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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE GOVERNMENT CONTINUES TO DISREGARD THE PLAIN LANGUAGE OF THE STATUTE

This case involves a straightforward statutory provision: the "except" clause in 18 U.S.C. § 924(c). That clause provides that defendants should not receive a mandatory minimum sentence under § 924(c) if they face "a greater minimum sentence [that] is otherwise provided by this subsection or by any other provision of law." The case turns on the meaning of the phrase "any other provision of law."

The court of appeals, at the government's behest, held that the phrase "any other provision of law" serves solely as a "safety-valve" for future laws and does not apply to *any* existing provisions of law. Pet App. 13a. In our opening brief, we argued that this interpretation contravened the bedrock principle that statutory language should be accorded its plain meaning. Br. 13-18. It could scarcely be more plain that the phrase "any other provision of law" must include some provisions of law.

In its brief, the government does not try to defend the court of appeals' decision on its own terms. Nor, by extension, does the government defend its own earlier interpretations of the "except" clause, offered in this case and many others, including one pending before this Court. See Pet. at 12, *United States* v. *Williams* (2009) (No. 09-466) (pending) (noting the absence of any laws outside of § 924(c) covered by the "except" clause). Instead, the government now argues that the "except" clause actually *does* have a current application. See U.S. Br. 18-21. Under the government's new reading, instead of applying to *no*

existing laws, "any other provision of law" would apply to *one*: 18 U.S.C. § 3559(c).[1]

The government's shift is understandable, given the implausibility of reading "any other provision of law" to mean "no existing provision of law." But its new interpretation is scarcely more plausible than its earlier one. It remains inconsistent with the text, structure, and purpose of the statute and finds no support in the legislative history. Put simply, the phrase "any other provision of law" does not and cannot mean "one provision of law."

A. The Government's Interpretation Is Far From The "Most Natural Reading" Of The Statutory Text

The government argues that "any other provision of law" refers only to laws that require "higher minimum sentences for the Section 924(c) offense itself." U.S. Br. 13. This reading has no basis in the text, adds words to the statute that are not there, and fundamentally changes the meaning of the "except" clause. Instead of applying to "any other provision of law," as the statute plainly commands, the "except" clause would apply to a vanishingly narrow and partially hypothetical subset of laws: Section 3559(c) and some imaginary future laws, not one of which has materialized in the twelve years since the "except" clause was adopted. See Pet. Br. 21-26.

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[1] Section 3559(c) is a rarely used provision at that. The Sentencing Commission reports that there were only two counts of conviction for 18 U.S.C. § 3559(c) in 2008, the most recent year for which such statistics are available. See United States Sentencing Commission (USSC), *Overview of Statutory Mandatory Minimum Sentencing*, App. B (2009), *available at* http://www.ussc.gov/MANMIN/man_min.pdf.

The government nonetheless claims that its interpretation is "'the most natural reading of the relevant statutory text.'" U.S. Br. 16 (quoting *United States* v. *Ressam*, 553 U.S. 272, 274 (2008)). But reading "any other" to mean "almost none" is far from natural. As this Court recognized in *Republic of Iraq* v. *Beaty*, the word "any" in the phrase "any other provision of law" has an "expansive meaning"—not an exceedingly narrow one. 129 S. Ct. 2183, 2189 (2009) (internal quotation marks omitted).

The government never offers a persuasive reason to disregard the plain language of the statute. The government tries to argue, at one point, that petitioners themselves do not follow the plain language, implying that a plain reading of the "except" clause is not possible. U.S. Br. 23-24. It later backtracks from this argument, however, and in a footnote essentially endorses the logic of petitioner's interpretation. See U.S. Br. 25 n.4.

We argued in our opening brief that one could follow the plain meaning of "any other provision of law" without leaving the "except" clause completely unbounded. Br. 15-21. This is because application of the "except" clause still depends on whether a "greater minimum sentence is *otherwise provided*." § 924(c)(1)(A) (emphasis added). *Id.* at 18-20. The government, in footnote four of its brief, agrees and acknowledges that the phrase "otherwise provided" limits the "except" clause to laws that are applicable to a particular defendant. See U.S. Br. 25 n.4. Had the government stopped there, petitioner and the government would be in basic agreement about the meaning of the "except" clause.

The government goes a step further, however, and claims that "the *only plausible reading*" of "otherwise provided" is a sentence that is "'otherwise provided

for the violation of Section 924(c) at issue.'" See U.S. Br. 25 n.4 (emphasis added). But surely this is not the *only* plausible reading of the simple and general phrase "otherwise provided." Indeed, it is not even *a* plausible reading, given that it renders one half of the "except" clause largely superfluous.

As we explained in our opening brief, "otherwise provided," in combination with the phrase "any other provision of law," most naturally refers to a sentence that is otherwise provided for *this* defendant. See Pet. Br. 18-21. As we further explained, it is also sensible to construe "otherwise provided" to limit application of the "except" clause to sentences for conduct occurring during the transaction giving rise to the § 924(c) offense. Doing so avoids random applications of the "except" clause and is faithful to § 924(c)'s purpose. See *ibid.*; see also *United States* v. *Williams*, 558 F.3d 166, 171-172 (2d Cir. 2009), petition for cert. pending, No. 09-466 (filed Oct. 20, 2009). The government's reading, by contrast, goes well beyond recognizing reasonable, contextual limits on the phrase "any other provision of law" and instead drains that phrase of its meaning. See, *e.g.*, *Knight* v. *Commissioner*, 552 U.S. 181, 190 (2008) (rejecting an interpretation of one provision that would cause another provision in the same statute to "do no work").

B. Under The Government's New Interpretation, The Phrase "Any Other Provision Of Law" Still Does No Work

The government, as mentioned, now argues that the "except" clause in § 924(c) applies to 18 U.S.C. § 3559(c). U.S. Br. 18-21. The government also suggests that it might apply to one other provision: 18 U.S.C. § 924(j)(1). *Id.* at 21 n.3. The government leans heavily on the existence of these provisions,

contending that they prove that the government's reading of the statute is plausible. *Id.* at 18-21. In fact, they demonstrate the opposite.

1. The "Except" Clause Is Unnecessary To Prevent Consecutive Sentences For § 3559(c) And § 924(c)

Section 3559(c), the federal "three strikes" law, imposes life imprisonment for serious repeat offenders, "notwithstanding any other provision of law." Two of the offenses, among many, that trigger § 3559(c) are "firearms possession" and "firearms use," as those terms are described in § 924(c). See 18 U.S.C. §§ 3559(c)(2)(F)(i), 3559(c)(2)(D). The government argues that the "except" clause operates in this context to make clear that a defendant who receives a life sentence under § 3559(c) should not also receive a separate consecutive sentence for a § 924(c) violation. U.S. Br. 18-21. That is, the "except" clause makes clear that courts should not impose a mandatory minimum sentence that would begin after the completion of a life sentence.

The flaw in that argument is apparent on its face. Life sentences under federal law are exactly that: sentences for the duration of the defendant's life, with no possibility of parole or early release. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 218(a)(5), 98 Stat. 1837, 2027; 18 U.S.C. § 3624(b)(1). Put simply, there is no point in limiting the imposition of consecutive sentences that would begin after a defendant "completes" a life sentence in federal system, and it is implausible to think that Congress would have intended the broadly worded "except" clause to accomplish a purely metaphysical objective.

Even if it *were* plausible to suppose that Congress would use a broad phrase solely for this narrow, hypothetical purpose, that goal is already achieved by § 3559(c) itself. By requiring a life sentence "notwithstanding any other provision of law," § 3559(c) makes clear that courts cannot impose both a life sentence for a defendant whose "third strike" is a § 924(c) violation and a consecutive sentence for the same § 924(c) violation. Thus, the government's single proposed application for the phrase "any other provision of law" still leaves this portion of the statute "insignificant, if not wholly superfluous," and with "no operative effect on the scope of" § 924(c). See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001).

The government's invocation of the legislative history of § 3559(c) does not help its argument; in fact, it cuts the other way. The government argues that the "except" clause was needed in 1998 to reconcile § 924(c) and § 3559(c) because both statutes were simultaneously amended that year to cover "firearms possession." U.S. Br. 19-21. But this argument ignores the fact that § 924(c) and § 3559(c) were already linked before the 1998 amendments, because one of the felonies triggering § 3559(c) was "firearms use" as defined in § 924(c). See Pub. L. No. 103-322, § 70001, 108 Stat. 1982. Amending both statutes to cover firearms possession, in addition to firearms use, thus cannot possibly establish a sudden need in 1998 for an "except" clause in § 924(c) to reconcile the two statutes.

2. 18 U.S.C. § 924(j)(1) Can Never Trigger The "Except" Clause

That leaves § 924(j)(1). This statutory provision, which the government relegates to a footnote (U.S. Br. 21 n.3), establishes penalties for defendants who, in the course of violating § 924(c), cause the death of

another person through the use of a firearm. Defendants who violate § 924(j)(1) "shall be punished by death *or* by imprisonment for any term of years *or* for life." § 924(j)(1) (emphasis added). The government suggests that this provision falls within the "except" clause, apparently in another effort to show that its interpretation does not render the phrase "any other provision of law" meaningless.[2]

Section 924(j)(1), however, cannot trigger the "except" clause, which may explain why the government only hints at this argument. The reason is simple: Section 924(j)(1) does not establish a mandatory minimum sentence.[3] Thus, the second of two provisions the government cites to establish that its reading of the "except" clause does not render a portion of the statute superfluous points in exactly the opposite direction.

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[2] Oddly, the government never explicitly argues that § 924(j)(1) is covered by the "except" clause. Instead, the government states, obliquely, that "Section 3559(c) is not alone in imposing greater penalties for violation of Section 924(c)," and then goes on to describe § 924(j)(1). See U.S. Br. 21 n.3. The clear implication is that § 924(j)(1) is, like § 3559(c), covered by the "except" clause, but the issue is not free from doubt given the government's cryptic phrasing.

[3] The phrase "any term of years" is typically used to denote that there is no mandatory minimum sentence. See, *e.g.*, Revisor's Note, 18 U.S.C. § 1111 (explaining phrase as serving to "conform[] to a uniform policy of omitting the minimum punishment"). Even if the phrase were read to create a mandatory minimum, by its plain terms it could not establish a mandatory minimum longer than two years, which is less than the shortest mandatory minimum established by § 924(c). Either way, § 924(j)(1) could never trigger the "except" clause.

C. Following The Plain Language Of The "Except" Clause Neither Renders § 924(c) Meaningless Nor Contravenes The Statute's Purpose

Contrary to the government's insinuation (U.S. Br. 38-39), following the plain language of the "except" clause does not hollow out the sentencing provisions of § 924(c) by making them inapplicable whenever defendants face sentences for drug trafficking, crimes of violence, or firearms offenses. As the government is surely aware, there are numerous drug trafficking offenses, crimes of violence, and firearms offenses that either have no mandatory minimum sentence or impose a minimum sentence shorter than five years. Indeed, most of these offenses do not trigger mandatory minimum sentences. See 21 U.S.C. 841(b) (including a variety of non-mandatory-minimum penalties under the Controlled Substances Act); 21 U.S.C. § 960(b) (same regarding penalties under the Controlled Substances Import and Export Act); 18 U.S.C. § 924 (same regarding penalties for firearms offenses); 18 U.S.C. § 1111(b) (no mandatory minimum for second-degree murder); 18 U.S.C. § 1112 (no mandatory minimum for manslaughter). Not surprisingly, thousands of federal defendants are sentenced each year for such crimes and thus face no mandatory minimum sentence. See USSC, *Overview of Statutory Mandatory Minimum Sentencing* at 7.

Faithfully applying the "except" clause as written, therefore, would not render § 924(c) meaningless. The government's objection is nonetheless telling, if ironic, because it illustrates the obligation to avoid reading statutory provisions so as to leave them "with little, if any, meaningful application." *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2301 (2009). This, of course,

is precisely what the government's reading of "any other provision of law" would do to one half of the "except" clause.

More generally, petitioner's interpretation of the "except" clause is perfectly consistent with the purpose of the statute and its legislative history. That purpose, as we explained in our opening brief (Br. 26-29), is to ensure that defendants who possess or use a gun during a crime of violence or drug trafficking spend at least five years in prison. None of the legislative history cited by the government (U.S. Br. 28-31, 47-48) suggests otherwise. Applying the "except" clause according to its plain meaning furthers the legislative purpose of § 924(c), while respecting the broad language that Congress actually used in the clause.

The government argues that Congress could have achieved the same purpose by requiring that § 924(c) sentences run concurrently, rather than consecutively, with sentences for other offenses. U.S. Br. 35. That a statute could be rewritten to achieve a similar purpose, however, is not a license to ignore the language that Congress has chosen. In any event, the government overlooks the fact that ensuring *at least* a five year sentence is not the same as ensuring *only* a five year sentence, which is what a concurrency requirement would establish in every case where the sentence for the predicate crime is less than five years. Including the "except" clause also serves to clarify that only one § 924(c) sentence should be imposed for a single violation. See, *e.g.*, *Missouri* v. *Hunter*, 459 U.S. 359, 366-67 (1983).

Finally, the government's argument regarding the purpose of the "except" clause rests on the false assumption that defendants must always receive a § 924(c) sentence in addition to a sentence for the

predicate offense. See U.S. Br. 27-29. But that is not, in fact, how § 924(c) operates. Defendants can be convicted of a § 924(c) offense even if not charged with or convicted of a predicate offense. See, *e.g.*, *United States* v. *Hargrove*, No. 06-3184, 2010 WL 2399348, at *15 (10th Cir. June 16, 2010) (noting uniformity among courts of appeals on this issue). In these cases, because of prosecutorial discretion or a jury's decision, the only sentence a defendant will receive is for the § 924(c) offense. The government is thus incorrect in asserting that the purpose of § 924(c) is to ensure that defendants *always* receive a § 924(c) sentence *and* a sentence for the predicate crime. To the contrary, this feature of § 924(c) underscores that the actual purpose of § 924(c) is to ensure that defendants serve at least five years in prison, which is perfectly compatible with the plain language of the "except" clause.

II. THE GOVERNMENT'S ATTEMPT TO DISTINGUISH *NIJHAWAN* IS UNAVAILING

As we explained in our opening brief (Br. 22-24), this Court in *Nijhawan* rejected an interpretation that would leave a statutory provision "with little, if any, meaningful application." 129 S. Ct. at 2301. For similar reasons, we argued, the government's interpretation of the "except" clause in § 924(c) should be rejected. The government tries to distinguish *Nijhawan*, in part by asserting that the statutory interpretation rejected in that case would have "caused the statutory trigger to function in an irrational manner" because it would cover a "seemingly random set of federal and state statutes." U.S. Br. 26 (citing *Nijhawan*, 129 S. Ct. at 2302). Precisely the same could be said, however, of the government's interpretation of § 924(c)'s "except" clause.

A. The Government Never Explains What It Means By "A" Or "The" § 924(c) Offense

The government contends that "any other provision of law" in the "except" clause encompasses only laws that create a sentence for "*a* Section 924(c) offense" or "*the* Section 924(c) offense." U.S. Br. 10, 13 (emphasis added). But the government never explains exactly what it means by "a" or "the" § 924(c) offense. This silence is odd, both because this is a crucial part of the government's argument and because the answer is not obvious.

There are two possible answers, but neither helps the government. First, the government might be suggesting that there is only a single § 924(c) offense, and that only provisions of law that impose sentences for that single offense are included within the "except" clause. This position, however, cannot be squared with this Court's recent decision in *United States* v. *O'Brien*, 130 S. Ct. 2169 (2010), which made clear that there is no such thing as "a" or "the" § 924(c) offense.

As this Court held in *O'Brien*, § 924(c)(1)(B)(ii) establishes a separate offense, which requires proof of the element that a machine gun was possessed or used. See *id.* at 2180. All parties agree that the "except" clause applies to higher mandatory minimum sentences established by subsections of § 924(c), including the subsection at issue in *O'Brien*. It follows that separate offenses within § 924(c), and not simply sentencing enhancements, fall within the "except" clause. It remains a mystery why, under the government's reading, separate offenses outside of § 924(c) must be excluded from the "except" clause. The mystery only deepens when one considers that separate offenses outside of § 924(c) are supposedly

excluded by the inclusive phrase "any other provision of law."

The second possibility is that by "a" or "the" § 924(c) offense the government means to refer to the way offenses are defined for purposes of double jeopardy under *Blockburger* v. *United States*, 284 U.S. 299 (1932). Under that test, two offenses are considered the "same" unless each offense requires proof of a fact that the other does not. *Id.* at 304; see also *Whalen* v. *United States*, 445 U.S. 684, 691-692 (1980). But if *that* is what the government means, there is an enormous problem: Predicate § 924(c) offenses—drug trafficking and crimes of violence—are necessarily the "same" as § 924(c) offenses for purposes of the *Blockburger* test. Yet the government rejects the idea that sentences for predicate offenses fall within the "except" clause. U.S. Br. 14-18.

In sum, the government's insistence that the phrase "any other provision of law" includes *only* provisions of law that establish sentences for "a" or "the" § 924(c) offense, if followed, would make application of the "except" clause irrational at best and incoherent at worst. More fundamentally, it remains hard to arrive at the government's cramped and needlessly complicated interpretation from the simple statutory phrase "any other provision of law."

B. *Nijhawan* Cannot Be Distinguished On The Ground That The Statutory Provision At Issue In That Case Was "Scope-Defining"

The government also attempts to distinguish *Nijhawan* on the ground that the statutory trigger in that case—the definition of "aggravated felony" for purposes of deportation—is functionally different from the statutory trigger in this case. U.S. Br. 25-

26. The government argues that the statutory provision in *Nijhawan* was "scope-defining," while the provision at issue in this case is a "narrow *exception*" to the statute. *Ibid*. This is nothing but word play, fixating on the word "except" while ignoring the function of the "except" clause. The "except" clause establishes the operative scope of § 924(c) and is thus, by definition, "scope-defining."

There is no indication, in any event, that the principle of *Nijhawan* is somehow limited to "scope-defining" language, however defined—just as there is no indication that the duty to give meaning to each word in a statute only applies to "scope-defining" language. See, *e.g.*, *Duncan*, 533 U.S. at 174. The statutory provision at issue in *Nijhawan* defined one of more than fifty offenses that qualify as "aggravated felonies" for purposes of deportation. See 8 U.S.C. § 1101(a)(43). The notion that each of these fifty-plus definitions must be given an expansive reading, while the "except" clause must be given an exceedingly narrow one, cannot be supported. This Court in *Nijhawan* unanimously rejected an interpretation of one discrete and relatively minor provision in a sprawling deportation statute because it would give that provision "little, if any, meaningful application," 129 S. Ct. at 2301, and what application it would have would be random. The government's interpretation in this case ought to be rejected for the same reasons.

Knight v. *Commissioner*, 552 U.S. at 191, upon which the government relies (U.S. Br. 26), is not to the contrary. *Knight* rejected a statutory interpretation under which an "exception would swallow" or "eviscerate" a general rule. 552 U.S. at 191 (internal quotation marks omitted). For reasons already explained, according the "except" clause its plain

meaning would hardly "swallow" up or "eviscerate" § 924(c). See *supra* at 7-8.

III. THE GOVERNMENT OFFERS NO GOOD REASON TO REJECT PETITIONER'S ALTERNATIVE READING OF THE "EXCEPT" CLAUSE

In our opening brief, we offered an alternative reading of the "except" clause that would limit its application to other firearms offenses. Br. 39-48. We reasoned that this interpretation is consistent with the central purpose of § 924(c), which is to punish defendants who use firearms in the course of a crime of violence or drug trafficking. *Id.* at 39. This interpretation would also eliminate the hypothetical sentencing anomalies that have troubled some lower courts. *Id.* at 46-47.

The government agrees that the central purpose of § 924(c) is "to deter criminals from using or possessing guns in the course of certain crimes by ensuring that they would face an additional mandatory minimum sentence if they did so." U.S. Br. 27. That purpose would be served by limiting the "except" clause to laws, like the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e), that establish mandatory minimum sentences for the use of firearms that are longer than the sentences under § 924(c). Nonetheless, the government chides petitioner for offering this modest, alternative reading of the statute, suggesting that it is implausible. U.S. Br. 36-37.

What the government now calls an implausible interpretation, however, is strikingly similar to the reading the government itself offered just two years ago in *United States* v. *Whitley*, 529 F.3d 150, 153 (2d. Cir. 2008). See also Pet. Br. 40-41 (quoting

government's Second Circuit brief in *Whitley*, which claimed that the "except" clause applies to other firearms offenses *outside* of § 924(c) as long as they provide consecutive sentences). As the First Circuit has recognized, moreover, it is perfectly plausible to assume that Congress wanted "to avoid a double increment for the same firearm," and thus sensible to conclude that the "except" clause applies to other firearms offenses. *United States* v. *Parker*, 549 F.3d 5, 11-12 (1st Cir. 2008), cert. denied, 129 S. Ct. 1688 (2009).

The government argues that Congress could not have sought to avoid such "double counting" because other firearms offenses, such as ACCA, serve a different purpose than § 924(c). U.S. Br. 36-37. The government reasons that ACCA "focus[es] on the repeat offender, not on a particular use of a firearm." *Id.* at 36.

The weakness of the government's objection is obvious when one recalls that the government has conceded that the "three-strikes" law of § 3559(c) is covered by the "except" clause. *Id.* at 19-21. That law, like ACCA, contains a "recidivism enhancement," which is focused on "the repeat offender, not on a particular use of a firearm" (U.S. Br. 36). Yet the government agrees that defendants should receive only a § 3559(c) sentence and not an additional sentence for the § 924(c) offense.

The relationship between § 3559(c) and § 924(c) is also instructive because it indicates that Congress believed that the recidivism enhancement under § 3559(c) was sufficiently severe to justify *not* imposing a separate sentence under § 924(c). For similar reasons, Congress could have concluded that defendants already facing a fifteen-year sentence under ACCA need not receive an additional sentence

under § 924(c) for use of the same gun in the same transaction.

Indeed, the structure of § 924(c) reveals that Congress wanted to ensure that defendants who use or possess firearms in connection with specified crimes spend at least a definite, minimum amount of time in prison, leaving any additional penalties to the discretion of the district judge. Section 924(c) is not finely calibrated to ensure that, as defendants climb the ladder of seriousness in terms of their offenses, they receive a perfectly matched minimum sentence. The sentencing scheme instead reveals general thresholds rather than perfect stair-steps.

For example, a defendant who possesses a handgun is sentenced to five years, while a defendant who brandishes a handgun is sentenced to seven. Compare § 924(c)(1)(A)(i) with § 924(c)(1)(A)(ii). However, defendants who either possess *or* brandish a short-barreled rifle receive the same mandatory minimum sentence of ten years, see § 924(c)(1)(B)(i). Similarly, defendants who possess a machine gun receive a mandatory minimum sentence of thirty years, see § 924(c)(1)(B)(ii), but they face no higher minimum sentence for brandishing or even discharging the gun. Thus, once a certain threshold sentence is reached, previous distinctions among defendants no longer come into play.

Likewise, those who possess a short-barreled rifle are punished more severely for an initial offense than those who possess a handgun. Compare § 924(c)(1)(B)(i) (ten years) with § 924(c)(1)(A)(i) (five years). But for a second or subsequent offense, these defendants are treated identically—both receive a twenty-five year sentence. § 924(c)(1)(C)(i). These various provisions reveal an interest in reaching a threshold, beyond which mandatory distinctions

among offenses disappear and are instead left to the sentencing court. Thus, it is perfectly consistent with the structure of § 924(c) for Congress to have decided that, once a defendant receives fifteen years under ACCA for the use or possession of a firearm, there is no need to tack on another mandatory minimum sentence for the use or possession of the same firearm in the same transaction.

The government's reliance on *United States* v. *Gonzales*, 520 U.S. 1 (1997), is misplaced. In that case, this Court invoked the plain meaning of the phrase "any other term of imprisonment" in § 924(c) to hold that the phrase included state terms of imprisonment. *Id.* at 5-6. Along the way, the Court acknowledged that by the statute's plain terms, "§ 924(c) enhancements" must run "consecutively to all other prison terms, regardless of whether they were imposed under firearms enhancement statutes similar to § 924(c)." *Id.* at 10. The government argues that this feature of § 924 proves that Congress could not have been concerned with "double counting." U.S. Br. 37. The fact that § 924(c) sentences must run consecutively, however, says nothing about the scope of the "except" clause, which, by definition, excludes some sentences altogether. And, again, it would not be unreasonable to decide that, once a certain minimum threshold punishment is reached, there is no need to tack on an additional mandatory minimum sentence.

IV. THE GOVERNMENT CONCEDES THAT ANY ALLEGED ANOMALIES CREATED BY § 924(C) CAN BE RESOLVED BY DISTRICT COURTS DURING SENTENCING

The government repeats the argument regarding anomalies made by the court of appeals, Pet. App. 15a-16a, which amounts to the contention that

avoiding supposed anomalies justifies ignoring the plain language of the "except" clause. See U.S. Br. 39-41. The government does not contend that anomalies arise because more culpable defendants will receive a shorter *total* sentence than less culpable defendants. Instead, the supposed anomalies arise because, under certain circumstances, less culpable defendants receive a lower mandatory *minimum* sentence than more culpable defendants. The government also claims that it is anomalous for a defendant to be convicted of § 924(c) but "receive no sentence for that offense." *Id.* at 39.

There are four separate problems with the government's argument. First, the government concedes that the alleged anomalies do not constitute the sort of "absurdities" that would justify ignoring the plain language of a statute. U.S. Br. 43. For this reason, the government is forced to argue that allowing district courts some sentencing discretion is inconsistent with the purpose of the act. The reason for the inconsistency, however, is the entirely circular one that the purpose of the act is to take away all sentencing discretion. See U.S. Br. 44.

Properly understood, § 924(c), including the "except" clause, limits a district court's discretion but does not eliminate it entirely. This result is hardly unusual in a federal sentencing scheme that consists of offenses with mandatory minimum sentences and others with no such minimums. Nor is it unusual in connection with § 924(c) itself. Section 924(c), after all, provides a mandatory minimum for the discharge of some weapons (such as handguns) but not others (such as machine guns), leaving additional penalties in the latter cases to the court's discretion. In addition, § 924(j), which applies to defendants who commit murder or manslaughter in the course of

violating § 924(c), does not impose a mandatory minimum sentence at all, leaving the sentence to the discretion of the district court.

Second, the government concedes that district courts can cure any supposed anomalies by relying on their authority under 18 U.S.C. § 3553(a) and provisions in the Sentencing Guidelines that have been in effect since the "except" clause was added to § 924(c) in 1998. See U.S. Br. 44-46. The government thus cannot dispute that more culpable defendants can easily receive longer total sentences than less culpable defendants, which is ultimately what matters in terms of fair and just sentencing. Indeed, the situation here is no more anomalous than the fact that refusing to testify before Congress carries a mandatory minimum sentence (one month of imprisonment), see 2 U.S.C. § 192, while second-degree murder carries no minimum sentence at all, see 18 U.S.C. § 1111(b). In both instances, the supposed "anomaly" disappears when one considers the total sentence—not merely the minimum—a defendant will receive in an actual case.

Third, the government is wrong to assert that anomalies would still arise if the "except" clause were limited to other firearms offenses. Under that reading of the "except" clause, only sentences for firearms offenses that are longer than the relevant mandatory minimum under § 924(c) would be included. Thus, defendants would be subject both to a sentence for the predicate offense *and* whatever higher mandatory minimum sentence could be imposed for use or possession of a firearm in the same transaction. The government claims there would still be an "anomaly" in this circumstance, but only because it assumes that the mandatory sentence for the firearms offense would run concurrently, rather

than consecutively, with the sentence for the predicate offense. See U.S. Br. 41. This assumption, however, is unwarranted, as district courts generally have discretion whether to impose sentences consecutively or concurrently. See 18 U.S.C. § 3584; *Gonzales*, 520 U.S. at 6-7.

Fourth, the government is wrong to claim that it is anomalous for a defendant to be convicted of violating a statute but receive no sentence. This happens whenever a defendant is convicted of a general offense and a lesser-included offense, and the legislature has not authorized cumulative punishments. See, *e.g.*, *Ball* v. *United States*, 470 U.S. 856, 864-865 (1985). It can also happen whenever a defendant is convicted of violating one subsection of this very statute. A defendant convicted of violating § 924(c)(1)(B)(ii) would necessarily also be guilty of violating § 924(c)(1)(A). While the defendant could be charged and found guilty of both offenses, see *ibid.*, even the government would concede that the defendant could not receive a sentence for violating § 924(c)(1)(A).

More generally, it is important to recognize that, contrary to the government's suggestion, defendants who are subject to the "except" clause are not being treated leniently or receiving a windfall. There is not a single mandatory minimum sentence—aside from 924(c)'s brandishing provision—that is greater than five years but shorter than ten. See USSC, *Overview of Statutory Mandatory Minimum Sentencing* at App. A. Thus, every defendant to whom the "except" clause applies because of a provision of law outside of § 924(c) necessarily faces a mandatory minimum sentence of at least ten years. These defendants will face even longer sentences, through the exercise of the district courts' discretion, if their crimes are

sufficiently serious to warrant additional time. Put simply, defendants to whom the "except" clause applies will nonetheless face stiff penalties that are tailored to their crimes.

V. THE GOVERNMENT'S SHIFTING INTERPRETATIONS OF THE "EXCEPT" CLAUSE OFFER FURTHER SUPPORT FOR APPLYING THE RULE OF LENITY IN THIS CASE

The government suggests that the rule of lenity can be applied only if there is a "grievous ambiguity or uncertainty in the statute." U.S. Br. 49 (quoting *Muscarello* v. *United States*, 524 U.S. 125, 138-39 (1998)). This Court, however, has indicated otherwise, most recently endorsing "the familiar principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling* v. *United States*, 130 S. Ct. 2896, 2932 (2010) (internal quotation marks omitted). The Court did not indicate that the ambiguity must be "grievous," but instead applied the rule of lenity to reject "the Government's less constrained construction [of a criminal statute] absent Congress' clear instruction otherwise." *Id* at 2933. See also *Scheidler* v. *NOW, Inc.*, 537 U.S. 393, 408-409 (2003) (stating that criminal statutes "must be strictly construed, and any ambiguity must be resolved in favor of lenity," and if "there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language") (internal quotation marks omitted); *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) (stating that the rule of lenity should apply "where text, structure, and history fail to establish that the Government's position is unambiguously correct").

Regardless of the precise formulation of the rule of lenity, the government cannot prevail. As we argued in our opening brief, the plain language of the statute supports petitioner. Br. 13-21. Even if it did not, however, it could hardly be said that the government's reading of the statute is either unambiguously correct or free from ambiguity ("grievous" or otherwise). Indeed, the government's current interpretation *itself* is ambiguous, leaving unclear the precise scope of the "except" clause. See *supra* at 10-12.

The government's current reading of the statute, moreover, marks its third different interpretation in two years. See *supra* at 1, 14. These repeated interpretive shifts suggest a continual if fruitless search for a persuasive reason to disregard the statutory language that Congress actually used in the "except" clause. These shifting interpretations do not suggest, much less establish, that the government's current reading of the statute is free from ambiguity. To the contrary, the government's "less constrained" and implausible reading of the "except" clause is without basis in the text, history, or structure of the statute, and unless and until Congress provides "clear instruction otherwise," that reading must be rejected. See *Skilling*, 130 S. Ct. at 2932.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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