No. 09-7073

In The
Supreme Court of the United States

CARLOS RASHAD GOULD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

18 U.S.C. § 924(c)(1)(A) requires a 5-year minimum sentence for possessing a firearm in furtherance of a drug-trafficking crime – "[e]xcept to the extent that a greater minimum sentence is otherwise provided by . . . any other provision of law." Did the U.S. Court of Appeals for the Fifth Circuit correctly hold, despite this "except" clause, that a defendant is subject to the 5-year minimum sentence for the firearm possession even though another provision of law requires a greater minimum sentence for another count of conviction?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is available at 329 F. App'x 569. J.A. 15; Pet. App. 1a. The Fifth Circuit's order denying rehearing *en banc* is unreported. J.A. 18; Pet. App. 3a.

JURISDICTION

The Fifth Circuit issued its opinion on July 29, 2009. J.A. 15; Pet. App. 1a. The Fifth Circuit's order denying rehearing *en banc* was issued on August 28, 2009. J.A. 18; Pet. App. 3a. The petition for a writ of certiorari was filed on October 16, 2009. On January 25, 2010, this Court granted the petition and consolidated this case with *Abbott v. United States*, No. 09-479. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 18 U.S.C. § 924(c), the text of which is set out in the Appendix to this brief.

STATEMENT OF THE CASE

Petitioner Carlos Rashad Gould pleaded guilty and admitted to the elements of an indictment's Count One under 21 U.S.C. § 846 and Count Three

under 18 U.S.C. § 924(c)(1)(A). J.A. 10-14. Count One concerns conspiracy to possess with intent to distribute a controlled substance. Based upon the quantity of drugs attributed to Petitioner, 21 U.S.C. § 841(b)(1)(A) requires a minimum sentence of 10 years for Count One, a drug-trafficking crime. Count Three concerns Petitioner's possession of a firearm in furtherance of that drug-trafficking crime. Section 924(c)(1)(A) requires a minimum sentence of 5 years for Count Three, a firearm crime – "[e]xcept to the extent that a greater minimum sentence is otherwise provided . . . by any other provision of law." 18 U.S.C. § 924(c)(1)(A).

At sentencing, Petitioner cited the decision by the U.S. Court of Appeals for the Second Circuit in *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), and objected that, because of section 924(c)(1)(A)'s "except" clause and the 10-year minimum sentence required for the predicate drug-trafficking crime pursuant to 21 U.S.C. § 841(b)(1)(A), the firearm crime is not subject to the 5-year minimum sentence under 18 U.S.C. § 924(c)(1)(A)(i). The District Court overruled this objection.

The District Court sentenced Petitioner to 137 months (11 years, 5 months) for the drug-trafficking crime and to an additional 60 months (5 years) for the firearm crime. This produced a total term of imprisonment of 197 months (16 years, 4 months). Petitioner reurged his objection that the firearm crime is not subject to the 5-year minimum sentence because "a greater minimum sentence is otherwise provided

by [an]other provision of law," that is, the provision of law requiring a 10-year minimum sentence for the predicate drug-trafficking crime, 21 U.S.C. § 841(b)(1)(A). The District Court overruled the objection and entered judgment on the sentence.

On appeal, relying on the unpublished decision in *United States v. Collins*, 205 F. App'x 196 (5th Cir. 2006), as adopted by *United States v. London*, 568 F.3d 553 (5th Cir. 2009), the Fifth Circuit rejected Petitioner's argument that the firearm crime is not subject to the 5-year minimum sentence. J.A. 15-17; Pet. App. 1a-2a. *First*, the Fifth Circuit reasoned that the "except" clause's phrase "any other provision of law" simply provides a safety valve reserving the possibility that another law, enacted by a future Congress, might require a greater minimum sentence for violating section 924(c). *See* J.A. 15-17; Pet. App. 1a-2a; *Collins*, 205 F. App'x at 197-98. *Second*, the Fifth Circuit reasoned that the Second Circuit's and Petitioner's interpretation of the "except" clause was illogical because it would cause some defendants to be punished more leniently than less culpable defendants. *See* J.A. 15-17; Pet. App. 1a-2a; *Collins*, 205 F. App'x at 197-98. *Third*, the Fifth Circuit reasoned that, because section 924(c)(1)(A) as a whole concerns possessing a firearm in furtherance of a drug-trafficking or violent crime, it is reasonable to limit the phrase "any other provision of law" to legal provisions outside of section 924(c) that concern the same thing. *See* J.A. 15-17; Pet. App. 1a-2a; *see Collins*, 205 F. App'x at 198. The Fifth Circuit therefore

affirmed Petitioner's sentence. J.A. 16-17; Pet. App. 2a.

SUMMARY OF THE ARGUMENT

This case concerns the proper interpretation and application of 18 U.S.C. § 924(c)(1)(A)'s "except" clause for sentences involving drug trafficking and firearm possession. Section 924(c)(1)(A) requires a 5-year mandatory minimum sentence for possessing a firearm in furtherance of a drug-trafficking crime – "[e]xcept to the extent that a greater minimum sentence is otherwise provided by . . . any other provision of law." The District Court, affirmed by the Fifth Circuit, erred by imposing this 5-year sentence on Petitioner for possessing a firearm in furtherance of a drug-trafficking crime because another provision of law (21 U.S.C. § 841(b)(1)(A)) requires a greater, 10-year minimum sentence for the drug-trafficking offense.

The plain language of section 924(c)(1)(A)'s "except" clause forbids an additional sentence for the firearm crime under these circumstances. As this Court recently held in *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009), the phrase "any other provision of law" has a plain and expansive meaning that gives no warrant to limit the class of laws to which it refers. The "except" clause therefore exempts a defendant from section 924(c)(1)(A)'s 5-year sentence for possessing a firearm in furtherance of a drug-trafficking

crime where any law for any type of crime requires a district court to impose a greater minimum sentence on the defendant for any count of conviction.

The purpose and context of section 924(c)(1)(A) support this straightforward statutory command. They demonstrate that Congress included the "except" clause in section 924(c)(1)(A), as amended in 1998, as a measure to moderate the expansion of the statute's application and to assure that defendants who possess a firearm in furtherance of a drug-trafficking or violent crime will serve at least 5 years in prison. Petitioner's reading of section 924(c)(1)(A)'s plain meaning accords with and furthers that purpose.

Both the Fifth Circuit and the government misunderstand and misconstrue the "except" clause. Attempting to narrow the expansive scope of the language that Congress chose to enact, they interpret the phrase "any other provision of law" to mean only "any provision of law *outside of section 924(c)* that provides a greater minimum sentence *for violating section 924(c)(1)(A)*." This interpretation, however, requires improperly reading the language "for violating section 924(c)(1)(A)" into the enacted text of the "except" clause. To justify and explain this departure from the "except" clause's actual text, the Fifth Circuit and the government strangely assert that Congress included the phrase "any other provision of law" as a so-called "safety valve" to account for any new, greater minimum sentences in the future that are provided outside of section 924(c) for violating section

924(c)(1)(A) – apparently on the assumption that Congress presupposed its own inability to write a statute or amend section 924(c)(1) in a manner that would specifically account for any such sentencing provisions. It is implausible, however, that Congress would so haphazardly use a phrase as expansive as "any other provision of law" to account only for provisions of law outside of section 924(c) that provide greater minimum sentences for violating 924(c)(1)(A).

Faced with this implausibility, the Fifth Circuit and the government have turned to misplaced canons of construction and fanciful hypotheticals to support a reading of the "except" clause that Congress neither wrote nor intended. The Fifth Circuit's and the government's interpretation, which ignores and distorts the statute's plain language, is incorrect because there is no escaping that the "except" clause – as Congress actually enacted it – means what its plain language says.

Finally, even if this Court were to harbor some doubt as to the "except" clause's meaning in light of the Fifth Circuit's and the government's arguments, the rule of lenity would require the Court to adopt Petitioner's interpretation.

ARGUMENT

I. THE PLAIN LANGUAGE OF 18 U.S.C. § 924(c)(1)(A)'S "EXCEPT" CLAUSE FORBIDS AN ADDITIONAL SENTENCE FOR FIREARM POSSESSION WHERE ANY COUNT OF CONVICTION REQUIRES A MINIMUM SENTENCE GREATER THAN THAT PRESCRIBED IN SECTION 924(c)(1)(A).

This is a statutory construction case. The analysis therefore "begins, as always, with the statutory text." *United States v. Gonzales*, 520 U.S. 1, 4 (1997). "In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (internal quotation marks omitted). Courts may depart from a statute's plain meaning only if adhering to it "would produce an absurd and unjust result which Congress could not have intended," that is, one that is supported by "no plausible reason." *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (internal quotation marks omitted).

The statute at issue here, 18 U.S.C. § 924(c)(1)(A), criminalizes possessing a firearm in furtherance of a drug-trafficking or violent crime and assures that a defendant who does so will receive at least 5 years' imprisonment, and even more if the firearm was either brandished or discharged. 18 U.S.C. § 924(c)(1)(A). Section 924(c)(1)(A) accomplishes this by providing

that a defendant convicted of this firearm crime will receive a 5-year sentence "in addition to" any sentence for the drug-trafficking or violent crime – "except" when section 924(c) or "any other provision of law" already requires the district court to impose "a greater minimum sentence" for any count of conviction. *Id.* That is the plain meaning of section 924(c)(1)(A) and its introductory "except" clause, which was added by amendments to the statute in 1998 (Pub. L. No. 105-386, 112 Stat. 3469 (1998)):

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Id.

Stated differently, the "except" clause modifies the operative phrase "shall . . . be sentenced to a term of imprisonment," which authorizes the penalties for violating section 924(c)(1)(A). *Id.* The clause thus carves out an exception to the general requirement that defendants be sentenced to an additional, consecutive term of at least 5 years' imprisonment for possessing a firearm in furtherance of a drug-trafficking or violent crime. Under section 924(c)(1)(A), a defendant "shall . . . be sentenced to a term of imprisonment of not less than 5 years" for possessing the firearm – which must be imposed on top of any sentence "provided for [the predicate] crime of violence or drug trafficking crime" – "except" when section 924(c) (that is, "this subsection") or "any other provision of law" requires a greater minimum sentence for any count of conviction. *Id.* This assures that the defendant will serve at least 5 years in prison, as Congress intended. Here, Petitioner's predicate drug-trafficking count of conviction provides a greater, 10-year minimum sentence, triggering the "except" clause and mandating that the District Court not impose an additional, section 924(c)(1)(A) sentence.

A. The Plain Language Of Section 924(c)(1)(A) Compels The Conclusion That "Any Other Provision Of Law" Was Intended To Apply Broadly To Statutes Requiring Mandatory Minimum Sentences For Any Count Of Conviction.

Here, "any other provision of law" is the pertinent trigger for applying the "except" clause. Petitioner is not subject to a section 924(c)(1)(A) sentence for possessing a firearm where "any other provision of law" under which he was sentenced provides a greater minimum sentence. This raises the question whether "any other provision of law" means what it says, encompassing all provisions of law affecting the sentence that the district court will impose, or should be narrowly limited to some unspecified subset or class of provisions. *See Gonzales*, 520 U.S. at 5 ("The question we face is whether the phrase 'any other term of imprisonment' 'means what it says, or whether it should be limited to some subset' of prison sentences." (internal citations omitted)).

This Court recently encountered the same question in *Republic of Iraq v. Beaty*, 129 S. Ct. 2183 (2009), which involved the interpretation of the Emergency Wartime Supplemental Appropriations Act. Under that Act, the President had authority to except Iraq from certain laws, including "section 620A of the Foreign Assistance Act of 1961 or *any other provision of law* that applies to countries that have supported terrorism." *Beaty*, 129 S. Ct. at 2189

(emphasis added) (internal citations omitted). At issue in *Beaty* was whether the phrase "any other provision of law" included 28 U.S.C. § 1605(a)(7)'s exception to sovereign immunity for state sponsors of terrorism. *Id*. The Court concluded that it did, holding that "the word 'any' (in the phrase 'any other provision of law') has an 'expansive' meaning, giving us no warrant to limit the class of provisions." *Id.* (internal citations omitted).

That holding relied on this Court's interpretation in *Gonzales* of the word "any," as used in section 924(c)(1)'s phrase "any other term of imprisonment." *See id*. (citing *Gonzales*, 520 U.S. at 4-5). Under section 924(c)(1), a sentence required for possessing a firearm in furtherance of a drug-trafficking or violent crime may not run concurrently with "any other term of imprisonment." 18 U.S.C. § 924(c)(1)(D)(ii). At issue in *Gonzales* was whether "any other term of imprisonment" includes a state prison term or should be limited to a class of prison terms – namely, federal prison terms. *Gonzales*, 520 U.S. at 5.

"Read naturally," the Court explained in *Gonzales*, the word "any" means "one or some indiscriminately of whatever kind." *Id*. at 5 (quoting Webster's Third New International Dictionary 97 (1976)). What is more, "Congress did not add any language limiting the breadth of that word" in the phrase "any other term of imprisonment." *Id*. Thus, the Court held, the phrase "any other term of imprisonment" means all terms of imprisonment, not only federal prison terms. *Id*.

The same reasoning applies here to the "except" clause, which Congress enacted the very next year after this Court's decision in *Gonzalez*. Congress did not add language in section 924(c)(1)(A) that would limit the breadth of "any" in the "except" clause's phrase "any other provision of law." Section 924(c)(1)(A)'s phrase "any other provision of law" means what it says and is as broad as its plain language suggests.

As demonstrated elsewhere in section 924(c)(1)(A), Congress knows how to limit the breadth of "any" when it wants to. In the same sentence in section 924(c)(1)(A) in which the phrase "any other provision of law" appears, Congress limited the phrase "any crime of violence or drug trafficking crime" to "any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States." 18 U.S.C. § 924(c)(1)(A). That no restriction similarly modifies the "except" clause's phrase "any other provision of law" demonstrates that no restriction was intended. *See Gonzales*, 520 U.S. at 5 ("find[ing] it significant" that two sentences before Congress used the unlimited phrase "any other term of imprisonment," Congress used the limited "phrase 'any crime of violence or drug trafficking crime . . . for which [a defendant] may be prosecuted in a court of the United States'").

The words "any" and "other" and the phrase "provision of law" are clear, and that clarity does not disappear upon combining them into a single phrase in section 924(c)(1)(A)'s "except" clause. The phrase "any other provision of law" refers to all provisions of law,

as it did in *Beaty*, and not to some subset or class of provisions concerning particular offense types. As the Sixth Circuit recently explained, there is no qualification of this "prohibition against greater mandatory minimums." *United States v. Almany*, 598 F.3d 238, 242 (6th Cir. 2010). "Instead, the except clause encompasses greater mandatory minimum sentences from both [section 924(c)] and 'any other provision of law.'" *Id*. It therefore encompasses the greater, 10-year minimum sentence provided for Petitioner's predicate drug-trafficking offense pursuant to 21 U.S.C. § 841(b)(1)(A).

B. The Most Natural Reading Of The "Except" Clause's Plain Language Encompasses Any Law Under Which The Defendant Will Be Sentenced For Any Count Of Conviction.

The "except" clause speaks in the present tense of a greater mandatory minimum sentence that "is" provided "by any other provision of law." 18 U.S.C. § 924(c)(1)(A). Other than the offense-defining provisions in section 924(c)(1)(A)'s clauses modifying the subject "any person" ("any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm. . . ."), section 924(c)(1)(A)'s text and structure focus entirely on setting the statutory minimum prison sentence, if any, that a district court must impose for violating section 924(c)(1)(A). And the "except" clause plainly

modifies only section 924(c)(1)(A)'s penalty provisions, not its offense-defining provisions.

Consistent with this, the "except" clause will be triggered by a greater mandatory minimum sentence required for any of a defendant's counts of convictions at sentencing, which is the time and place at which section 924(c)(1)(A)'s penalty provisions (including the "except" clause) are employed. These triggering sentences include, but are not limited to, "a greater minimum sentence" for any drug-trafficking or violent crime on which the section 924(c)(1)(A) count is predicated (as in Petitioner's case) or any offense involving the same firearm as the section 924(c)(1)(A) count. Each is, plainly, "a greater minimum sentence" that "is otherwise provided" for the particular defendant by "any other provision of law" – that is, any statutory provision other than "this subsection" (section 924(c)). *Id.*

In contrast, the "except" clause is not written in the past or future tense to refer to a greater mandatory minimum sentence that was previously imposed or could be imposed in the future. This exception, therefore, is not triggered by a greater mandatory minimum sentence for a past conviction or for a pending count of which the defendant has not been and may never be convicted.

Simply put, the "except" clause, based on the most natural reading of its plain language, prohibits an additional sentence for possessing a firearm in furtherance of a drug-trafficking crime if one of the

defendant's counts of convictions at sentencing – in this case, Petitioner's count of conviction under 21 U.S.C. § 846 – requires that the district court impose a greater minimum sentence.

II. THE STATUTE'S PURPOSE AND CONTEXT CONFIRM THIS UNDERSTANDING OF SECTION 924(C)(1)(A)'S PLAIN LANGUAGE.

The meaning of section 924(c)(1)(A) is plain. It applies, by its own terms, only to a defendant who has committed a drug-trafficking or violent crime, and it speaks prospectively of minimum sentences, if any, to be imposed based on the concomitant use, carrying, or possession of a firearm in addition and consecutive to any sentence for the predicate drug-trafficking or violent crime. Section 924(c)(1)(A)'s "except" clause is equally plain in that it is triggered by a greater mandatory sentence that is provided by, and will be imposed on the defendant by the district court pursuant to, "any other provision of law," without limitation. There is no intimation that Congress intended otherwise. *See Gonzales*, 520 U.S. at 9 ("The statute speaks of 'any term of imprisonment' without limitation, and there is no intimation that Congress meant § 924(c) sentences to run consecutively only to certain types of prison terms.").

"Given the straightforward statutory command, there is no reason to resort to legislative history," *id.* at 6, and there is "no room to speculate about

congressional intent," *id.* at 9; *accord Boyle v. United States*, 129 S. Ct. 2237, 2246 (2009) (holding that where "the statutory language is clear, there is no need to reach . . . arguments based on statutory purpose, legislative history, or the rule of lenity"). Section 924(c)(1)(A)'s purpose and context, however, confirm the statutory text's command.

In 1998, Congress amended section 924(c)(1) to its current version primarily in response to *Bailey v. United States*, 516 U.S. 137 (1995), in which this Court held that "use" of a firearm does not include "possession" of a firearm. *United States v. Whitley*, 529 F.3d 150, 154-55 (2d Cir. 2008). The amendments criminalized possession in furtherance of a drug-trafficking or violent crime while also adding graduated mandatory minimum sentences for brandishing and discharging a firearm and for subsequent convictions under section 924(c). *Id.* At the same time, the amendments added the "except" clause to section 924(c)(1)(A). *Id.* at 153-54 n.2.

While these 1998 amendments suggest that Congress generally intended to extend section 924(c)'s application following this Court's decision in *Bailey*, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). In fact, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id.*

Here, section 924(c)(1)(A)'s text and context demonstrate that, in extending section 924(c)'s application, Congress did not intend to act without restraint. The 1998 amendments reflect that Congress wanted to ensure that a defendant who commits a drug-trafficking or violent crime using, carrying, or possessing a firearm will spend at least 5 years in prison. *Accord Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the Judiciary*, 105th Cong. 3 (1997) (statement of Sen. Helms) ("If you possess a gun in any way to further your violent criminal behavior, you get a minimum of five years in the slammer. . . ."). The statutory text that Congress enacted – which is the best evidence of the statute's purpose – also reflects that Congress reasonably believed that this purpose is served if that defendant is subject to a mandatory minimum sentence of more than 5 years for, as in Petitioner's case, the drug-trafficking crime. *See generally W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of th[e] purpose [of a statute] is the statutory text adopted by both Houses of Congress and submitted to the President."). As the Second Circuit explained:

> Although we have no doubt that a congressional purpose was to enhance firearm penalties, we do not regard it as inconsistent with that purpose for Congress to have provided a series of increased minimum sentences and also to have made a reasoned judgment that where a defendant is exposed to two minimum sentences, some of which were increased by the 1998 amended version,

> only the higher minimum should apply. Indeed, such a sentencing pattern seems eminently sound.

Whitley, 529 F.3d at 155 (footnote omitted).

By its plain terms, the "except" clause added to section 924(c)(1)(A) in 1998 moderated Congress's extension of section 924(c)'s application by directing courts not to add a sentence for possessing a firearm in furtherance of a drug-trafficking crime if, because of "any other provision of law," a defendant is already guaranteed to be sentenced to serve more than 5 years in prison. This is the most reasonable explanation for why Congress added an exception triggered not only by section 924(c) but also by "any other provision of law" at the same time that it extended section 924(c).

III. THE GOVERNMENT AND THE FIFTH CIRCUIT MISUNDERSTAND AND MISCONSTRUE THE "EXCEPT" CLAUSE.

In the face of the most natural reading of section 924(c)(1)(A)'s plain language and this Court's broad interpretation of the statutory phrase "any other provision of law" in *Beaty*, the government and the Fifth Circuit narrowly interpret the phrase "any other provision of law" to mean only those laws outside of section 924(c) that would require a greater minimum sentence *for violating section 924(c)(1)(A)*. *See* Petition for a Writ of Certiorari at 11-12, *United States v. Williams*, No. 09-466 (Oct. 20, 2009); *Collins*,

205 F. App'x at 197-98; *accord* J.A. 15-17 (relying on the "reasoning and holding of *Collins*," adopted in full by *United States v. London*, 568 F.3d 553, 564 (5th Cir. 2009), to reject Petitioner's argument under section 924(c)). Under this interpretation, as applied here, "any other provision of law" would trigger the "except" clause and preclude the imposition of section 924(c)(1)(A)'s 5-year minimum sentence *only* if that other provision required a greater minimum sentence *for the section 924(c)(1)(A) offense itself*. This unduly narrow interpretation, which ignores and distorts the statute's expansive plain language, is incorrect.

A. The Government's And The Fifth Circuit's Interpretation Improperly Reads Language Into The Statute To Narrow The Scope Of Its Expansive Language On An Assumption Of Congressional Incompetence.

The government's and the Fifth Circuit's interpretation of "any other provision of law" improperly reads language into the "except" clause to give it a narrower construction than is called for by the broad, unlimited language that Congress enacted. In particular, their interpretation reads in the phrase "for violating section 924(c)(1)(A)," as if the "except" clause provides: "Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any provision of law *outside of section 924(c) for violating section 924(c)(1)(A)*. . . ." "This added requirement, however, is in no way anchored in

the text of the statute." *See Gonzales*, 520 U.S. at 6 (internal citation and quotation marks omitted). This 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." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, "[t]o supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926).

Had Congress intended the government's narrow construction, "it could have so indicated." *Smith v. United States*, 508 U.S. 223, 229 (1993). The language that Congress actually enacted is most naturally read – without reading any language in – to refer to "any other provision of law" under which the defendant will be sentenced for any count of conviction. Nothing in section 924(c)(1)(A)'s language supports a more restrictive reading of "any other provision of law" to mean only provisions outside of section 924(c) providing penalties for violating section 924(c)(1)(A) or, for that matter, an offense involving the same firearm as the section 924(c)(1)(A) violation.

To justify an interpretation that reads language into the statute to narrow its scope, the government has argued, and the Fifth Circuit held, that the phrase "any other provision of law" acts as a place-holder or "safety valve" in case some future Congress decides to enact a greater statutory mandatory minimum sentence outside of section 924(c) for violating section 924(c)(1)(A). Pet. at 12-13, *Williams*, No. 09-466; *Collins*, 205 F. App'x at 197-98. That is, according

to the government and the Fifth Circuit, by including the phrase "or by any other provision of law" in the "except" clause, Congress was legislating for the possibility of future legislation. Left unanswered by the Fifth Circuit and the government is why Congress would presuppose its own inability to write a statute that would address this issue by, for example, amending section 924(c)(1)(A) to refer specifically to any new statutory provision requiring a greater minimum sentence for a section 924(c)(1)(A) violation.

Indeed, a "safety valve" is only necessary to prevent accidents or to address unforeseeable circumstances. It is implausible that Congress included the phrase "any other provision of law," in addition to the phrase "this subsection" (referring to section 924(c)), for the limited purpose of protecting against the chance that future, new legislation, which enacts provisions somewhere outside of section 924(c) itself, might come into existence and inadvertently create greater minimum sentences for violating section 924(c)(1)(A). That possibility is, in any event, not something that Congress could fail to foresee or control. To the contrary, because Congress alone may enact federal criminal legislation, any legislation that provides a greater statutory minimum sentence for violating section 924(c)(1)(A) would not pass unbeknownst to it. Congress would know any legislation's effect on section 924(c)(1)(A) and can be expected to (and can expect itself to) account for that effect at the time of the legislation's enactment, rather than preemptively.

This Court itself recently doubted that Congress would have statutory triggers apply "in so limited and so haphazard a manner." *Nijhawan v. Holder*, 129 S. Ct. 2294, 2302 (2009). In *Nijhawan*, the Court addressed a statute providing that any alien convicted of an "aggravated felony" may be deported. *Id*. at 2297. The "aggravated felony" at issue was "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." *Id*. The defendant interpreted this language to mean that fraud or deceit constitutes an "aggravated felony" only when a monetary threshold of $10,000 or more is an element of the offense. *See id.* Although the defendant identified three federal statutes with relevant monetary thresholds, those statutes specify thresholds not of $10,000, but of $100,000 or $1,000,000. *Id.* at 2301-02.

Rejecting this interpretation, this Court questioned why Congress would draft a statutory trigger with those three statutes in mind but then specify a monetary threshold – $10,000 – that "would apply to other, nonexistent statutes as well." *Id.* at 2302. That is, the Court refused to believe that Congress would enact such broad language if it had a narrow set of statutes in mind. *See id.* at 2301-02 (noting that the defendant's interpretation would have left the statute "with little, if any, meaningful application"); *accord United States v. Hayes*, 129 S. Ct. 1079, 1087-88 (2009) ("Given the paucity of state and federal statutes targeting *domestic* violence, we find it highly improbable that Congress meant to extend § 922(g)(9)'s

firearm possession ban only to the relatively few domestic abusers prosecuted under laws rendering a domestic relationship an element of the offense."). Otherwise, as the government argued in *Nijhawan*, it "would effectively mean that Congress had used an elephant-sized hole to house a mouse." Brief of Respondent at 30, *Nijhawan v. Holder*, No. 08-495 (Mar. 25, 2009).

The government and the Fifth Circuit are therefore wrong to interpret "any other provision of law" as limited to greater mandatory minimum sentences that may be provided outside of section 924(c) for violating section 924(c)(1)(A). Rather, as in *Beaty*, "any other provision of law" means all provisions of law, not some subset or class of laws. *See Beaty*, 129 S. Ct. at 2189. Because Congress did not limit "any other provision of law" to "any other provision of law for violating section 924(c)(1)(A)," neither may this Court. *Smith*, 508 U.S. at 229 (holding that because Congress did not indicate that it intended a narrow construction, "we decline to introduce that additional requirement on our own").

However, even if the Court were inclined to adopt some sort of narrowed construction of the phrase "any other provision of law," the Court should not accept the government's invitation to narrow it as though it reads "any provision of law outside of section 924(c) that would require a greater minimum sentence for violating section 924(c)(1)(A)." Rather, section 924(c)(1)(A) as a whole, in context, would better yield the conclusion that "any other provision of law"

at the very least refers to statutes providing a mandatory minimum sentence for the predicate drug-trafficking or violent crime itself. The latter portion of section 924(c)(1)(A) makes plain that its mandatory minimum sentences are to be imposed "in addition to the punishment provided for [the predicate] crime of violence or drug trafficking crime" – "except to the extent that a greater minimum sentence is otherwise provided by" a "provision of law" "other" than section 924(c). 18 U.S.C. § 924(c)(1)(A). These "except" and "in addition to" clauses, which appear in the same sentence, both refer to penalties provided by statutory provisions outside of section 924(c) itself. In context, then, the phrase "any other provision of law" must encompass more than provisions outside of section 924(c) for violating section 924(c)(1)(A); it must at least encompass "the punishment provided for such crime of violence or drug trafficking crime" by provisions of law "other" than section 924(c). *Id.* Under that alternative, narrowed construction, the greater, 10-year minimum sentence provided for Petitioner's predicate drug-trafficking offense is itself "a greater minimum sentence [that] is otherwise provided . . . by any other provision of law," *id.*, and his 5-year section 924(c)(1)(A) sentence would have to be vacated.

B. The Government And The Fifth Circuit Have Mistakenly Relied On The Inapplicable Canon Of *Noscitur A Sociis*.

The government and the Fifth Circuit have likewise improperly relied on the canon of "*noscitur a sociis*, according to which a word is known by the company it keeps." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008) (internal citation and quotation marks omitted). The government has argued that, "[j]ust as the phrase 'this subsection' refers to provisions that prescribe minimum sentences for the Section 924(c) offense, so too the phrase 'any other provision of law' should be read to refer to those provisions elsewhere in the United States Code that establish penalties for violating Section 924(c)(1)(A)." Pet. at 12-13, *Williams*, No. 09-466. The Fifth Circuit, for its part, held that, because section 924(c)(1)(A) concerns firearm possession in furtherance of a drug-trafficking or violent crime, the plainly broad phrase "by any other provision of law" should be limited to legal provisions outside of section 924(c) (that is, "this subsection") that concern the same thing. *Collins*, 205 F. App'x at 198.

However, "that a word may be known by the company it keeps is . . . not an invariable rule, for the word may have a character of its own not to be submerged by its association." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923); *see also Graham County Soil & Water Conservation Dist. v. United States*, ___ S. Ct. ___, 2010 WL 1189557, at

*4-5 (Mar. 30, 2010) (rejecting the argument that "the placement of 'administrative' squarely in the middle of a list of obviously federal sources strongly suggests that 'administrative' should likewise be restricted to *federal* administrative reports, hearings, audits, or investigations"). For example, in *Ali*, this Court construed the phrase "any officer of customs or excise or any other law enforcement officer." *Ali*, 552 U.S. at 215-16 (internal quotation marks omitted). The Court rejected the application of *noscitur a sociis*, holding that the language "any other law enforcement officer" was "all-encompassing" and not limited to "any other law enforcement officer acting in a customs or excise capacity." *Id.* at 227 (internal quotation marks omitted). According to the Court, the statute's emphasis on "customs and excise is not inconsistent with the conclusion that 'any other law enforcement officer' sweeps as broadly as its language suggests." *Id.* at 226.

Similarly, nothing in section 924(c)(1)(A) requires this Court to assimilate the phrase "provided by . . . any other provision of law" with the phrase "provided by this subsection" simply because the latter has a necessarily narrow application. *Cf. Russell Motor Car Co.*, 261 U.S. at 519. Just as this Court had no reason in *Ali* to limit "any other law enforcement officer" to "any other law enforcement officer acting in a customs or excise capacity," the Court has no reason in this case to limit "any other provision of law" to "any other provision of law providing a greater minimum sentence for violating section 924(c)(1)(A)." While the

"except" clause already encompasses greater minimum sentences for a section 924(c) offense through its phrase "by this subsection," the phrase "by any other provision of law," by its terms, sweeps more broadly than merely sentences for section 924(c)(1)(A) offenses themselves. And it does so with good reason, entirely consistently with the limited scope of the phrase "by this subsection," where section 924(c)(1)(A) is designed to ensure that a defendant who possesses firearms in furtherance of a drug-trafficking or violent crime will serve at least 5 years in prison. That purpose is accomplished by any mandatory minimum sentence of greater than 5 years imposed for *any* count of conviction on which a defendant is sentenced.

The canon of *noscitur a sociis* is, in any event, misplaced here for at least additional reasons. *First*, a list of two items "is too short to be particularly illuminating." *Graham County Soil & Water Conservation Dist.*, 2010 WL 1189557, at *5; *see also S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 379 (2006) ("The argument seems to assume that pairing a broad statutory term with a narrow one shrinks the broad one. . . ."). *Second*, the canon of *noscitur a sociis* does not provide a license to write restrictions into section 924(c)(1)(A)'s text that Congress did not enact. This Court applies the canon only to clarify words that "are of obscure or doubtful meaning." *Russell Motor Car Co.*, 261 U.S. at 520. The "except" clause's consecutive phrases "by this subsection" and "by any other provision of law,"

however, are in no way ambiguous. *Accord United States v. Stevens*, ___ S. Ct. ___, 2010 WL 1540082, at *9 (Apr. 20, 2010) (declining to apply the canon of *noscitur a sociis* in part because words "should be read according to their ordinary meaning" and "the phrase 'wounded . . . or killed' at issue [in the case] contain[ed] little ambiguity"). As explained above, each phrase is clear, and each phrase has its own character that should not "be submerged by its association" with the other. *Russell Motor Car Co.*, 261 U.S. at 519; *see also Graham County Soil & Water Conservation Dist.*, 2010 WL 1189557, at *5.

C. The Government And The Fifth Circuit – Ignoring Both The Sentencing Guidelines And A District Court's Discretion To Impose Greater Than Mandatory Minimum Sentences – Have Wrongly Hypothesized That Interpreting The "Except" Clause According To Its Plain Language Would Lead To "Illogical" Results.

The government and the Fifth Circuit have hypothesized that interpreting the "except" clause to mean what it says would lead to "illogical results." Pet. at 16-17, *Williams*, No. 09-466; *Collins*, 205 F. App'x at 197-98. According to the government and the Fifth Circuit, if Petitioner's interpretation of the plain language of the "except" clause were correct, less culpable defendants would receive greater sentences

than more culpable defendants under a certain set of circumstances:

> Consider, for example, two defendants possessing cocaine – the first possessing 500 grams and subject to a mandatory minimum sentence of five years under 21 U.S.C. 841(b)(1)(B), and the second possessing five kilograms (ten times the amount) and subject to a mandatory minimum of ten years under 21 U.S.C. 841(b)(1)(A). If the first defendant brandishes a firearm in furtherance of his drug offense, under the decision below the "except" clause would not apply and the defendant would be subject to two mandatory minimum sentences totaling 12 years: the five-year sentence under 21 U.S.C. 841(b)(1)(B) and a consecutive mandatory minimum sentence of seven years under Section 924(c)(1)(A)(ii). But if the second defendant brandishes a firearm in furtherance of his much more serious drug offense, under the Second Circuit's view the except clause would apply, the seven-year mandatory minimum in Section 924(c)(1)(A)(ii) therefore would disappear, and the defendant would be subject to a single mandatory minimum of ten years under 21 U.S.C. 841(b)(1)(A). Thus, the more serious offender would face a lesser minimum sentence.

Pet. at 16-17, *Williams*, No. 09-466; *see also Collins*, 205 F. App'x at 197-98.

But this hypothetical ignores that, applying the Sentencing Guidelines, district courts can tailor

sentences for every drug-trafficking crime to ensure that defendants receive sufficient punishment for their conduct. The Guidelines provide a two-level enhancement for possessing a dangerous weapon, "including a firearm," in connection with a drug-trafficking crime. U.S. Sentencing Guidelines § 2D1.1(b)(1) (2009); *see also, e.g.*, *id.* §§ 2B3.1(b)(2)(A), 2B3.2(b)(3)(A)(i) (providing similar enhancements for certain violent crimes). This enhancement applies as long as a defendant is not subject to a section 924(c)(1)(A) sentence for possessing, brandishing, or discharging the firearm. *E.g.*, *id.* § 2K2.4 cmt. n.4. The Guidelines further provide that "[i]f a weapon or dangerous instrumentality was used or possessed in the commission of [an] offense the court may increase the sentence above the authorized guideline range" and that the "discharge of a firearm might warrant a substantial sentence increase." *Id.* § 5K2.6. Thus, a district court sentencing the defendants depicted in the hypothetical would have an array of tools to account adequately and appropriately in a particular case for firearm possession in imposing a sentence.

The same pertinent Guidelines existed in 1998 when Congress amended section 924(c) to include the "except" clause. *E.g.*, U.S. Sentencing Guidelines §§ 2D1.1(b)(1), 5K2.6 (1998); U.S. Sentencing Guidelines §§ 2D1.1(b)(1), 5K2.6 (1997). Because that 1998 amendment predated this Court's 2005 decision in *United States v. Booker*, 543 U.S. 220 (2005), Congress would have known when adding the "except" clause that, if no sentence would be imposed for

violating section 924(c)(1)(A), a district court was *required* to account for the criminalized firearm possession in sentencing the defendant for the drug-trafficking crime alone. A district court therefore had the ability before *Booker* – and certainly has the discretion after it – to fashion a sufficiently stringent sentence that will ensure that the firearm possession is not rendered immaterial or insignificant.

Critically, section 924(c)(1)(A)'s "except" clause has no effect on the statutory maximum applicable to the count of conviction for which "a greater minimum sentence" is provided. The government's hypothetical falls short of proving its point because it simply compares the *minimum* sentence that two defendants might face, not a determinate or maximum term to which each can be sentenced.

The Second Circuit captured this idea in debunking the government's objections to reading the "except" clause literally based on this hypothetical. The Court of Appeals explained that the supposed

> anomaly "disappears upon close scrutiny" because "no court would be *required* to sentence the five-kilogram defendant to only the ten-year minimum. That defendant would face a maximum sentence of life. . . . If the 'except' clause subjected more serious drug offenders to a lower *maximum* sentence than less serious drug offenders, the Government's anomaly argument would have some force." Thus, a literal reading of the statute does not render it incoherent. . . . "[T]he

> literal wording leaves no defendant unsentenced. Indeed, . . . it leaves sentencing judges free to impose precisely the same number of years that the Government contends should have been imposed on [the defendant], but authorizes them to do so as a matter of discretion, not as a requirement."

United States v. Williams, 558 F.3d 166, 175 (2d Cir. 2009) (internal citations omitted), *pet. for cert. filed* (Oct. 20, 2009).

The government's proffered hypothetical therefore does not, as the government would have it, illustrate what are necessarily actual "sentencing *outcomes*" at all. Pet. at 16, *Williams*, No. 09-466 (emphasis added). The results to which the government points are not in any way "illogical," much less the "absurd and unjust result[,] which Congress could not have intended," that would be required to depart from the statute's plain meaning. *Clinton*, 524 U.S. at 429.

In fact, the results of the hypothetical are entirely consistent with the text and purpose of section 924(c)(1)(A) and its "except" clause. Both defendants identified in the government's proffered hypothetical would, as Congress intended, face a total mandatory *minimum* sentence of at least 7 years' imprisonment in connection with committing a drug-trafficking crime while brandishing a firearm.

The result in the government's hypothetical is likewise neither inconsistent with nor somehow

"illogical" in the face of the general rule that a 924(c)(1)(A) sentence must be imposed as a consecutive sentence "in addition to the punishment provided for" the predicate "crime of violence or drug trafficking crime" (including one "that provides for an enhanced punishment if committed by the use of a" firearm). The "except" clause is, by its plain text and design, an *exception* to that general rule. "The government would have the rule swallow the exception." *Williams*, 558 F.3d at 172. When the "except" clause is triggered, the defendant will not receive the lesser minimum sentence under section 924(c)(1)(A) but will be sentenced to a term of at least – in fact, more than – 5 years' imprisonment pursuant to the "greater minimum sentence" provided by section 924(c) or another provision of law.

Neither does the government's hypothetical demonstrate any inconsistency between a plain reading of the "except" clause and the operation of section 924(c)(1)(D)(ii), which dictates that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." 18 U.S.C. § 924(c)(1)(D)(ii). That directive applies by its own terms only when a sentence is actually "imposed on [the defendant] under" section 924(c). *Id.* "If the 'except' clause is read literally, and another statute provides a higher minimum penalty, the minimum

punishments set forth in the subdivisions of Section 924(c)(1)(A) would never be imposed at all, and thus, there would be no concurrent sentences." *Williams*, 558 F.3d at 172.

In any event, even if the government's hypothetical did represent an imagined instance of supposedly "illogical results" or "sentencing outcomes" or "anomalies," that is not enough to relieve this Court of its "obligation . . . to apply the statute as Congress wrote it." *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 470 (1997) (internal quotation marks omitted). The government's arguments simply do not establish that applying the plain text "would frustrate Congress's clear intention or yield patent absurdity." *Id.* (internal quotation marks omitted).

As this Court has explained in recently interpreting section 924(c)(1)(A), courts deal with "[f]anciful hypotheticals" on their own terms, "not by contorting and stretching the statutory language." *See Dean v. United States*, 129 S. Ct. 1849, 1854 (2009). To be sure, "[v]irtually *every* legal (or other) rule" can be argued to have "imperfect applications in particular circumstances." *Barnhart v. Thomas*, 540 U.S. 20, 29 (2003). But that is no reason to ignore or disregard the rule as enacted by Congress. "[T]o the extent that cases can be hypothesized in which [a] holding may support curious or seemingly unreasonable comparative sentences, . . . the asserted unreasonableness flows not from . . . this decision, but from the statute[ ] as Congress wrote [it]." *Busic v. United States*, 446 U.S. 398, 405-06 (1980); *cf. Lamie v.*

United States Trustee, 540 U.S. 526, 542 (2004) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." (internal quotation marks omitted)); *United States v. Locke*, 471 U.S. 84, 95 (1985) ("[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do.").

Thus, as this Court has repeatedly explained (including in connection with this same statute), "[i]f corrective action is needed, it is the Congress that must provide it." *Busic*, 446 U.S. at 405; *cf. Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) ("Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts"). "Given [a] clear legislative directive, it is not for the courts to carve out statutory exceptions based on judicial perceptions of good sentencing policy." *Gonzales*, 520 U.S. at 10; *cf. United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 105 (1820) ("We can conceive no reason why other crimes which are not comprehended in this act, should not be punished. But Congress has not made them punishable, and this Court cannot enlarge the statute.").

D. Even If The "Except" Clause Were In Any Way Ambiguous In Light Of The Government's Interpretation, The Rule Of Lenity Would Still Compel The Court To Adopt Petitioner's Interpretation.

The "except" clause plainly prohibits a section 924(c)(1)(A) sentence for possessing a firearm in furtherance of a drug-trafficking crime when another statute provides a greater minimum sentence for any count of conviction. The government's contrary interpretation of the statute is neither dictated nor justified by, for instance, its reading language into the statute's text to narrow the "except" clause's scope or its proffered hypothetical scenarios that demonstrate neither illogical sentencing outcomes nor absurd results.

But the government's resort to these arguments presents more than an attempt to evade the statute's plain language – it is also an acknowledgement, albeit an implicit one, that the government cannot prevail in the absence of effectively rewriting the statute or a finding of textual ambiguity. *See generally United States v. Monsanto*, 491 U.S. 600, 611 (1989) (canons of interpretation "are quite often useful in close cases, or when statutory language is ambiguous. But we have observed before that such interpretative canons are not a license for the judiciary to rewrite language enacted by the legislature." (internal quotation marks and brackets omitted)). This acknowledgement is fatal to the government's interpretation because, in

the context of interpreting a statue that criminalizes conduct and defines criminal penalties, abiding due process and notice concerns weigh heavily.

Even if this Court were to harbor some doubt as to the "except" clause's meaning, certainly the "Government's position is [not] unambiguously correct," *United States v. Granderson*, 511 U.S. 39, 54 (1994), and the rule of lenity therefore would operate to bar any section 924(c)(1)(A) sentence for Petitioner for possessing the firearm. The rule of lenity – requiring the Court "to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment," *Bell v. United States*, 349 U.S. 81, 83 (1955) – operates when substantial doubt over a statute's meaning remains after all other applicable canons of construction have been exhausted, *see United States v. Shabani*, 513 U.S. 10, 17 (1994). When such a doubt remains, this Court has not hesitated to apply the rule in recognition of the fundamental values that it protects:

> [The rule] is founded on two policies that have long been a part of our tradition. First, 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. To make the warning fair, so far as possible the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures

> and not courts should define criminal activity.

United States v. Bass, 404 U.S. 336, 348 (1971) (internal quotation marks, citations, and footnote omitted).

In light of these policies, "[u]nder a long line of our decisions, the tie must go to the defendant." *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion). "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Id*. "When interpreting a criminal statute, [this Court does] not play the part of a mind reader." *Id.* at 2026. Rather, "before one can be punished, it must be shown that his case is plainly within the statute." *McNally v. United States*, 483 U.S. 350, 360 (1987). "[P]robability is not a guide which a court, in construing a penal statute, can safely take." *Wiltberger*, 18 U.S. (5 Wheat.) at 105 (*quoted in Santos*, 553 S. Ct. at 2026 (plurality opinion)).

Despite the "except" clause's plain text and the ill fit of the government's arguments, the Fifth Circuit nevertheless improperly chose the government's unduly narrow interpretation. Even if that interpretation were *also* reasonable, a court could only conclude that the "except" clause is at least ambiguous in that its application is not expressly foreclosed when a greater minimum sentence is provided for any count of conviction other than the section 924(c)(1)(A) offense itself – that is, insofar as what a "greater minimum sentence is otherwise provided" for is not

made more explicit. Indeed, the Fifth Circuit itself admitted that the "except" clause "is not a model of clarity." *Collins*, 205 F. App'x at 198.

The statute's legislative history does not definitively fix the statute's meaning – and certainly not in favor of the government's interpretation. During the hearings, debates, and the like leading up to section 924(c)(1)(A)'s 1998 amendments, no member of Congress apparently ever expressly discussed the "except" clause. *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 n.2 (1992) ("Suffice it to say that legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning."). Neither do very general statements of policy and purpose behind the 1998 amendments to the statute as a whole suggest that the government's reading of the "except" clause is correct, much less unambiguously so. *See Hughey v. United States*, 495 U.S. 411, 422 (1990) ("Even were the statutory language . . . ambiguous, longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant, preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history." (citation omitted)).

As a result, the Court should, based at the very least on the rule of lenity, reject the Fifth Circuit's and the government's interpretation of the "except" clause, adopt Petitioner's interpretation,

and, if necessary, invite Congress to speak more clearly if Congress desires to go further.

* * *

In the end, this case presents the Court with a choice between two possible interpretations of section 924(c)'s "except" clause. On the one hand, the Court can read "except to the extent that a greater minimum sentence is otherwise provided . . . by any other provision of law" as Petitioner suggests. That reading remains true to the statute's plain language and all discernable evidence of congressional intent. On the other hand, the Court can interpret the clause as the government suggests, to refer only to provisions of law that provide greater minimum sentences for violating 924(c)(1)(A). This not only assumes that Congress chose the expansive language "any other provision of law," without any further limitation, to account only for provisions concerning a particular offense, but also improperly reads language into the enacted text. Faced with such a choice, the right answer is clear, and the Court should adopt the former reading of the "except" clause and vacate Petitioner's sentence.

The Fifth Circuit affirmed the District Court's sentence of Petitioner to 5 years under section 924(c)(1)(A) for possessing a firearm in furtherance of a drug-trafficking crime, even though 21 U.S.C. § 841(b)(1)(A) provides a greater, 10-year sentence for his drug-trafficking crime. Whether based on section 924(c)(1)(A)'s plain language or on the rule of lenity,

this 10-year sentence triggered the "except" clause, precluding the District Court from imposing on Petitioner an additional sentence for the firearm crime. Petitioner's sentence, therefore, should be vacated and his case remanded for further resentencing.

CONCLUSION

For the reasons stated above, the Court should reverse the Fifth Circuit's judgment and remand for further proceedings.

Respectfully submitted,

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APPENDIX (18 U.S.C. § 924(c))

Section 924(c) of Title 18, United States Code, provides:

(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection –

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall –

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law –

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person,

> including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a

crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section –

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition –

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.