No.

In the Supreme Court of the United States

KEVIN ABBOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

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

TABLE OF CONTENTS

TABLE OF CONTENTS – cont'd

TABLE OF CONTENTS – cont'd

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

Statutes

Legislative And Executive Materials

TABLE OF AUTHORITIES – cont'd

Page(s)

Miscellaneous

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Third Circuit, App., *infra*, 1a-24a, is reported at 574 F.3d 203. The district court's opinion, App., *infra*, 25a-31a, is available at 2008 WL 540737.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2009. Petitioner timely filed a petition for rehearing en banc, which was denied on August 31, 2009. App., *infra*, 32a-33a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

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

firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime be sentenced to a term of imprisonment of not less than 5 years.

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

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

Section 922(g) provides, in pertinent part:

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

STATEMENT

As amended in 1998, § 924(c) declares that the mandatory minimum sentences it authorizes for specified gun offenses do not apply when "a greater minimum sentence is otherwise provided * * * by any other provision of law." The courts of appeals have split deeply over what the language of this so-called "except" clause means. The Second Circuit has held that the clause renders the § 924(c) sentence inoperative whenever another provision of law

subjects the defendant to a longer minimum than the one § 924(c) would specify. See *United States* v. *Williams*, 558 F.3d 166 (2d Cir. 2009). Other circuits have held that the clause bars a § 924(c) sentence only when a defendant is subject to a longer mandatory minimum for a *firearm offense*. See pp. 11-15, *infra*. Those courts of appeals have, in turn, split over exactly what kinds of firearm offenses count. Some have held that any firearm offense can qualify; others have held that only violations of provisions exactly like § 924(c) suffice. In the decision below, the Third Circuit joined the Fourth and Fifth Circuits in holding that the term "any other provision of law" does not, in fact, refer to *any* provision of law currently found in the U.S. Code. Instead, the court below concluded, that clause addresses the possibility that Congress might in the future enact a law imposing a heavier minimum sentence for the precise offense described in § 924(c) itself but codify that punishment elsewhere. App., *infra*, at 12a. Only in such a case, the court held, would § 924(c) impose no additional, consecutive sentence.

The United States has acknowledged that "[t]he courts of appeals are divided on the meaning of the 'except' clause," Br. in Opp. at 9, *McSwain* v. *United States*, No. 08-9560 (filed Aug. 5, 2009), and that this is an "important and recurring issue." *Id.* at 7, 10. Accordingly, "[t]he Solicitor General has authorized the filing of a petition for certiorari," *id.* at 7, in another case concerning this provision. That case, however, poses only the first of the two questions this case presents. See Pet. for Reh'g En Banc at 1-2, *United States* v. *Williams*, 558 F.3d 166 (2d Cir.

2009) (No. 07-2436-cr); U.S. S. Ct. No. 09A247 (extending time for filing petition for a writ of certiorari to Oct. 20, 2009).

* * * * *

Petitioner was arrested and indicted for (1) conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846; (2) possession of more than five grams of cocaine base with intent to distribute (and aiding and abetting) in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(B) and 18 U.S.C. § 2; (3) possession of a firearm in furtherance of a drug trafficking crime (and aiding and abetting) in violation of 18 U.S.C. §§ 924(c)(1) & (c)(2); and (4) possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) & 924(e). App., *infra*, 4a-5a. Petitioner was convicted of all charges. *Id.* at 5a.

The district court sentenced petitioner to 15 years' imprisonment on count 4 under § 924(e)(1) because he (1) possessed a gun in furtherance of the drug trafficking crime and (2) had three previous convictions for violent felonies or serious drug offenses. App., *infra*, 5a-6a. The district court sentenced petitioner to an additional five consecutive years' imprisonment on count 3 under § 924(c) for possessing a gun in furtherance of a drug trafficking crime. *Ibid.* In so doing, the district court rejected petitioner's argument that § 924(c)(1)(A)'s "except" clause precluded imposition of a consecutive 5-year § 924(c) sentence for the same gun possession for which it had sentenced him to 15 years under § 924(e)(1). *Id.* at 7a. The district court concluded that § 924(c)(1)(D)(ii), which states that "no term of

imprisonment imposed on a person * * * shall run concurrently with any other term of imprisonment," required imposing an additional consecutive sentence. *Id.* at 28a.

Petitioner appealed, challenging, among other things, the lawfulness of the additional five-year § 924(c) sentence. App., *infra*, 2a. The Third Circuit acknowledged that the language "any other provision of law" "is the subject of disagreement among courts of appeals." *Id.* at 7a. The court held that "the most cogent interpretation is that the [except] clause refers only to other minimum sentences that may be imposed for violations of § 924(c), not separate offenses." *Id.* at 11a-12a. In its view, Congress added the "except" clause in 1998 only "to reflect the reorganization of the statute, which moved alternative minimum sentences into separate subsections." *Id.* at 12a. "In referring to alternative minimum sentences," the court explained, "the [except] clause mentions 'any other provision of law' to allow for additional § 924 sentences that may be codified elsewhere in the future." *Ibid.*

The court of appeals then proceeded to "test [its] interpretation of § 924(c) [against] other possible interpretations." App., *infra*, 14a. It began by expressly rejecting the view "that § 924(c) does not apply when a predicate offense carries a minimum sentence greater than the relevant minimum imposed by [§ 924(c) itself]." *Ibid.* Instead, it concluded that "the [except] clause refers to * * * greater minimum sentences provided by this subsection, not for predicate offenses." *Ibid.* It further determined that § 924(c) minimum sentences "apply *in addition to* the

punishment provided for a predicate offense." *Ibid.* (internal quotation marks omitted). "[R]eading the [except] clause to refer to the minimum sentence for a predicate offense," it continued, "would narrow the scope of § 924(c)" when Congress had intended to broaden it. *Id.* at 15a.

The court then considered whether the phrase "any other provision of law" could refer to greater mandatory minimums imposed under other provisions for possessing the same firearm. The court acknowledged that it "would be logical for Congress to 'provide[] a series of increased minimum sentences [under § 924(c)] and also to [make] a reasoned judgment that where a defendant is exposed to two minimum sentences * * * only the higher minimum should apply.'" *Id.* at 16a (quoting *United States* v. *Whitley*, 529 F.3d 150, 155 (2d Cir. 2008)). The court further recognized that this interpretation would avoid "some of the problems" of the broader view that would include all predicate offenses within the "except" clause. *Ibid.* In the end, however, the Third Circuit rejected this reading, explaining that it could sometimes lead to more-blameworthy defendants receiving shorter minimum sentences than less culpable ones. *Id.* at 17a. Although it noted that district courts could avoid these problems by exercising their discretion to increase a sentence in appropriate cases, it thought such a solution "ad hoc" and believed it unavailable in 1998 when Congress added the "except" clause to the statute. *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's Decision Exacerbates Two Deep Splits Among The Circuits Regarding The Scope Of The "Except" Clause Of 18 U.S.C. § 924(c)(1)(A)

Section 924(c)(1)(A) imposes mandatory additional consecutive sentences upon any person who "uses or carries a firearm" "during and in relation to any crime of violence or drug trafficking crime," or "possesses a firearm" "in furtherance of any such crime." 18 U.S.C. § 924(c)(1)(A). By its terms, however, § 924(c)(1)(A) does not apply when "a greater minimum sentence is otherwise provided by this subsection or by *any other provision of law*." *Id.* (emphasis added). As the Third Circuit expressly acknowledged below, the interpretation of this "except" clause is the "subject of disagreement among courts of appeals." App., *infra*, 7a.

The "except" clause has, in fact, generated splits among nine courts of appeals over two distinct questions: (1) whether the legislatively mandated exception applies when a defendant is subject to "a greater mandatory minimum sentence" for a drug trafficking crime or crime of violence that supplies the predicate for the § 924(c)(1)A) conviction; and (2) whether the exception is triggered when the longer mandatory minimum sentence is imposed for a firearm offense outside of § 924(c) itself. The depth and sharpness of these splits, as well as the resultant confusion among the circuits, warrant this Court's review.

A. The Courts Of Appeals Are Divided As To Whether The "Except" Clause Applies When The Greater Minimum Sentence Is Imposed For A Predicate Offense

The courts of appeals are split 8-1 on whether the "except" clause applies to sentences imposed for predicate crimes. The United States has acknowledged that this particular conflict alone is sufficiently important to warrant this Court's review. See U.S. Br. in Opp. at 7, 10, *McSwain* v. *United States*, No. 08-9560 (filed Aug. 5, 2009).

In holding that the statutory language "any other provision of law" does not include predicate crimes, the Third Circuit joined six other circuits that had already reached the same conclusion. See *United States* v. *London*, 568 F.3d 553, 564 (5th Cir. 2009) (citing *United States* v. *Collins*, 205 Fed. Appx. 196, 198 (5th Cir. 2006)); *United States* v. *Easter*, 553 F.3d 519, 525 (7th Cir. 2009); *United States* v. *Parker*, 549 F.3d 5, 11–12 (1st Cir. 2008); *United States* v. *Jolivette*, 257 F.3d 581, 586-587 (6th Cir. 2001); *United States* v. *Studifin*, 240 F.3d 415, 423–424 (4th Cir. 2001); *United States* v. *Alaniz*, 235 F.3d 386, 386 (8th Cir. 2000). The Eleventh Circuit has since joined these seven. *See United States* v. *Segarra*, No. 08-17181, 2009 WL 2932242, at *3 (11th Cir. Sept. 15, 2009).

Ignoring the plain language of the statute, these courts of appeals have instead rested their arguments on either the supposed congressional purposes or the sparse legislative history behind the clause. The Third, Fourth, Seventh, and Eighth Circuits, for

example, have reasoned that applying the "except" clause to predicate offenses would contravene Congress's assumed aim to increase sentences for drug trafficking and violent crimes. App., *infra*, 15a; *Easter*, 553 F.3d at 526; *Studifin*, 240 F.3d at 423; *Alaniz*, 235 F.3d at 389–390. The Seventh and Eleventh Circuits also have held that counting predicate offenses as "any other provision of law" would make § 924(c) a sentence enhancement instead of a stand-alone crime. *Easter*, 553 F.3d at 526; *Segarra*, 2009 WL 2932242 at *3 (citing *Easter*).

The Third, Fourth, Fifth, Seventh, and Eighth Circuits have also refused to read "any other provision of law" to include predicate offenses because doing so, they believed, would lead to courts imposing sentences disproportionate to the underlying criminal offense. App., *infra*, at 15a; *Easter*, 553 F.3d at 526; *Collins*, 205 Fed. Appx. at 198; *Studifin*, 240 F.3d at 423; *Alaniz*, 235 F.3d at 389. The Third, Fourth, Sixth, and Eighth Circuits also have reasoned that Congress added the "except" clause in 1998 only to reflect the reorganization of § 924(c)'s penalty provisions. App., *infra*, 12a; *Jolivette*, 257 F.3d at 586-587 (quoting with approval the Fourth Circuit's analysis of the purposes behind the amendment, *Studifin*, 240 F.3d at 423-424); *Studifin*, 240 F.3d at 422-423 (agreeing with Eighth Circuit's analysis in *Alaniz*, 235 F.3d at 389); *Alaniz*, 235 F.3d at 389.

The Second Circuit, by contrast, has squarely held that predicate crimes count as "any other provision of law." *United States* v. *Williams*, 558 F.3d 166, 168 (2d Cir. 2009). In so holding, the Second Circuit

relied upon the reasoning of *United States* v. *Whitley*, 529 F.3d 150 (2d Cir. 2008), in which it had held that the "except" clause applied to a sentence for a *firearm-related* offense. *Whitley*, 529 F.3d at 151. Acknowledging this Court's repeated admonition to "give statutes a literal reading and apply the plain meaning of the words Congress has used," the Second Circuit read the phrase "any other provision of law" to mean "literally what it says." *Whitley* 529 F.3d at 156 (citing *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992)); see *Williams*, 558 F.3d at 171.

The Second Circuit also considered and rejected the arguments advanced against giving the statutory language its plain meaning. It held that Congress could have enacted a series of increased minimum sentences and also have made "a reasoned judgment that when a defendant is exposed to two minimum sentences, some of which were increased by the * * * amended version [of § 924(c)], only the higher minimum should apply." *Whitley*, 529 F.3d at 155. The Second Circuit also reasoned that there was no serious danger of anomalous results because the sentences at issue were *minimums*, not maximums. *Ibid.* Under the sentencing regime Congress enacted, it held, a sentencing judge can "increase the sentence above the minimum" when more serious conduct warrants doing so. *Ibid.*

The Second Circuit also rejected the notion that the "except" clause merely reflected Congress's reorganization of the subsection in 1998. It held that the reorganization created no problems that would necessitate the "except" clause and that, even if it

had, this alone could not explain the addition of the broad phrase "or by any other provision of law." *Whitley*, 529 F.3d at 154. Notably, while identifying no ambiguity in the plain language of the provision, the Second Circuit stated that, even if ambiguity were present, this Court's directive to "interpret ambiguous criminal statutes in favor of defendants, not prosecutors" would compel rejection of the majority position. *Williams*, 558 F.3d at 173 (citing *United States* v. *Santos*, 128 S. Ct. 2020, 2026, 2028 (2008)); see also *Whitley*, 529 F.3d at 156 ("[W]e are aware of no decision rejecting the literal meaning of statutory language to the detriment of a criminal defendant.").

B. The Courts Of Appeals Are Also Deeply Split Over Which Firearm-Related Minimum Sentences Trigger The "Except" Clause

The courts of appeals are even more sharply divided over which firearm-related sentences trigger the exception. The Second, Sixth, and Eighth Circuits have held that the "except" clause applies to minimum sentences imposed for firearm-related conduct covered by § 924(c) and by any other provision of law. The Third, Fourth, and Fifth Circuits, by contrast, have held that the "except" clause is not triggered by any firearm offenses currently codified outside of § 924(c). Rather, those courts have held that the clause "simply reserv[es] the possibility that another statute or provision [in the future] might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation." *Studifin*, 240 F.3d at 423; see App., *infra*, 12a (holding that the "except" clause merely "allow[s]

for additional § 924(c) sentences that may be codified elsewhere in the future"); *United States* v. *Collins*, 205 Fed. Appx. 196 (5th Cir. 2006) (given precedential significance by *United States* v. *London*, 568 F.3d 553 (5th Cir. 2009)). The First Circuit has strongly indicated that the "except" clause is triggered by all firearm offenses but has stopped short of so holding.[1]

1. The Second, Sixth, and Eighth Circuits have all held that the "except" clause is triggered by minimum sentences for firearm offenses covered either by § 924(c) or by any other provision of law. As discussed above, the Second Circuit in *Whitley* held that the "except" clause applies to a longer minimum sentence mandated for the same firearm by any provision of law. See pp. 10-11, *supra*. The Eighth Circuit similarly held that the "except" clause applies

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[1] The Eleventh Circuit, although it has rejected the broader predicate view, has not addressed the firearm question. See *Segarra*, 2009 WL 2932242. And the Seventh Circuit's view of the matter is somewhat unclear. On the one hand, it somewhat ambiguously appears to adopt the Third, Fourth, and Fifth Circuits' position. *Easter*, 553 F.3d at 526 (stating that the "most natural reading of the 'except' clause is that a defendant convicted under § 924(c)(1) shall be sentenced to a term of imprisonment set forth in § 924(c)(1)(A) unless subsections (c)(1)(B) or (c)(1)(C), or another penalty provision elsewhere in the United States Code, requires a higher minimum sentence for *that* § 924(c)(1) offense"). On the other hand, in reaching this conclusion, it conflated the Fourth and Eighth Circuits' opposed positions. *Id.* at 525 (claiming "[t]he Fourth Circuit echoed the Eighth Circuit's position").

"to the firearm-related conduct proscribed either by 924(c)(1) or '*by any other provision of law*.'" *Alaniz*, 235 F.3d at 389 (emphasis added). Although it saw no ambiguity in the statute's text, *ibid.*, the Eighth Circuit also concluded that this reading gave § 924(c) "a sensible construction," *ibid.*, and respected Congress's policy decisions, *id.* at 389-390.

The Sixth Circuit largely adopted this approach in *Jolivette*. 257 F.3d at 587. Although it described the Eighth Circuit's reading as "entirely correct," the Sixth Circuit slightly narrowed the Eighth Circuit's rule. *Ibid.* Jolivette was convicted under 18 U.S.C. § 2113(d) for use of a dangerous weapon or device in the course of a robbery. *Id.* at 582. The Sixth Circuit held that, although this statutory language covered firearms, it was "not specific to [them]" and thus did not trigger § 924(c)'s exception. *Id.* at 587.

2. The Third, Fourth, and Fifth Circuits, by contrast, have held that the "except" clause refers only to provisions governing conduct exactly identical to that of § 924(c). In *United States* v. *Studifin*, the Fourth Circuit held that:

> the "any other provision of law" language provides a safety valve that * * * preserve[s] the applicability of any other provisions that could impose an even greater mandatory minimum consecutive sentence for a violation of § 924(c). In other words, we read this language as simply reserving the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation. 240 F.3d at 423.

In *Abbott*, the Third Circuit adopted this view. Fearing that applying § 924(c)'s "except" clause to any gun offense would lead to "anomalous results," App., *infra*, 16a, the Third Circuit restricted its application to "other minimum sentences that may be imposed for violations of § 924(c), not separate offenses." *Id.* at 11a-12a (citing *Studifin*, 240 F.3d at 423-424). The Fifth Circuit apparently has also adopted this interpretation. *United States* v. *London*, 568 F.3d 553 (5th Cir. 2009) (adopting and giving precedential effect to *United States* v. *Collins*, 205 Fed. Appx. 196 (5th Cir. 2006)). In *Collins*, the court had held that "the phrase 'any other provision of law' [refers] to legal provisions outside the confines of § 924(c) that concern firearm possession in furtherance of a crime of violence or drug-trafficking crime." 205 Fed. Appx. at 198.

3. The First Circuit has strongly indicated that all firearm offenses are covered by the "except" clause, but has expressly reserved so holding. In *United States* v. *Parker*, 549 F.3d 5, 11 (1st Cir. 2008), the First Circuit squarely rejected the argument that the "except" clause covers predicate offenses. It did so because it determined that the clause is better read to cover sentences for all firearm offenses:

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

> otherwise applicable section 924(c) adjustment. Conceivably, Congress wished to avoid a double increment for the same firearm.

Id. at 11. But in the end, the court left the question open. Because the case presented no danger of "double counting of [a] gun," the court determined that it "need not decide how the [firearm issue] would be resolved in [the First C]ircuit." *Id.* at 11-12.

* * *

As the above description makes clear, there is a 3-3 split as to whether the "except" clause includes all firearm offenses. The Second, Sixth, and Eighth Circuits stand on one side, and the Third, Fourth, and Fifth Circuits stand on the other. In addition, the First Circuit has indicated that it would side with the first group on this question but has stopped short of so holding.

Viewed more broadly, there is three-way split regarding the reach of the "except" clause. At one end of the spectrum, the Second Circuit reads the statute literally and thus includes within its reach mandatory minimum sentences for both predicate offenses and firearm offenses. At the other end of the spectrum, the Third, Fourth, and Fifth Circuits read the "except" clause exceedingly narrowly and do not include either predicate offenses or any firearm offenses outside of § 924(c) itself. In between these two positions, the Sixth and Eighth (and possibly the First) Circuits do not include predicate offenses but do include all or most firearm offenses within the "except" clause. The multiple splits and the confusion

among the circuits regarding this important and recurring issue in criminal sentencing warrant resolution by this Court.

II. The Court Of Appeals' Interpretation Of 18 U.S.C. § 924(c)(1)(A) Ignores The Plain Language Of The Statute And Finds No Support In The Legislative History

A. By Its Terms, § 924(c)(1)(A) Bars The Imposition Of An Additional, Consecutive Five-Year Sentence When A Court Has Already Sentenced The Defendant To A Mandatory Minimum Term Of At Least Five Years, Particularly For A Gun Crime

Section 924(c)(1)(A) imposes a minimum sentence of five years' imprisonment for the possession or use of a firearm during the commission of a crime of violence or drug trafficking "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by *any other provision of law*." 18 U.S.C. § 924(c)(1)(A) (emphasis added). Despite this Court's frequent admonishments against distorting the plain language of statutes, see, *e.g.*, *United States* v. *Rodriquez*, 128 S. Ct. 1783, 1788 (2008); *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917), the Third Circuit's interpretation twists the "except" clause beyond recognition.

The "except" clause actually establishes two exceptions, each of which bars the imposition of additional, five-year mandatory minimum sentences.

First, the five-year minimum does not apply if another provision within the same subsection would impose a higher minimum. Second, the five-year minimum does not apply if "any other provision of law," 18 U.S.C. § 924(c)(1)(A), imposes a higher mandatory minimum sentence. This case turns on the second exception and the meaning of the simple phrase "any other provision of law."

This Court "ha[s] 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." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253–254 (1992). "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain * * * the sole function of the courts is to enforce it according to its terms." *Central Trust Co.* v. *Official Creditors' Comm. of Geiger Enter., Inc.*, 454 U.S. 354, 359–360 (1982) (quoting *Caminetti*, 242 U.S. at 485). Applying that "elementary" principle to this statute, the Second Circuit correctly reasoned that "any other provision of law" means exactly what it says: "any other provision of law." See *United States* v. *Whitley*, 529 F.3d 150, 153 (2d Cir. 2008).

This Court reached a similar conclusion—and followed the same route—when interpreting another phrase in the *very same subsection*. In *United States* v. *Gonzales*, 520 U.S. 1 (1997), this Court interpreted the meaning of "any other term of imprisonment" in § 924(c) and, specifically, whether that term included both state and federal terms. To this Court, stating the question answered it: "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." *Id.* at 5 (quoting *Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980)).

This Court thus followed the plain language of the text, observing that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Gonzales*, 520 U.S. at 5 (quoting *Webster's Third New International Dictionary* 97 (1976)). Noting that "Congress did not add any language limiting the breadth of that word," the Court held that "we must read § 924(c) as referring to all 'term[s] of imprisonment.'" *Ibid.* Despite some legislative history pointing the other way and despite policy arguments made by the lower court and the dissent, this Court remained faithful to the principle that "[g]iven [a] clear legislative directive, it is not for the courts to carve out statutory exceptions based on judicial perceptions of good sentencing policy." *Id.* at 10.

The Third Circuit, by contrast, ignored the plain language of § 924(c) to read the second exception out of the statute. It reasoned that the "most cogent interpretation" of the "except" clause "refers only to other minimum sentences that may be imposed for violations of § 924(c), not separate offenses." App., *infra*, at 11a-12a. This is an adequate interpretation of the first exception, which refers to "greater minimum sentence[s] otherwise provided by *this subsection*" (emphasis added). But it fails to give any meaning to the second exception and specifically to the phrase "any other provision of law." For that statutory language to have meaning, it must refer, at

the very least, to some provisions of law beyond § 924(c).

Faced with this difficulty, the Third Circuit invented a purpose for the second exception that the plain language nowhere suggests. According to the court, the second exception exists "to allow for additional § 924(c) sentences that may be codified elsewhere in the future." App., *infra*, 11a-12a; see also *United States* v. *Studifin,* 240 F.3d 415, 423 (4th Cir. 2001) (proposing a similar "safety valve" reading of the second exception). This assertion is startlingly implausible. If correct, it means that Congress deliberately inserted the seemingly simple phrase "any other provision of law" to guard against the remote possibility that a future Congress might try to increase § 924(c) penalties not by straightforwardly amending § 924(c) itself, but by creating a provision somewhere else in the United States Code that is supposed to replace, not supplement, § 924(c). To say the least, such a reading imputes both an unreasonably high degree of cautiousness to the original enacting Congress and an implausibly low degree of thoughtfulness and care to any subsequent one.

The Third Circuit suggested that its interpretation of the "except" clause was consistent with the majority of courts of appeals to address the issue. App., *infra*, 19a. This is half right. As previously explained, the Third Circuit *did* join a majority of courts in holding that the "except" clause does not apply to sentences for predicate offenses—the first question presented. It joined a *minority* of courts of appeals, however, in holding that the

"except" clause does not cover firearm offenses beyond the ambit of § 924(c) itself—the second question presented.

As the majority of courts in the second split have recognized, excluding sentences for firearm offenses from the scope of the "except" clause is especially difficult to justify. The reason is straightforward. Section 924(c) imposes a mandatory minimum penalty for the use or possession of a firearm during a drug crime or crime of violence. If the "except" clause does not apply to other firearm offenses that also punish defendants for using or possessing the same firearm, there is a serious danger of double counting. See *Parker*, 549 F.3d at 11. By excluding firearm offenses that carry a greater minimum sentence than those provided by § 924(c), the statute both ensures that all defendants receive at least a minimum of five years and avoids penalizing defendants twice for the use or possession of the same firearm. While Congress can subject a defendant to two sentences for the same act in a single criminal transaction, it must clearly express its intent to do so. See *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983). No such intent appears here.

The Third Circuit also argued that its strained interpretation was necessary to avoid anomalous results. App., *infra*, 16a-18a. As the Second Circuit has indicated, however, this concern is illusory. There are logical reasons for Congress to have "provided a series of increased minimum sentences" and to have decided that "where a defendant is exposed to two minimum sentences * * * only the higher minimum should apply." *Whitley*, 529 F.3d at

155. And, in any event, as this Court emphasized in *Gonzales*, where the legislative directive is clear, it is not for courts to rewrite statutes "based on judicial perceptions of good sentencing policy." 520 U.S. at 9.

B. The Legislative History Undermines The Third Circuit's Interpretation

Because the language of § 924(c) is unambiguous, there is no need to look to the statute's history. *Gonzales*, 520 U.S. at 6. Even were this Court to do so, however, it would find no support for the unusual proposition that Congress intended to limit "any other provision of law" to some hypothetical provision it had not yet enacted.

Indeed, what appears in the legislative history supports the opposite interpretation. Congress enacted the "except" clause in 1998 as part of a larger response to this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), which held that the previous version of the statute did not reach defendants who merely possessed rather than used a firearm in furtherance of a crime of violence or drug trafficking crime. 144 Cong. Rec. H10329-01 (1998). Debate centered on the propriety of such additional penalties; it did not directly address the meaning of the "except" clause itself.

One thing was clear, however. One of the bill's main sponsors wanted to send a signal that "[i]f you possess a gun in any way to further your violent criminal behavior, you get a minimum of five years in the slammer." *Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the Judiciary*, 105th

Cong. (1997) (statement of Sen. Jesse Helms). Applying the plain meaning of the term "any other provision of law" would, of course, accomplish this goal—as would understanding the term as "any other provision of law" to include all firearm offenses.

In addition, the Department of Justice suggested to Congress that the "except" clause be removed from the bill. See *Whitley*, 529 F.3d at 154 (citing Letter from Andrew Fois, Ass't Attorney General, Office of Legislative Affairs, to Albert Gore, Feb. 25, 1997). Congress obviously refused to do so. All of this confirms that Congress intended the term "any other provision of law" to mean what it says.

C. The Third Circuit's Interpretation Of § 924(c) Violates The Normal Rule That A Court Should Resolve Ambiguities In Criminal Statutes In Favor Of The Defendant

The statute's plain language and the legislative history both indicate that Congress intended "any other provision of law" to mean exactly that. Even if there were some ambiguity, however, the rule of lenity would require that it be resolved in favor of the defendant. See *Santos*, 128 S. Ct. at 2025; *United States* v. *Granderson*, 511 U.S. 39, 53-54 (1994).

The Third Circuit's approach turns the rule of lenity on its head. The court ignored the plain language of the statute to create an ambiguity that does not exist; it then compounded that error by resolving the ambiguity with an implausible interpretation that favors the government rather than the defendant. As the Second Circuit observed,

"other than the decisions * * * that have rewritten the 'except' clause * * * to escape its plain meaning, we are aware of no decision rejecting the literal meaning of statutory language to the detriment of a criminal defendant." *See Whitley*, 529 F.3d at 156. The judgment below cannot stand.

III. This Case Presents Recurring And Important Issues Of Federal Law, And It Is An Ideal Vehicle Through Which To Resolve Them

A. The Government Concedes That The Meaning Of The "Except" Clause Is A Recurring And Important Issue

The government has recognized that the reach of the "except" clause is a recurring and important issue, worthy of this Court's attention. See U.S. Br. in Opp. at 7, 10, *McSwain* v. *United States*, petition for cert. pending, No. 08-9560 (filed Mar. 26, 2009). As the government acknowledges, § 924(c) is "a significant and frequently used criminal statute." Pet. for En Banc Rev. at 19, *United States* v. *Williams*, 558 F.3d 166 (2d Cir. 2009).

Indeed, prosecutions under § 924(c) are a staple of federal criminal practice. More than two thousand defendants are charged with violating this provision each year. Bureau of Justice Statistics, Federal Justice Statistics Program, Number of Defendants in Cases Filed Under 18 U.S.C. § 924(c), FY2003-FY2007, http://fjsrc.urban.org (last accessed Oct. 16, 2009). And as the many appellate cases reviewed in this petition indicate, prosecutors do not hesitate to invoke § 924(c) when charging defendants already

subject to other mandatory minima. See pp. 8-16, *supra* (collecting cases). As long as the rules adopted below prevail, prosecutors undoubtedly will continue to seek these additional sanctions under § 924(c).

This issue is of fundamental importance because § 924(c), as currently interpreted by several courts of appeals, significantly and unfairly increases a defendant's sentence for conduct already penalized by longer mandatory minimums. As one expert concluded, "use of [§ 924(c)] can lead to extraordinarily harsh sentences that are grossly out of proportion to the defendant's conduct and difficult to justify under any principled theory of punishment." Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 Geo. Mason L. Rev. 303, 341 (2009). Given the frequency with which defendants are sentenced under § 924(c), the splits and confusion among the courts of appeals, and the harshness of imposing multiple mandatory minimum sentences, this Court's review is warranted.

B. This Case Is An Ideal Vehicle For The Court To Settle Both Splits Regarding The "Except" Clause

This case is an ideal vehicle through which to resolve, clearly and finally, the proper scope of the "except" clause. The Third Circuit's decision below fully addressed both of the questions that have split the courts of appeals, namely whether the "except" clause applies to predicate offenses and whether it applies to firearm offenses. These questions are interrelated and ought to be addressed simul-

taneously in order to provide proper and sufficient guidance to the courts of appeals.

The government has stated its intent to file a petition for a writ of certiorari in *United States* v. *Williams*. See U.S. Mot. for Ext. of Time to File Pet. for a Writ of Cert., 558 F.3d 166; U.S. Br. in Opp. at 7, 14, *McSwain*, *supra* (No. 08-9560). We respectfully submit, however, that this case presents a superior vehicle through which to address the meaning of the "except" clause, because *Williams* raises *only* the question of how to apply the "except" clause to predicate offenses generally. It does not raise the more specific question of how that clause would apply where the longer mandatory minimum arises from a firearm offense.

The Court should grant review in this case rather than in *Williams* in order to avoid the piecemeal adjudication of these genuinely interrelated issues. Deciding only a predicate offense case such as *Williams* will not necessarily resolve cases like this one. That is because, if the government were correct that the "except" clause is not triggered by all other mandatory minimums, it will remain to be decided whether § 924(c) can be applied to impose an additional five-year sentence where the defendant has already received a longer mandatory minimum for his use of the very same firearm and, if so, whether firearm offenses outside of § 924(c) count.

Put differently, without addressing the second question, there is the possibility that the Court could determine only what is *not* included within the "except" clause, which would leave lower courts

guessing—and disagreeing—as to what *is* included. The second question presented, moreover, has generated a sharper division among the courts of appeals. Even courts that do not follow the plain meaning of the "except" clause have indicated that it must exclude double-counting for firearm offenses. See, *e.g.*, *Alaniz*, 235 F.3d at 389; *Jolivette*, 257 F.3d at 587.

Only a firearm case will provide the court with full adversarial testing of the second question. The defendant and would-be respondent in *Williams*, for example, will have an interest in arguing only that the "except" clause applies to all predicate offenses. He will have no incentive to argue in the alternative that, at a minimum, the clause prevents the imposition of a consecutive mandatory minimum sentence under § 924(c) where the defendant already has received a longer mandatory sentence for the very same firearm. Because *Abbott* permits this Court to decide both of the § 924(c) questions with the benefit of full adversarial testing, there is no single better case for this Court to address the scope of the "except" clause. Therefore, at a minimum, this Court should grant certiorari in *Abbott* in order to offer a comprehensive interpretation of the "except" clause and thereby give maximum guidance to the lower courts.

C. If This Court Wishes To Consolidate Predicate Offense And Firearm Offense Cases, It Should Grant This Petition and The Petition In *London*

The Third Circuit held that the "except" clause does not apply to predicate offenses, and it also held that it does not apply to firearm offenses outside of § 924(c). There would be no obstacle, therefore, to this Court reaching both issues were it to review the Third Circuit's decision in *Abbott*. Cf. *Clingman* v. *Beaver*, 544 U.S. 581, 598 (2005) ("We ordinarily do not consider claims neither raised nor decided below.")

Abbott, however, is a firearm case. The other mandatory minimum sentence imposed on Mr. Abbott (in addition to the minimum wrongly imposed under § 924(c)) arose from a firearm offense. Because predicate offense and firearm cases present different factual contexts and slightly different statutory contexts, the Court might wish to consolidate a firearm and a predicate offense case.

This would, at first blush, argue in favor of granting both this petition and the petition in *Williams*. There is, however, an even better alternative, assuming that the Court is inclined in this direction. The Court should instead grant this petition and the petition in *London* v. *United States*, No. 09-5844 (filed Aug. 11, 2009), and consolidate the cases.

London, like *Williams*, is a predicate offense case. The undersigned counsel of record, however,

represents both Mr. Abbott and Mr. London and therefore would be able to submit consolidated briefing and argument, allowing this Court to offer maximum guidance to the lower courts with the most efficient allocation of resources.

In *London*, the district court imposed upon petitioner London both a ten-year mandatory minimum sentence for violation of 18 U.S.C. § 841 (a drug offense) and a consecutive five-year sentence for use of a firearm under § 924(c). 568 F.3d at 564. The Fifth Circuit rejected the argument that the greater mandatory minimum sentence for the predicate drug offense precluded imposition of the § 924(c) sentence, adopting the reasoning of its earlier decision in *United States* v. *Collins*, 205 Fed. Appx. 196 (5th Cir. 2006). *Id.*

Mr. London filed a *pro se* petition squarely raising this issue. The government's brief in opposition, if any, is currently due November 12, 2009. The undersigned counsel of record will file a reply brief in support of Mr. London' petition, if necessary.

Consolidating *Abbott* and *London*—as opposed to *Abbott* and *Williams*—would allow briefing and argument by one set of counsel. This, in turn, would ensure that both questions regarding the meaning of the "except" clause are fully but concisely presented to this Court for decision.[2] Consolidating *Abbott* and *London* rather than *Abbott* and *Williams* would also mean that the defendants are the petitioners and the

[2] Mr. Abbott and Mr. London both have given their fully informed consent to the undersigned counsel of record's joint representation.

government is the respondent in both cases. This would avoid the practical difficulties and awkwardness of consolidating cases and holding a single oral argument where the United States is the petitioner in one case (*Williams*) and the respondent in the other (*Abbott*) and there are two related but nonetheless distinct questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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