

United States v. Williams, 558 F.3d 166 (2d Cir. 2009)....................14

United States v. Williams, Petition for Writ of Certiorari No. 09-466 (2009) 7, 15-17, 21, 25, 28

Watson v. United States, 552 U.S. 74 (2007).............1

Whalen v. United States, 445 U.S. 684 (1980)....21, 24

Williams v. Taylor, 529 U.S. 362 (2000)..................18

Statutes

8 U.S.C. § 1324(a)(2)(B) 17

18 U.S.C. § 1028A..17

18 U.S.C. § 3146(b)(1)-(2)..27

18 U.S.C. § 3553(a)....................................4, 9, 28, 33

18 U.S.C. § 3553(a)(2)(A) 30

18 U.S.C. § 3553(a)(6) 29

18 U.S.C. § 3559(c)(1)...21

18 U.S.C. § 3559(c)(7)...21

18 U.S.C. § 844(h)..28

18 U.S.C. § 924(a)(4) 27

18 U.S.C. § 924(c) 3, 5, 28

18 U.S.C. § 924(c)(1)(A).............................2, 3, 11, 23

18 U.S.C. § 924(c)(1)(A)(i) 11

18 U.S.C. § 924(c)(1)(A)(ii) 28

18 U.S.C. § 924(c)(1)(B)(i) 11

18 U.S.C. § 924(c)(1)(B)(ii) 6

18 U.S.C. § 924(c)(1)(D)(ii) 13
18 U.S.C. § 924(e) 3, 4
18 U.S.C. § 929(a) 28
18 U.S.C. § 3584 16
18 U.S.C. § 3621 16
21 U.S.C. § 841(a)(1) 3
21 U.S.C. § 841(b) 26
21 U.S.C. § 841(b)(1)(A) 5, 28
21 U.S.C. § 841(b)(1)(B) 3, 28
21 U.S.C. § 846 ....3, 5
21 U.S.C. § 865 27

Other Authorities

U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 90 (2004) 31

U.S. Sentencing Comm'n, *Overview of Statutory Mandatory Minimum Sentencing* App. B (2009) 17

U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* Table 17 n.3. (2008) 20

U.S. Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991) 13, 30, 31, 32

U.S.S.G. § 2D1.1 ....26, 29
U.S.S.G. § 2J1.6 27
U.S.S.G. § 2K2.4 ....27, 28
U.S.S.G. § 3C1.3 27

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private attorneys, public defenders, and law professors. The NACDL seeks to promote the proper administration of justice, including the correct interpretation of federal criminal statutes and the sound application of federal sentencing law. NACDL's concern for protecting the statutory and constitutional rights of federal defendants has led it to appear frequently as amicus curiae in this Court, including in the October 2009 Term in *Carachuri-Rosendo v. Holder*, No. 09-60, and *United States v. O'Brien*, No. 08-1569.

Several of the cases in which NACDL has participated, including *O'Brien*, involved the statute at issue here. *See, e.g.*, *Dean v. United States*, 129 S. Ct. 1849 (2009) (addressing whether the higher mandatory minimum under Section 924(c)(1)(A)(iii) for discharge of firearm requires proof of intent); *Watson v. United States*, 552 U.S. 74 (2007) (holding that a person who trades a firearm for drugs does not "use" the firearm "during and in relation to . . . [a] drug trafficking crime"); *Lopez v. Gonzales*, 549 U.S. 47

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission The parties have consented to the filing of this brief.

(2006) (holding that conduct deemed a felony under state law but only a misdemeanor under federal law is not a "felony punishable under the Controlled Substances Act" pursuant to Section 924(c)(2)); *Harris v. United States*, 536 U.S. 545 (2002) (holding that "brandishing" a firearm under Section 924(c)(1)(A) is a sentencing factor, not an element of the substantive offense); *Castillo v. United States*, 530 U.S. 120 (2000) (holding that the firearm types in 18 U.S.C. § 924(c) are elements of a substantive offense, not merely sentencing factors).

STATEMENT

1. Section 924(c) of Title 18 of the United States Code makes it a federal crime to use or carry a firearm during and in relation to a federal crime of violence or drug trafficking crime, or to possess a firearm in furtherance of such a crime. The penalties are steep. Wholly apart from a potentially lengthy sentence for the underlying offense, the statute authorizes a court to imprison the defendant for the rest of his life. Also, any prison sentence for a Section 924(c) conviction must be consecutive to any other sentence that the court imposes or that any other court has already imposed. In most cases, that consecutive sentence *must* be at least five years. *See, e.g.*, 18 U.S.C. § 924(c)(1)(A) (requiring a minimum sentence of seven or ten years if the firearm was brandished or discharged and of five years otherwise).

There is an exception to Section 924(c)'s requirement to impose one of these minimum terms of years. The mandatory minimum 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). It is beyond dispute that in the two cases before the Court no greater minimum sentence was otherwise provided by "this subsection." The issue, then, is whether minimum sentences provided by 21 U.S.C. § 841 (as in petitioner Carlos Gould's case) or 18 U.S.C. § 924(e) (as in petitioner Kevin Abbott's case) fall within the category of "greater minimum sentence[s]" that are "otherwise provided by . . . any other provision of law."

2. In No. 09-479, Kevin Abbott was convicted by a jury of two drug offenses and two firearms offenses: (1) conspiring to distribute a controlled substance, 21 U.S.C. § 846; (2) possessing more than five grams of cocaine base with intent to distribute, 21 U.S.C. § 841(a)(1) & (b)(1)(B); (3) possessing a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c); and (4) possessing a firearm in violation of the Armed Career Criminal Act ("ACCA"), which makes it unlawful to possess a firearm after three prior convictions of violent felonies or serious drug offenses, 18 U.S.C. § 924(e). The four convictions all stemmed from the jury's finding that Abbott possessed firearms and crack cocaine that the authorities discovered in the same location.

The court imposed concurrent sentences of ten years on each of the two drug counts. As for the Section 924(c) firearms count, Abbott argued that the five-year mandatory minimum did not apply because the second firearms count—under the ACCA—otherwise provided a greater minimum sentence in

his case of fifteen years. *See* 18 U.S.C. § 924(e)(1). Section 924(c)(1)(D)(ii) still required the judge to make any sentence imposed under the Section 924(c) count run consecutively to the sentences on all other counts, but a mandatory minimum should not have restricted the judge's exercise of his sentencing authority under the Sentencing Guidelines and 18 U.S.C. § 3553(a).

The district court rejected Abbott's argument and imposed both mandatory minimums, for a total sentence of twenty years, "noting that several other courts of appeals have held that 'the plain meaning of section 924(c) clearly states that a term of imprisonment imposed under section 924(c) cannot run concurrently with any other term of imprisonment imposed for any other crime, including a sentence under [ACCA].'" No. 09-479, App. to Pet. Cert. 7a (quoting district court opinion). The Third Circuit agreed, concluding that Section 924(c)(1)(A)'s "prefatory clause" containing the exception to the listed mandatory minimums only "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." *Id.* at 13a.

The court of appeals rejected the Second Circuit's contrary conclusion in *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), that the clause—"except to the extent . . . otherwise provided . . . by any other provision of law"—"refers to *any* offense." Pet. App. 13a-14a. The Third Circuit reasoned *inter alia* that "Congress did not intend" the type of "bizarre result"

that might follow from the Second Circuit's ruling. *Id.* at 15a. The Third Circuit explained with a hypothetical involving defendants in separate cases who brandish firearms while distributing different quantities of drugs. Focusing only on the mandatory minimums that would apply, the Third Circuit stated that "a defendant convicted of a predicate offense with a minimum sentence *one day longer* than the relevant minimum under § 924(c) would escape any further punishment while a defendant whose predicate offense carries *exactly the same* minimum sentence provided by § 924(c) sees his total sentence at least doubled." *Id.*

3. In No. 09-7073, Carlos Gould pleaded guilty to two counts of an indictment: (1) conspiracy to possess fifty grams or more of cocaine base with the intent to distribute, 21 U.S.C. § 846; and (2) possessing a firearm in furtherance of that drug trafficking crime, 18 U.S.C. § 924(c). Because the quantity of drugs in the conspiracy count triggered a statutory minimum sentence of ten years, *see* 21 U.S.C. § 841(b)(1)(A), Gould argued that the court was not required to impose the otherwise applicable minimum of five years for possession of a firearm in furtherance of the drug crime. The district court disagreed. After determining that Gould's Guideline range for the drug count was 120 – 137 months, the court sentenced him to 137 months on that count, and imposed a consecutive mandatory minimum of sixty months for the Section 924(c) conviction, for a total sentence of 197 months.

The Fifth Circuit affirmed in an unpublished opinion, relying on its earlier decision in *United States v. London*, 568 F.3d 553 (5th Cir. 2009).

SUMMARY OF ARGUMENT

1. Although a sentence of imprisonment under Section 924(c) may not run concurrently with "any other term of imprisonment"—a phrase that this Court interpreted as broadly as possible because of the choice of the word "any," *see United States v. Gonzales*, 520 U.S. 1, 5 (1997)—Congress enacted an exception to the statute's mandatory minimum provisions that applies under two circumstances. In particular, Section 924(c)(1)(A) directs a court to impose the specified minimum, "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law."

The scope of the circumstances for applying the statutory exception, when considered in context, is clear. First, to determine whether "this subsection" "otherwise provide[s]" for "a greater minimum sentence," a court looks to the rest of subsection (c) where, for example, Congress provided a greater minimum sentence of thirty years for defendants who possess a machinegun. *See, e.g.*, 18 U.S.C. § 924(c)(1)(B)(ii). In applying the second part of the exception, the court looks *beyond* Section 924(c) to "any *other* provision of law" that "*otherwise* provide[s]" a minimum sentence greater than those found in Section 924(c)(1)(A). Congress chose "any"—the most expansive word it could have used

for this situation—and it added no qualifiers to the quoted phrase.

When Congress adopted the "except" clause, the only "other provision[s] of law" on the books that could "otherwise provide[]" an additional "greater minimum sentence" in any case were statutes that criminalize conduct *beyond* that already proscribed in subsection (c)(1). The most commonly employed of those other provisions are found in the Controlled Substances Act ("CSA") and the ACCA, each of which defined in 1998 (and continue to define today) related federal offenses that prosecutors routinely charge in tandem with one or more Section 924(c) counts.

Thus, under the straightforward wording of Section 924(c)(1)(A)'s "except" clause, read in proper context, the "greater minimum sentence" "provided" by the CSA and ACCA in cases such as Gould's or Abbott's is the minimum that applies in lieu of the minimum in Section 924(c)(1)(A).

The government would have this Court alter the operation of the statute by reading "any" other provision of law to mean a contrived category of *hypothetical* provisions of law that Congress *might* some day enact—a set of statutes that today, as in 1998, numbers exactly zero. In the government's view, "any other provision of law" must be understood to refer *only* to "those provisions elsewhere in the United States Code that establish penalties for violating Section 924(c)(1)(A)." Petition for a Writ of Certiorari at 11, *United States v. Williams*, No. 09-466 (U.S. 2009) ("*Williams* Pet."). "[A]ny other provision

of law" thus becomes a null set, because the government readily concedes that *no* other provision of law calls for two or more minimum sentences for the same Section 924(c) violation.

The government resorts to pure, untenable conjecture in an effort to avoid the consequences of its position. It assumes that Congress might have decided to add this second, broader exception to guard against the possibility that a future Congress might decide to enact a new law that imposes higher minimum penalties for conduct [1] that is identical in every detail to the conduct already proscribed by Section 924(c)(1)(A), but [2] is somehow codified in some other, remote statutory provision far away from Section 924(c) or even Title 18, [3] just in case the putative future Congress enacting such an identical penalty provision somehow fails to realize that punishments for this particular conduct already are codified in Section 924(c) and inadvertently adds to the penalties elsewhere. Even putting aside the manifest implausibility of the government's reasoning, or the fact that its adoption would render half of the exception wholly superfluous, the government has proffered no evidence from any legislative record suggesting that such a counterintuitive chain of contingencies was even remotely contemplated by the 1998 Congress.

Lastly, the very best that can be said for the government's position is that Section 924(c)(1)(A) arguably is ambiguous with respect to which precise conduct the "other" sentence must be "provided" for. Yet to claim that a provision might be ambiguous does not render all possible interpretations equally plau-

sible. The government not only insists on the *least* plausible interpretation that might conceivably be articulated—to the exclusion of other interpretations more faithful not only to the text of the statute but to traditional canons of construction—but wholly disregards the rule of lenity.

2. Honoring the statute's straightforward meaning does not lead to the types of undesirable sentencing outcomes of which the government warns. The mandatory minimums at issue in cases such as these set a *floor* for the total sentence. The sentencing judge must also calculate the applicable Sentencing Guidelines and consider each of the seven principal sentencing factors (and various subsidiary factors) in the Sentencing Reform Act before arriving at a total sentence that will be sufficient, but not greater than necessary, to comply with the sentencing purposes that Congress identified. *See* 18 U.S.C. § 3553(a).

From the time Congress added the "except" clause to the present, when judges continue to sentence under the advisory regime remaining in place five years after this Court decided *United States v. Booker*, 543 U.S. 220 (2005), Congress has given judges the tools to calibrate a defendant's total sentence and avoid unwarranted disparity. The government's interpretation, on the other hand, would replace the precision available under Section 3553(a) with the inflexibility of a second mandatory minimum term. The Court need not take the extreme step of disregarding the plain text of the statute, especially where a ruling faithful to that text will better promote Congress's sentencing objectives in federal criminal cases.

ARGUMENT

I. UNDER THE EXPRESS STATUTORY LANGUAGE, THE MINIMUM CONSECUTIVE IMPRISONMENT TERMS SPECIFIED IN SECTION 924(C)(1)(A) DO NOT APPLY WHERE A COURT SENTENCES THE DEFENDANT TO A GREATER MINIMUM SENTENCE UNDER ANOTHER FEDERAL STATUTE.

The language of the "except" clause in 18 U.S.C. § 924(c)(1)(A) is straightforward. The clause applies whenever a greater minimum sentence "is otherwise provided" by the relevant portion of Section 924(c)(1) or by "any other provision of law." In the cases before the Court, greater minimums were provided by two drug and firearm statutes that together account for the lion's share of mandatory minimum sentences in federal cases and that prosecutors almost invariably charge in tandem with Section 924(c) counts. The government's contrary interpretation of the exception to disregard these two sources of greater minimum sentences violates two cardinal rules of statutory construction by adding words of limitation to the statute, and by giving the subsection's key phrase—"any other provision of law"—no rational purpose.

A. Section 924(c)(1)(A)'s "Except" Clause Is Not Confined To Other Provisions Of Law That Set Penalties For The Precise Conduct That Violates Section 924(c)(1)(A).

1. Section 924 of Title 18, entitled "Penalties," specifies prison terms and fines for violations of several federal firearms provisions. Section 924(c), in particular, lists the penalties—including the applicable minimum prison terms—for using, carrying, or possessing a firearm during and in relation to a

crime of violence or a drug trafficking crime. Depending on the firearm type, whether the firearm was more than simply possessed, and the defendant's history of similar violations, mandatory minimum sentences specified in this subsection range from five years to life imprisonment. Section 924(c)(1)(A) directs the sentencing court to impose one of these consecutive mandatory minimum sentences—the lowest being a five-year mandatory minimum for possession of a firearm—"[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).

By the plain wording of the "except" clause there are two separate circumstances in which a greater minimum sentence applies in place of the minimum in Section 924(c)(1)(A). First, the clause directs a court not to impose Section 924(c)(1)(A)'s mandatory minimum term where "a greater minimum sentence is otherwise provided by this subsection." For example, a ten-year minimum would be imposed if the firearm was "a short-barreled rifle" (§ 924(c)(1)(B)(i)) instead of the five-year minimum that applies for "possess[ing]" any firearm (§ 924(c)(1)(A)(i)). Second, the "except" clause overrides the mandatory minimum provided in Section 924(c)(1)(A) where "a greater minimum sentence is otherwise provided . . . by any other provision of law."

Relevant to the "except" clause's second circumstance, the federal drug statutes and the ACCA are "other provisions" that "provide[]" for a "minimum sentence" that is often "greater" than the lowest minimum specified in Section 924(c)(1)(A). The two cases before the Court turn on whether Congress, in this second circumstance, unambiguously excluded

these greater minimum sentences from the broad phrase "greater minimum sentence . . . otherwise provided . . . by any other provision of law."

2. "[I]n any case of statutory construction, [the] analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citation and internal quotation marks omitted); *see Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (explaining that the Court has "stated 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").

Petitioners demonstrate that Congress chose expansive language, which the government has successfully urged this Court to interpret broadly where used within the very same subsection. *See* Brief for Petitioner at 13-14, 16, *Abbott v. United States*, No. 09-479; Brief for Petitioner at 11-13, *Gould v. United States*, No. 09-7073. Of course, as petitioners have further explained, no statutory phrase should be considered in strict isolation from "the neighboring words with which it is associated." *See, e.g.*, *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008). The issue, then, is what sources of greater minimum sentences Congress indicated that it was including when it created a penalty override for each greater minimum that "is otherwise provided by this subsection or by any other provision of law."

The context in which the quoted language appears demonstrates that the two most likely sources of greater minimum sentences are the CSA and the ACCA. Of the dozens of mandatory minimum provisions then on the books, only a handful allowed for a

mandatory minimum that could trigger the "except" clause—*i.e.*, one greater than five years. Of that limited universe, these two statutes were far and away the most frequently employed by federal prosecutors. U.S. Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 37-38 (1991). Based on the type of conduct that these two statutes penalize—drug trafficking and firearms possession—it is common for one or both to be charged alongside one or more Section 924(c) counts.

It was plain at the time Congress added the "except" clause that these two statutes and Section 924(c) were heavily intertwined. A defendant who uses, carries, or possesses a firearm while engaging in drug trafficking or a crime of violence will be subject to the ACCA's fifteen-year minimum if he has the requisite prior convictions for those types of conduct (drug trafficking or violent felonies) that serve as the only predicates for a Section 924(c) charge. And the CSA is the most commonly charged federal statute that can serve as one of the two predicates. So routine are indictments containing both CSA and Section 924(c) charges that Section 924(c) itself expressly contemplates and addresses how to impose multiple penalties in such a case. 18 U.S.C. § 924(c)(1)(D)(ii) (specifying that a term of imprisonment may not run concurrently with other terms of imprisonment "including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried or possessed").

Congress knew, based on the degree to which these statutes overlap, that of the totality of greater mandatory minimum penalties that the law might

provide when a defendant is being sentenced for possessing a firearm during and in relation to a drug trafficking offense or crime of violence, the vast majority would be for either the drug trafficking that serves as a Section 924(c) predicate or the aggravating circumstance that the defendant possessed the firearm after already being convicted of conduct that itself serves as a Section 924(c) predicate.

3. The government and some courts of appeals, however, narrowly construe "any other provision of law," proposing to create restrictions and qualifiers that Congress did not choose. In departing from the approach taken by the Second and Sixth Circuits,[2] these courts have read "any" other provision of law to mean only "some" other provisions of law.[3]

The difficulty with these various positions is well illustrated by the degree to which the courts and the government have been unable to agree on what the "except" clause means if it does not apply to greater minimum sentences provided by other counts of conviction. Some courts have rewritten the "except" clause to require imposition of a mandatory mini-

---

[2] *See United States v. Almany*, 598 F.3d 238 (6th Cir. 2010); *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009); *Whitley*, 529 F.3d at 150.

[3] *See London*, 568 F.3d at 564 (adopting and giving precedential effect to *United States v. Collins*, 205 Fed. Appx. 196 (5th Cir. 2006)); *United States v. Easter*, 553 F.3d 519, 525 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1281 (2010); *United States v. Parker*, 549 F.3d 5, 11 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 1688 (2009); *United States v. Studifin*, 240 F.3d 415, 423-24 (4th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386, 386 (8th Cir. 2001).

mum found in Section 924(c)(1)(A), except to the extent a greater minimum sentence is otherwise provided by subsection (c) or by another provision of law that punishes firearm-related conduct. *See, e.g.*, *Alaniz*, 235 F.3d at 389 (holding that the "except" clause applies "to the *firearm-related conduct* proscribed either by 924(c)(1) or 'by any other provision of law'" (emphasis added)). Under this view, the ACCA would be included in "any other provision of law," but statutes such as the CSA would not be included, even when used to charge the same drug offense that serves as the predicate for the Section 924(c) violation.

Other circuits have decided to limit the reach of the "except" clause even more, reading "any other provision of law" to mean those other provisions that apply to the same subset of firearm-related conduct already made unlawful by Section 924(c)(1) itself. *See, e.g.*, *Studifin*, 240 F.3d at 423. The government takes this more extreme view, arguing that the other provision of law must "establish penalties for violating Section 924(c)(1)(A)," "[j]ust as the phrase 'this subsection' refers to provisions that prescribe minimum sentences for the Section 924(c) offense." *Williams* Pet. 12. In other words, the phrase "any other provision of law" was designed for other statutes that create new penalties for violations of Section 924(c)(1)(A) *itself*. *Id.* at 13 n.3 (example of hypothetical amendment to Section 922(k) that provides: "if a firearm with a defaced serial number is involved in a violation of Section 924(c)(1)(A), then the penalty for such a violation of Section 924(c)(1)(A) is at least 15 years").

None of these approaches can be squared with the statute as Congress amended it in 1998. The gov-

ernment, undeterred, claims that the relevant words ("is otherwise provided . . . by any other provision of law"), read literally, would require a judge to consider mandatory minimums for "charges pending in other jurisdictions, for entirely unrelated counts, or for crimes that were the subject of a previous sentencing." *Williams* Pet. 13. But a straightforward reading of the exception could not require a judge to take account of the potential sentence for a count that simply is not before the court because the sentence has not even been imposed in the other jurisdiction. The "except" clause, after all, addresses the sentencing phase—not the definition of an offense—and under no fair reading of this statute could it be said that a sentence unavailable to the sentencing court "is otherwise provided" in *that* case by some other provision of law.[4] Thus, the text of the clause need not be artificially restricted in order to avoid the prospect of a court considering mandatory minimums that the court has no authority to apply.[5]

---

[4] The government's reference to the relationship between a Section 924(c) sentence and a sentence for charges pending elsewhere is a red herring. No matter which interpretation of the "except" clause prevails, separate federal or state laws that govern sentencing administration in the jurisdiction where the *pending* charge later is sentenced will answer the question whether two consecutive mandatory minimums are imposed. *See, e.g.*, 18 U.S.C. §§ 3584, 3621 *et seq.*

[5] The government's concern about "entirely unrelated counts" likewise presents no reason to resort to an overly restrictive view of the statute. Even today, statutes that could theoretically produce an unrelated count of conviction in a Section 924(c) case routinely provide for minimums of no more than five years and therefore would not trigger the "except" clause. *Compare* U.S. Sentencing Comm'n, *Overview of Statutory Man-*

[Footnote continued on next page]

B. An Interpretation That Limits The Application Of § 924(c)(1)(A) To "Some" Other Provisions Of Law Violates Cardinal Rules Of Statutory Construction.

The government's view—interpreting "any other provision of law" to mean only those other provisions of law that provide mandatory minimum sentences for conduct proscribed by Section 924(c) itself—should be rejected because it violates two cardinal rules of statutory construction. Not only would the government's position render the second exception in the "except" clause superfluous, it would force into the statute words that Congress did not include.

1. As noted above, the government would limit "any other provision of law" to those provisions elsewhere in the United States Code that set a different and higher additional sentence for the Section 924(c) conviction *itself*. *Williams* Pet. 11 (reading the statute to mean *inter alia* that a defendant "is subject to a mandatory consecutive five-year sentence . . . *ex-*

[Footnote continued from previous page]
datory Minimum Sentencing App. B (2009), *available at* http://www.ussc.gov/MANMIN/man_min.pdf (listing the number of convictions in FY 2008 under each of various mandatory minimum statutes), *with, e.g.*, 8 U.S.C. § 1324(a)(2)(B) (minimums of three and five years for certain recidivist immigration offenses), *and* 18 U.S.C. § 1028A (minimums of two and five years for certain aggravated identity theft). 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. *See Overview of Statutory Mandatory Minimum Sentencing*, *supra*, at App. B (showing number of mandatory minimum sentences imposed for each statute).

cept that if another feature of the Section 924(c) offense triggers a greater mandatory minimum penalty for that crime under 'any other provision of law,' the defendant is instead subject to that higher sentence on the Section 924(c) count"). But the government concedes the complete "absence of any provision of law outside Section 924(c) that currently prescribes such penalties." *Id.* at 12.[6]

The government therefore proposes to render the words "any other provision of law" superfluous. Doing so would violate a "cardinal principle of statutory construction," *Williams v. Taylor*, 529 U.S. 362, 404 (2000), that courts should "give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). Because from the time Congress enacted the "except" clause to the present, no federal statute other than Section 924(c) itself has prescribed an additional minimum sentence for violating Section 924(c), the *first* part of the "except" clause—reaching cases where "a greater minimum sentence is otherwise provided by this subsection"—already fully serves the purpose that the government would attribute to the *second* part of the clause. To adopt the government's reading is to accept that *not a single case* prosecuted under Section 924(c) since the "except" clause was added would have come out differently had Congress omitted the words "or by any other provision of law."

---

[6] So narrow is the government's interpretation, it would allow a second consecutive minimum sentence for an offense that contains each *element* of a Section 924(c) violation but fails to make express *reference to* that subsection.

2. In an effort to evade the duty to give effect whenever possible to every word and clause of a statute, the government invents a *conditional* purpose for the language. The government theorizes that the language would operate as a "safety valve" guarding against consecutive sentences in the event a future Congress were to decide to enact a new statute setting new and higher penalties for violating Section 924(c)(1). That theory, untethered to anything resembling reality, is preposterous.

The government's premise is that Congress was looking to the future and "simply reserving the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation." *Studifin*, 240 F.3d at 423 (theorizing that the extra language "any other provision of law" was meant to "reserv[e] the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation"); *accord United States v. Abbott*, 574 F.3d 203, 208 (3d Cir. 2009) (citing for support of this proposition *Collins*, 205 Fed. Appx. at 197-98, which cites *Studifin*, 240 F.3d at 423), *cert. granted*, 130 S. Ct. 1284 (2010)); *London*, 568 F.3d at 564 (adopting *Collins*, 205 Fed. Appx. at 196). Even were legislative history needed to understand the plain reach of this statute, which it decidedly is not, nothing in that record suggests, much less establishes, that Congress had anything like this even remotely in mind.

No doubt the blank record is explained by the fact that the government has built its theory on multiple unsupportable assumptions about what Congress anticipated and intended in 1998 when it included the separate words "or by any other provision of law" in

its amendment of Section 924(c)(1). At a minimum, the Court would need to assume that the 1998 Congress anticipated: (i) that *another* Congress might someday decide to enact a separate penalties law governing conduct already proscribed in Section 924(c), which itself is located in the statute devoted to firearms "Penalties"; (ii) that this new law would add mandatory minimum sentences for Section 924(c) violations even though the 1998 Congress had restructured Section 924(c)(1) for the express purpose of allowing new minimum sentences to be added; (iii) that the new minimums would exceed (yet not replace) the current mandatory minimums; and (iv) that those drafting the future statute would not understand the need to account for the interaction between the putative provision and the one already in existence (which the government used nearly 1,500 times in 1998[7] and which produced nearly 2,500 convictions in 2008[8]).

Not only is the legislative record devoid of even a suggestion that Congress entertained these far-fetched assumptions, had the drafters given even a moment's thought to such a fanciful concern they would have soon recognized that no extra language would be needed to address it. It has long been the rule under the Double Jeopardy Clause of the Fifth Amendment that "in the absence of a clear indication

[7] Bureau of Justice Statistics, Federal Justice Statistics Resource Program, Number of Defendants Charged Under 18 U.S.C. § 924(c), FY 1998, http://fjsrc.urban.org.

[8] *See* U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* Table 17 n.3. (2008), *available at* http://www.ussc.gov/annrpt/2008/SBtoc08.htm.

of contrary legislative intent," "where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments." *Whalen v. United States*, 445 U.S. 684, 692 (1980). The test "to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Thus, if Congress ever added another provision to the United States Code providing a greater minimum sentence for a violation of Section 924(c)—such as the government's hypothetical statute punishing Section 924(c) offenses that involve firearms with defaced serial numbers, *Williams* Pet. 13 n.3—only one of the two penalties would apply because Section 924(c) would be a lesser included offense of the one in the new statute. The Court reaffirmed that rule in *Rutledge v. United States*, 517 U.S. 292 (1996), just two years before Congress created the "except" clause. *Id*. at 297 ("For over half a century we have determined whether a defendant has been punished twice for the 'same offense' by applying the rule set forth in *Blockburger*," and "have often concluded that two different statutes define the 'same offense,' typically because one is a lesser included offense of the other.").[9]

---

[9] Neither the government nor the courts of appeals have located any statute on the books in 1998 that would have prompted Congress to put special language in Section 924(c) as a way to prevent *additional* (rather than *alternative*) penalties for two violations (either identical violations or a lesser included within the greater violation) of the same statute. *Cf.* 18 U.S.C. § 3559(c)(1) & (7) (setting a life sentence "[n]otwithstanding any other provision of law" for conviction of a "se-

[Footnote continued on next page]

Of course, a future Congress could always override the *Blockburger* rule by clearly stating in the new statute that the greater punishment is cumulative, but that would not explain the decision to add the words "or by any other provision of law" in *this* statute. That is because if a later Congress does decide that the punishments should be separate and cumulative, *that* determination will control no matter how the law was worded in 1998.

3. Not only does the government's rendition give the second part of the "except" clause no purpose, it would require the Court to insert into the statute language that Congress did not decide to include. This Court has routinely resisted calls "to insert words that are not now in the statute." *See, e.g.*, *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968). The reason is grounded firmly in the respective roles of the co-equal branches. To add new words "would, to some extent, substitute the judicial for the legislative department of the government. . . .

[Footnote continued from previous page]
rious violent felony" under the "three strikes" statute, and providing that the defendant "shall be resentenced to any sentence that was available at the time of the original sentencing" if either of the two predicate convictions is later overturned). Simply put, Congress knew in 1998, as it surely knows today, that the easy and expedient way to prevent one statute from imposing cumulative penalties for a single violation of another statute is to place appropriate language (such as "notwithstanding any other provision of law") in the statute containing the higher penalty, rather than guess how future statutes might be worded and then seek preemptively to alter the effect of the predicted wording.

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." *Id.* (quoting *United States v. Reese,* 92 U.S. 214, 221 (1875)).

Congress did not limit the "except" clause to greater minimum sentences "otherwise provided by this subsection or by any other provision of law penalizing violations of this subsection." It more broadly worded the exception to cover greater minimum penalties provided by "any other provision of law," a term that at the time—and to this day—most notably includes the greater minimums under the ACCA and the CSA. Congress was careful to qualify the description of a provision of law in Section 924(c) when it wanted to limit the statute's scope. *See* § 924(c)(1)(A) (limiting "any crime of violence or drug trafficking crime" to those "for which the person may be prosecuted in a court of the United States"); *cf. Gonzales*, 520 U.S. at 5 (interpreting "any other term of imprisonment" to include state prison terms because "Congress did not add any language limiting the breadth" of that language). The "except" clause should be enforced consistent with the language Congress enacted rather than the language the government would have preferred.

C. An Interpretation That Limits The "Except" Clause To Only Some Other Provisions Of Law Violates The Rule Of Lenity.

Although the "except" clause, read in context, is clear, to the extent ambiguity arises from the government's proposed interpretation, the rule of lenity requires that the Court construe such ambiguity in favor of the defendant. *Moskal v. United States*, 498 U.S. 103, 107-08 (1990); *Bifulco v. United States*, 447

U.S. 381, 387 (1980); *Busic v. United States*, 446 U.S. 398, 406-07 (1980).

The rule of lenity protects two core values at issue here. Under fundamental notions of due process, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). "To make the warning fair, so far as possible the line should be clear." *Id.* Second, "legislators and not the courts should define criminal activity." *Huddleston v. United States*, 415 U.S. 814, 831 (1974). Protecting the line between the co-equal branches helps ensure that no citizen is "subjected to punishment that is not clearly prescribed" and it "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality op.).

This principle of statutory construction applies equally to the substance of criminal prohibitions and the penalties imposed for violations of them. *See Bifulco*, 447 U.S. at 387 (citing cases). Thus, even assuming the government can succeed in injecting ambiguity where none exists, lenity requires resolving it against the government, because when a statutory term is unclear, courts "choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (citing *United States v. Bass*, 404 U.S. 336, 347-48 (1971)); *see also Whalen*, 445 U.S. at 693-94 (resolving ambiguity regarding the authorization of consecutive sentences in favor of lenity).

II. GIVING § 924(C)(1)(A) ITS PLAIN AND STRAIGHTFORWARD MEANING WOULD AUTHORIZE COURTS TO IMPOSE SENTENCES SUFFICIENT, BUT NOT GREATER THAN NECESSARY, TO ACHIEVE THE PURPOSES OF PUNISHMENT.

1. The government nonetheless alludes to the rare exception in which courts will disregard a statute's plain meaning based on the results such a reading would produce. *Williams* Pet. 16, 17 (referring variously to the available sentences in certain Section 924(c) cases as "illogical," "anomalous," and "bizarre"). But this interpretive tool has no role to play under a statutory scheme that, after requiring imposition of the greatest minimum sentence, reserves to the sentencing court its traditional power to impose a *total* sentence properly calibrated to the defendant's level of culpability and dangerousness. The straightforward interpretation of Section 924(c) in no way requires a judge to give a lower sentence (or even the same sentence) to the more culpable or dangerous of two defendants.

As an initial matter, the bar is a fair bit higher than the government suggests. This Court does not override the wording of a statute simply because the occasional application would be anomalous, illogical, or even bizarre. Rather, the reading of the statute must produce an "absurd and unjust result which Congress could not have intended." *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (internal quotation marks omitted).

The government cannot even meet its own proposed test. A mandatory minimum sentence is, quite simply, nothing more than a minimum. It is a lower limit on the judge's discretion, just as a statutory maximum acts as an upper limit. Under 18 U.S.C.

§ 3553(a), a judge considers numerous factors—including the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense—in deciding how far above the minimum a defendant's sentence should be. Only by ignoring the overall context in which a mandatory minimum provision operates could the government contend that illogical outcomes are likely to flow from reading the statute to mean what it says.

Not only are the mandatory minimum sentences in a Section 924(c) case the starting point in a judge's determination of the appropriate sentence, the Section 924(c) count almost always is included with at least one other count carrying a lengthy maximum prison term. That is due, in no small part, to the fact that a violation of Section 924(c) does not occur unless the defendant uses, carries, or possesses a firearm during and in relation to another federal offense—either a crime of violence or a drug trafficking crime. The drug trafficking statute, for example, contains several maximum terms, depending on the quantity of drugs and the defendant's prior record. Aside from cases involving small quantities of marihuana, the shortest maximum is ten years. *See* 21 U.S.C. § 841(b).

2. The Sentencing Commission has drafted the Guidelines to account for the effect a Section 924(c) conviction can have on the total sentence, and the objective of those provisions is to avoid unwarranted disparity. For example, the drug trafficking Guideline contains a two-level enhancement "[i]f a dangerous weapon (including a firearm) was possessed." U.S. Sentencing Guidelines Manual § 2D1.1(b)(1) (2009) ("U.S.S.G."). But if the defendant also re-

ceives a mandatory minimum sentence under Section 924(c) for using or carrying a firearm during and in relation to the drug trafficking crime, the Guidelines instruct the court not to apply the Guidelines enhancement. *See id.* § 2K2.4 cmt. n.4. Thus, a defendant in criminal history category III who carries a gun while distributing four kilograms of cocaine would have a Guideline range of 121 – 151 months with a Section 924(c) conviction, and a range of 151 – 188 months without one. With a five-year mandatory minimum under Section 924(c)(1)(A)(i) the effective range for that defendant would be 181 – 211 months. Because the drug trafficking crime carries a maximum sentence of forty years (or a maximum of life if the defendant has a prior drug trafficking conviction), the court would have ample latitude to impose a sentence—through a departure from the Guidelines or, if needed, as a variance—that achieves the purposes of sentencing.[10]

---

[10] The statute does not bar a judge from imposing a consecutive sentence of imprisonment under Section 924(c) even if the "except" clause applies. The simple difference in such cases is that the sentence imposed under Section 924(c) need not be any particular minimum length. A number of other federal criminal statutes also require mandatory consecutive sentences without a required minimum term. *See, e.g.*, 18 U.S.C. § 924(a)(4) (requiring consecutive sentence, but with no minimum, for possessing firearms in a school zone); 18 U.S.C. § 3146(b)(1)-(2) (same for failure to appear in court or for service of sentence); 21 U.S.C. § 865 (same for smuggling certain controlled substances while participating in a program for facilitated entry into the country). Moreover, the Sentencing Commission is experienced in drafting Guidelines to account for such statutes. *See, e.g.*, U.S.S.G. §§ 2J1.6 cmt. n.3 (failure to appear); 3C1.3 cmt. n.1 (offense while on release).

The Commission expressly contemplated and addressed the unusual case where, even under the government's interpretation, a conviction under Section 924(c) might cause a lower overall sentence than would be the case without the conviction. U.S.S.G. § 2K2.4 cmt. n.4. The Guidelines state that "[i]n such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment." *Id.* Just as the Commission has expressly provided for adjustments that address this type of anomaly under the mandatory minimums in Section 924(c), nothing prevents a judge from exceeding the Guidelines range in the unusual case where a defendant faces a lower mandatory minimum sentence by operation of the statute and a higher sentence is needed to serve the purposes of sentencing under Section 3553(a).

In fact, a judge would not even need to depart or use a variance to avoid the supposed problem asserted by the government, because the Guidelines already address it. The government argued in *Williams* that a defendant who distributes five kilograms of cocaine and brandishes a firearm would only be subject to a ten-year minimum, *see* 21 U.S.C. § 841(b)(1)(A), while a defendant who distributes 500 grams of cocaine and brandishes a firearm would face a combined minimum of twelve years, *see* 21 U.S.C. § 841(b)(1)(B) (five-year minimum); 18 U.S.C. § 924(c)(1)(A)(ii) (seven-year minimum). *See Williams* Pet. 16-17. But the government quits its analysis at the first step of a multi-step sentencing process. Under the Guidelines the defendant delivering the larger quantity of drugs faces a Guidelines range higher than the total sentence range (including the mandatory minimum) applicable to the de-

fendant who distributed the smaller quantity.[11] And the range is higher still if the more culpable defendant has a prior record.

The "except" clause does not distort sentencing outcomes, because the Guidelines, along with the other Section 3553(a) sentencing factors, help guide judges as they seek an appropriate sentencing result. Even before *Booker*, judges could depart from the applicable Guidelines to avoid absurd—and even "bizarre"—outcomes. 543 U.S. at 234 (noting that the Guidelines as mandatory permitted departures to account for circumstances not adequately considered by the Sentencing Commission); *Koon v. United States*, 518 U.S. 81, 92-96 (1996) (recognizing that the Guidelines vest discretion in sentencing courts to depart from the applicable sentence range to account for factors not expressly contemplated by the Guidelines); *see, e.g.*, *United States v. Pool*, 937 F.2d 1528, 1534 (10th Cir. 1991) ("To permit appropriate sentencing under anomalous circumstances, the Guidelines allow the trial court to depart upward or downward from the Guidelines as the situation dictates. The degree of departure is within the sound discretion of the sentencing court."). Section 3553(a), as applied after *Booker*, gives judges even greater power to ensure that a sentence is sufficient, but not greater than necessary, to achieve the purposes of sentencing. A judge who has the power to "avoid unwarranted sentencing disparities," § 3553(a)(6),

[11] Five kilograms of cocaine and possession of a firearm yields an offense level of thirty-four and a range of 151 – 181 months (twelve years, seven months to fifteen years, one month). U.S.S.G. § 2D1.1(b)(1) & (c)(4) (2009).

and to tailor the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," § 3553(a)(2)(A), is fully capable of applying Section 924(c) in a manner that is both consistent with Congress's purpose and true to the language of the statute that Congress enacted.[12]

3. The government's interpretation, if adopted, would hamper the ability of judges to accomplish the statutory purposes of sentencing. The Sentencing Commission itself noted in its comprehensive review of such penalties that "lack of uniform application" of mandatory minimums by the government "creates unwarranted disparity in sentencing, and compromises the potential for the guidelines sentencing system to reduce disparity." *Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra*,

---

[12] This power, which Congress trusts judges to exercise when determining the appropriate punishment for a vast array of serious federal crimes, fully answers the assertion that the 1998 Congress must have been on a single-purpose mission to double up the use of mandatory minimums in cases where two mandatory minimums could be triggered. As an initial matter, it is at least equally likely that when adding to substantial mandatory minimum terms capable of putting a person behind bars for much of the rest of his life, Congress saw little marginal utility in funding another five years of prison at the end of such a term. And it is much more likely that Congress chose to rely on judges to make that determination based on the age of a defendant, the total sentence that will apply on all of the counts in the case, and other important case-specific factors for which Section 924(c)'s mandatory minimum provision does not account.

at ii-iii. The Commission has long noted that "disparate application" of mandatory minimums "appears to be related to the race of the defendant" and "to the circuit in which the defendant happens to be sentenced." *Id.* at iii (noting that mandatory minimums, in contrast to Sentencing Guidelines, "are wholly dependent upon defendants being charged and convicted of the specified offense under the mandatory minimum statute," that "the power to determine the charge of conviction rests exclusively with the prosecution" for cases that do not go to trial, and that, as a result, "mandatory minimums transfer sentencing power from the court to the prosecution"); *see also* U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 90 (2004) (in 1995 "Blacks accounted for 48 percent of the offenders who appeared to qualify for a charge under 18 U.S.C. § 924(c) but represented 56 percent of those who were charged under the statute and 64 percent of those convicted under it," and data from 2000 "showed the same pattern of disproportionate overrepresentation of Blacks among qualified offenders who actually received the statutory enhancement").

Wholly apart from the disparity in how the government chooses to invoke mandatory minimums, it appears that "an unintended effect of mandatory minimums is *unwarranted* sentencing uniformity" in which "offenders seemingly not similar nonetheless receive similar sentences." *Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra*, at iii. The reason is simple: "[T]he structure of the federal sentencing guidelines differentiates defendants convicted of the same offense by a variety of aggravating and mitigating factors, the consideration of which is meant to provide just punishment and proportional sentences," while "the structure of man-

datory minimums lacks these distinguishing characteristics." *Id.* "Whereas guidelines seek a smooth continuum, mandatory minimums result in 'cliffs'" that "compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act." *Id.* at iv.

The mandatory minimum feature of Section 924(c), as amended, still takes account of only a small number of differences between offenses and offenders (*i.e.*, type of firearm, whether it was used or displayed in a particular way, and the defendant's previous convictions for similar conduct). It is a far cry from the "system of finely calibrated sentences" that Congress intended when it created the Sentencing Guidelines. *See Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra*, at iv. Nor did Congress give any indication that the 1998 amendment was intended to compound the disparity and the lack of proportionality that characterizes mandatory minimums where another statute *already* provides for a greater minimum sentence, often for substantially overlapping conduct.

4. The "except" clause properly affords district courts the latitude to determine the appropriate length of a sentence that will *always* be *in addition to* a mandatory minimum greater than five years. These two cases are illustrative. Gould was subject to a mandatory minimum under the CSA of ten years. The district court had the statutory authority to sentence him to a maximum of life imprisonment on that count alone. Abbott received a fifteen-year sentence under the ACCA. That statute, according to the Court, allows for a maximum term of life imprisonment wholly apart from any consecutive sentence under Section 924(c). *Custis v. United States*,

511 U.S. 485, 487 (1994). In both cases, the sentencing judge followed the government's interpretation of Section 924(c)(1)(A) and imposed mandatory minimum terms of five years consecutive to the lengthy sentences on the other counts. Under a proper reading of the statute, the length of any additional sentences beyond the applicable minimum would have been governed by Section 3553(a), which requires the judge to consider all of the statutory purposes of sentencing and apply them to the facts of a particular case.

The "except" clause does not guarantee defendants shorter sentences. It merely affords the sentencing court appropriate discretion—the type of discretion exercised by federal judges every day in every sentencing hearing that is governed by Section 3553(a). A proper reading of Section 924(c)(1)(A) will not force judges to follow some unfamiliar standard, nor will it inject uncertainty or complexity into the sentencing process. Instead, it will be faithful to Congress's command that when a greater mandatory minimum is already provided by law, the length of the additional sentence should be guided in part by the considered judgment of the Sentencing Commission, which this Court notes has "examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill [its] statutory mandate," *Rita v. United States*, 551 U.S. 338, 349 (2007), and that the sentence ultimately imposed be "sufficient, but not greater than necessary, to comply with the purposes" of any federal sentence. 18 U.S.C. § 3553(a).

CONCLUSION

The judgments of the courts of appeals should be reversed and the cases remanded for a proper application of Section 924(c)(1).

Respectfully submitted.

JOSHUA L. DRATEL
CO-CHAIR, NACDL
AMICUS COMMITTEE
2 Wall Street
Third Floor
New York, NY 10005
(212) 732-0707
JDratel@joshuadratel.com

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500
MEstrada@gibsondunn.com

Counsel for Amicus Curiae

May 7, 2010