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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LEON WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 924(c) of Title 18 requires specified mandatory consecutive sentences for committing certain weapons offenses in connection with "any crime of violence or drug trafficking crime," "[e]xcept to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law."

The question presented is whether the "except" clause prohibits imposition of a Section 924(c) sentence if the defendant is also subject to a greater mandatory minimum sentence on a different count of conviction charging a different offense for different conduct.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 558 F.3d 166.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2009. A petition for rehearing was denied on June 22, 2009. (App, *infra*, 31a). On September 10, 2009, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c) of Title 18 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 32a-35a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, respondent was convicted of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g); possessing with intent to distribute over 50 grams of crack cocaine in violation of 21 U.S.C. 841(b)(1)(A); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). The district court sentenced respondent to a total of 195 months of imprisonment, including a consecutive term of five years on the Section 924(c) conviction, to be followed by five years of supervised release. App., *infra*, 1a, 3a. The court of appeals remanded to the district court for resentencing on the ground that, *inter alia*, the text of Section 924(c) exempted respondent from any separate sentence for his conviction under that statute. *Id.* at 1a-20a.

1. In February 2006, two police officers saw respondent urinating next to a car parked by the side of the road. As the officers approached, they observed in the car multiple cellular phones, wads of cash wrapped in rubber bands, and a plastic bag containing white residue. After arresting respondent and impounding the car, the officers conducted an inventory search, during which they discovered a hidden compartment containing a loaded gun, a gun magazine, bullets, and 180 small bags of powder and crack cocaine. The white residue was later determined to be narcotics, and respondent's

fingerprints were found on the gun magazine. Respondent later admitted that he had been driving the car, which was registered to his sister, and that the cellular phones and cash belonged to him. App., *infra*, 2a-3a.

2. In April 2006, a grand jury sitting in the Southern District of New York indicted respondent on three counts: possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g); possessing with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. 841(b)(1)(A); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). In October 2006, respondent was tried before a jury, which found him guilty on all three counts. Gov't C.A. Br. 1-2; App., *infra*, 3a.

3. The district court sentenced respondent to a total of 195 months of imprisonment. App., *infra*, 3a. Respondent was subject to two separate mandatory minimum sentences: a ten-year mandatory minimum for the drug trafficking count pursuant to Section 841(b)(1)(A) and a consecutive five-year mandatory minimum for the Section 924(c) count. *Ibid.*; see 18 U.S.C. 924(c)(1)(A) (providing that, except where a greater minimum penalty applies, any person who possesses a firearm in furtherance of a crime of violence or drug trafficking crime 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"). The district court imposed a 120-month sentence for the felon-in-possession count, a concurrent 135-month sentence for the drug trafficking count, and

the mandatory consecutive five-year term for the Section 924(c) count. App, *infra*, 3a, 22a.[1]

4. The court of appeals affirmed respondent's conviction but vacated his sentence and remanded for resentencing without any separate term of imprisonment for the Section 924(c) conviction. App., *infra*, 1a-20a.

a. After respondent filed an appeal but before oral argument, the court of appeals decided *United States* v. *Whitley*, 529 F.3d 150 (2d Cir. 2008). *Whitley* interpreted the introductory, "except" clause of Section 924(c)(1)(A), which states in relevant 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 * * * 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

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[1] The court of appeals incorrectly stated that the district court sentenced respondent on the felon-in-possession count to 130 months, which would have exceeded the statutory maximum of 120 months under 18 U.S.C. 922(g) and 924(a)(2). App., *infra*, 3a.

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

18 U.S.C. 924(c)(1)(A) (emphasis added). The defendant in *Whitley* was convicted of three offenses arising from a single robbery: a Hobbs Act violation, which carried no mandatory minimum sentence; a violation of 18 U.S.C. 922(g) for possessing a firearm as a convicted felon, which carried a 15-year mandatory minimum sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e); and a Section 924(c) offense, which carried a ten-year mandatory minimum consecutive sentence because the defendant had discharged the firearm during the robbery, see 18 U.S.C. 924(c)(1)(A)(iii). *Whitley*, 529 F.3d at 151-152.

The Second Circuit construed the introductory language of Section 924(c) to mean that Whitley was exempt from any sentence for his Section 924(c) conviction because he was subject to a greater mandatory minimum sentence under the ACCA. *Whitley*, 529 F.3d at 151. The court adopted what it considered to be a "literal" reading of Section 924(c)'s "except" clause, reasoning that "the ten-year minimum sentence required by subdivision (iii) of that subsection for discharge of a firearm * * * does not apply to [the defendant] because, in the words of th[e] ['except'] clause, 'a greater minimum sentence is otherwise provided by . . . any other provision of law,' namely, [the ACCA], which subjects him to a fifteen-year minimum sentence." *Id.* at 153.

In reaching that conclusion, the court of appeals rejected the government's contention that the "except" clause refers only to mandatory minimum penalties provided for the Section 924(c) offense, and that the court's

contrary construction departs from the statute's plain meaning, conflicts with Congress's evident intent, and would anomalously result in shorter mandatory sentences for more serious offenders. *Whitley*, 529 F.3d at 155. The court noted in *dicta*, however, that the anomalies the government identified "could be overcome if the 'except' clause were limited to higher minimums contained only in firearms offenses, rather than, as it reads, to higher minimums provided 'by any other provision of law.'" *Ibid.*

b. Following the decision in *Whitley*, the court of appeals ordered supplemental briefing and heard argument concerning the effect of that ruling on respondent's sentence. 07-2436 Docket entry (2d Cir. July 16, 2008). The court then held that the reasoning in *Whitley* also applies to a case such as this one, in which the defendant is subject both to a mandatory minimum sentence under Section 924(c) and to a higher mandatory minimum for the predicate crime of violence or drug trafficking crime. App., *infra*, 2a.

The court first rejected the contention that *Whitley* may be limited either to its particular facts—involving multiple mandatory minimum sentences based on the use of a single firearm—or to mandatory minimums arising from firearms offenses more generally. App., *infra*, 6a-7a. In the court's view, the phrase "any other provision of law" in Section 924(c)(1)(A) reaches beyond firearms statutes to the entire "set of crimes for which mandatory minimum sentences apply," including "drug trafficking crimes [and] other violent offenses." *Id.* at 8a-9a. The court reasoned that this conclusion is compelled by the text of the "except" clause, which "means what it literally says." *Id.* at 8a (citation omitted). At the same time, however, the Court cautioned that the

"except" clause is not "unbounded." *Id.* at 9a. The court stated that reading "any other provision of law" literally "to include, for example, provisions under which a defendant was already sentenced for a prior unrelated crime in a previous case, would be suspect." *Id.* at 10a. The court therefore held that application of the "except" clause controls only when the defendant faces a higher mandatory minimum sentence for a different offense "arising from the same criminal transaction or operative set of facts" as the Section 924(c) offense. *Ibid.*

The court acknowledged that Section 924(c)(1) requires that the sentences it prescribes must be in addition to, and may not run concurrently with, any sentence imposed for the predicate crime of violence or drug trafficking crime. App, *infra*, 10a-11a (citing 18 U.S.C. 924(c)(1)(A) (providing that the prescribed penalties are "in addition to the punishment provided for such crime of violence or drug trafficking crime"); 18 U.S.C. 924(c)(1)(D)(ii) (stating that, "[n]otwithstanding any other provision of law * * * 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"). The court concluded, however, that its interpretation did not violate these provisions. The court reasoned that the introductory clause of Section 924(c) carves out an exception to the "in addition to" requirement: when the "except" clause applies—*i.e.*, when a defendant is subject to a higher minimum sentence for a different offense—the defendant receives no sentence at all under Section 924(c)(1)(A), so the Section 924(c)

"sentence" is not "concurrent" with any other term of imprisonment. App., *infra*, 11a-12a.

The court also acknowledged that its interpretation of Section 924(c) might lead to the anomalous result that a defendant could be subject to a lower total mandatory sentence as a result of committing a more serious predicate drug crime. App., *infra*, 15a-16a. But the court reasoned that any such anomaly may be remedied by the sentencing court in the exercise of its discretion to fashion an appropriate punishment in the particular case. *Id.* at 16a-17a. And the court further concluded that, in any event, it was up to Congress to correct anomalies that result from what the court believed to be a literal reading of the statute. *Id.* at 17a.

Applying this interpretation of the "except" clause, the court held that, because respondent was subject to a ten-year mandatory minimum sentence under Section 841(b)(1)(A), he was exempt from the five-year mandatory minimum under Section 924(c)(1)(A). App., *infra*, 19a-20a. The court therefore remanded for resentencing without any sentence for respondent's Section 924(c) offense. *Ibid.*[2]

5. On April 24, 2009, the government petitioned for rehearing en banc, contending that the decision below is incorrect and noting that it conflicts with the decisions of every other court of appeals to address the issue. The court denied that petition without comment. App., *infra*, 31a.

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[2] The court of appeals also remanded for the district court to consider its authority to impose a non-guidelines sentence based on the disparity between the crack and powder cocaine offenses. App., *infra*, 19a-20a.

REASONS FOR GRANTING THE PETITION

In the decision below, the court of appeals extended *United States* v. *Whitley*, 529 F.3d 150 (2d Cir. 2008), to hold broadly that the mandatory minimum penalties prescribed in Section 924(c) do not apply when the defendant also faces a higher mandatory minimum sentence for another count of conviction. Under the Second Circuit's holding, when a defendant is convicted of a drug trafficking crime carrying a ten-year mandatory minimum and a Section 924(c) offense carrying a five-year mandatory minimum, the district court is required to sentence the defendant to zero months of imprisonment on the Section 924(c) offense. That interpretation of Section 924(c) is incorrect and implicates an entrenched conflict among the courts of appeals. Eight other courts of appeals have considered the meaning of the introductory "except" clause of Section 924(c)(1)(A), and all of them have rejected the interpretation adopted in the decision below. Those courts have correctly reasoned that the "except" clause does not displace the penalties of Section 924(c) whenever a defendant also faces a higher minimum sentence for a different offense. Because the meaning of Section 924(c)(1)(A)'s introductory clause is an important question in federal prosecutions and is squarely presented in this case, this Court's review is warranted.

A. The Court Of Appeals' Interpretation Of Section 924(c)(1)(A) Is Incorrect

The Second Circuit has fundamentally misconstrued the introductory language of Section 924(c)(1)(A). As other courts of appeals to consider the question have concluded, the "except" clause means that a defendant convicted of an offense under Section 924(c)(1)(A) must

be sentenced to the five-year mandatory minimum term set forth in that provision unless another penalty provision elsewhere in Section 924(c) or "the United States Code[] requires a higher minimum sentence for *that* § 924(c)(1) offense." *United States* v. *Easter*, 553 F.3d 519, 526 (7th Cir. 2009) (per curiam), petitions for cert. pending, No. 08-9560 (filed Mar. 26, 2009), and No. 08-10584 (filed May 20, 2009); see pp. 18-19, *infra*. The "except" clause does not mean that a defendant escapes any punishment for a Section 924(c) conviction whenever he is subject to a higher mandatory sentence for a *different* offense. The decision below departs from the plain meaning of Section 924(c)(1)(A), frustrates Congress's intent, and creates anomalies both within the statute and in its practical application.

1. The prefatory clause of Section 924(c)(1)(A) provides that a defendant who violates that statute must be sentenced to at least five years of imprisonment "[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). "The except clause * * * does not say 'a greater minimum sentence' *for what*; yet it must have *some* understood referent to be intelligible." *United States* v. *Parker*, 549 F.3d 5, 11 (1st Cir. 2008), cert. denied, 129 S. Ct. 1688 (2009). Read naturally, the "understood referent" of the clause is the offense set forth in the language that immediately follows: using, carrying, or possessing a firearm in connection with a crime of violence or a drug trafficking crime. See *United States* v. *Ressam*, 128 S. Ct. 1858, 1860 (2008) (noting that the plain meaning of a statute is the "most natural reading of the relevant statutory text."); *Easter*, 553 F.3d at 526 ("In the contest between reading the 'except' clause to refer to penalties for the offense in

question or to penalties for any offense at all, we believe the former is the most natural.").

The clause therefore provides that, except to the extent that Section 924(c) or any other provision of law provides a greater minimum sentence for using, carrying, or possessing a firearm in connection with a crime of violence or a drug offense, any person who commits that firearms offense is subject to the baseline five-year mandatory minimum term of imprisonment set forth in Section 924(c)(1)(A)(i). Thus, for example, if (as in this case) a firearm is possessed in furtherance of a drug trafficking offense, the defendant is subject to a mandatory consecutive five-year sentence; *except* that if (as in *Whitley*) the firearm is discharged during the drug trafficking crime, the defendant is instead subject to the ten-year mandatory minimum sentence under Section 924(c)(1)(A)(iii); *except* that if the discharged firearm is a machinegun, the defendant is instead subject to a 30-year mandatory minimum sentence under Section 924(c)(1)(B)(ii); *except* that if another feature of the Section 924(c) offense triggers a greater mandatory minimum penalty for that crime under "any other provision of law," the defendant is instead subject to that higher sentence on the Section 924(c) count.

This construction of the "except" clause does not "rewrit[e]" the statute or add any new words, as the court of appeals concluded. App., *infra*, 6a. It simply selects the most natural referent of the "except" clause, which is the basic crime set forth in Section 924(c)(1)(A). And it respects the purpose of that clause to ensure the imposition of the highest possible mandatory penalty for a Section 924(c) offense.

2. The statutory text does not support the court of appeals' contrary interpretation, under which the "ex-

cept" clause eliminates any Section 924(c) sentence whenever the defendant is subject to a higher mandatory minimum for a different crime "arising from the same criminal transaction or operative set of facts" as the Section 924(c) offense. App., *infra*, 10a. The court purported to rest its interpretation on a "literal reading" of the phrase "any other provision of law." *Id.* at 8a-9a. Consistent with ordinary principles of statutory construction, however, that phrase should be "given more precise content by the neighboring words with which it is associated." *United States* v. *Williams*, 128 S. Ct. 1830, 1839 (2008); see, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 486-487 (2006). Just 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).

The absence of any provision of law outside Section 924(c) that currently prescribes such penalties does not justify the court of appeals' interpretation. As several other courts of appeals have concluded, the "'any other provision of law' language provides a safety valve that would preserve the applicability of any other provisions that could impose an even greater mandatory minimum consecutive sentence for violation of § 924(c)." *United States* v. *Studifin*, 240 F.3d 415, 423 (4th Cir. 2001). That language "simply reserv[es] the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation." *Ibid;* see *United States* v. *Abbott*, 574 F.3d 203, 208 (3d Cir. 2009) ("[T]he prefatory clause mentions 'any other provision of law' to allow for additional § 924(c) sentences that may be codified elsewhere in the

future."); *United States* v. *Collins*, 205 Fed. Appx. 196, 197-198 (5th Cir. 2006) (per curiam) (finding "convincing" *Studifin*'s reasoning that "by any other provision of law" provides a "safety valve" for future provisions "that could impose an even greater mandatory minimum consecutive sentence for a violation of § 924(c)") (quoting *Studifin*, 240 F.3d at 423), cert. denied, 551 U.S. 1170 (2007).[3]

Indeed, despite its professed fidelity to interpreting the "except" clause according to "what it literally says," App, *infra*, 8a (quoting *Whitley*, 529 F.3d at 153), the court of appeals itself departed from a strict "literal reading" of the phrase "any other provision of law," *id.* at 9a. Construed without any consideration of context, the "except" clause would eliminate any sentence under Section 924(c) whenever the defendant faced a greater mandatory minimum sentence for charges pending in other jurisdictions, for entirely unrelated counts, or for crimes that were the subject of a previous sentencing. The court of appeals, however, deemed "suspect" any such literal or "unbounded" reading of the clause. *Id.* at 9a, 10a. The court therefore limited the "except" clause to those "other provision[s] of law" imposing mandatory minimums for offenses that "aris[e] from the same crim-

[3] For example, suppose Congress were to amend 18 U.S.C. 922(k), which criminalizes possession of a firearm with a defaced serial number, to provide that "if a firearm with a defaced serial number is involved in a violation of Section 924(c)(1)(A), then the penalty for such a violation of Section 924(c)(1)(A) is at least 15 years." The "except" clause would make clear that the penalty for using a firearm with a defaced serial number during a drug or violent crime, in violation of Section 924(c)(1)(A), would be a minimum of 15 years of imprisonment (rather than any lower minimum set forth in Section 924(c) itself), which (under Section 924(c)(1)(D)(ii)) would be consecutive to whatever sentence the defendant received for the Section 922(k) offense.

inal transaction or operative set of facts" as the Section 924(c) offense. *Id.* at 10a. That interpolation appears nowhere in the statutory text, and, as this Court has remarked on numerous occasions, "same transaction" tests (or other similar formulations) are inherently malleable and indeterminate. See, *e.g.*, *United States* v. *Dixon*, 509 U.S. 688, 710-711 (1993). The court's insertion of that test into the statute was also unnecessary. The "unbounded" reading of the "except" clause the court was trying to avoid arose only because the court failed to observe the limitation inherent in the statute itself—that the clause applies only where another provision prescribes a greater mandatory minimum for the Section 924(c) offense.

3. In addition to contravening the plain meaning of the relevant text, the Second Circuit's interpretation of the "except" clause ignores the history of the statute, brings that clause into conflict with other language in Section 924(c), and creates a variety of anomalies that Congress could not have intended.

a. The court of appeals' reading of the "except" clause cannot be squared with the history of Section 924(c)(1)(A). The "except" clause was added to the statute in 1998 as part of a slate of amendments intended both to broaden Section 924(c) in response to this Court's decision in *Bailey* v. *United States*, 516 U.S. 137, 150 (1995) (holding that the term "use" in Section 924(c) requires "active employment" of a firearm), and to stiffen the penalties for violating that law. The amendments accomplished the latter purpose by adding graduated minimum sentences for brandishing and discharging a firearm and for subsequent convictions under the statute. The obvious purpose of the 1998 amendments—including the "except" clause—was thus to *increase* sen-

tences for defendants who use, carry, or possess firearms in connection with other crimes. The Second Circuit's interpretation yields precisely the opposite effect, *eliminating* the Section 924(c) penalties altogether for the most serious offenders who commit predicate crimes carrying high minimum sentences. Nothing in the legislative history of Section 924(c) supports that counterintuitive result.

b. The interpretation adopted by the Second Circuit negates specific language in Section 924(c) demonstrating Congress's intent to impose additional, consecutive punishment on defendants who violate the statute. Section 924(c)(1)(A) states that a defendant who carries, uses, or possesses a firearm in connection with a crime of violence or a drug trafficking crime "shall" be sentenced to a minimum prison term "in addition to the punishment provided for such crime of violence or drug trafficking crime." Similarly, Section 924(c)(1)(D)(ii) states that, "[n]otwithstanding any other provision of law * * * 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 other term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." The Second Circuit's approach succeeds in preventing these cumulative sentences from occurring. As the Fourth Circuit has explained, the Second Circuit's

> construction of § 924(c) simply makes no sense in light of Congress's clear intent in § 924(c) to impose mandatory consecutive sentences, as opposed to choosing between one or the other sentence, and indeed would be patently inconsistent with the intent expressed in § 924(c)(1)(D)(ii) to require mandatory

> consecutive sentences against those who commit crimes of violence while using or carrying firearms in furtherance of their crimes.

Studifin, 240 F.3d at 423.

c. The court of appeals' reading of the "except" clause effectively treats Section 924(c) as a mere sentencing enhancement that can be displaced if some greater minimum for a different offense also applies. See *Whitley*, 529 F.3d at 151 ("This criminal appeal presents the unusual situation in which the literal meaning of a *sentencing statute* has been disregarded to the detriment of a defendant.") (emphasis added). "But [Section] 924(c) does not define an enhancement, it defines a standalone crime" for using, carrying, or possessing a firearm in connection with a drug or violent offense. *Easter*, 553 F.3d at 526; see *Dean* v. *United States*, 129 S. Ct. 1849, 1853 (2009) ("The principal paragraph [of Section 924(c)] defines a complete offense."); *Harris* v. *United States*, 536 U.S. 545, 553 (2002). The result required by the decision below—a Section 924(c) conviction for which the defendant receives no sentence whatsoever—is highly anomalous. As the Seventh Circuit observed, "[a] determination of guilt that yields no sentence is not a judgment of conviction at all." *Easter*, 553 F.3d at 526.

d. The decision below would produce illogical sentencing outcomes. 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. It is inconceivable that Congress intended such a result. See *Abbott*, 574 F.3d at 209 (discussing this and other sentencing anomalies and concluding that "[w]e are confident that Congress did not intend such a bizarre result").

The court of appeals attempted to rationalize such anomalous outcomes on the ground that, where the "except" clause applies, a district judge may compensate for the elimination of the Section 924(c) sentence by exercising its discretion under 18 U.S.C. 3553(a) to increase the sentence on the underlying offense. App., *infra*, 16a-17a. But Congress added the "except" clause to Section 924(c) in 1998, seven years before this Court ruled in *United States* v. *Booker*, 543 U.S. 220 (2005), that district courts may vary from the Sentencing Guidelines to fashion an appropriate punishment in the particular case. Congress therefore could not have intended to rely on the discretion afforded by Section 3553(a) as a means of correcting anomalies resulting from the "except" clause. See *Abbott*, 574 F.3d at 210 ("Congress could not have intended to create such sentencing dis-

parities with the clairvoyant expectation that seven years later the Supreme Court would grant district judges the discretion to cure such injustices.") (citing *Booker*, *supra*); *Easter*, 553 F.3d at 526-527.

B. The Decision Below Implicates An Entrenched Conflict Within The Circuits

There is a clear and well defined conflict among the courts of appeals on the question presented. Eight other courts of appeals—the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits—have considered the meaning of the "except" clause, and none has adopted the interpretation underlying the Second Circuit's decisions in this case and in *Whitley*. Contrary to the decision below, all of those courts have rejected a reading of the "except" clause that would eliminate the sentence for a Section 924(c) offense when the defendant is subject to a higher mandatory minimum sentence for the underlying crime of violence or drug trafficking. See *United States* v. *Segarra*, No. 08-17181, 2009 WL 2932242 (11th Cir. Sep. 15, 2009) (per curiam); *Abbott*, 574 F.3d at 208-209; *United States* v. *London*, 568 F.3d 553, 564 (5th Cir. 2009), petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009); *United States* v. *Pulido*, 566 F.3d 52, 65 & n.6 (1st Cir. 2009), petition for cert. pending, No. 09-5949 (filed Aug. 14, 2009); *Easter*, 553 F.3d at 525; *Parker*, 549 F.3d at 10-12; *United States* v. *Jolivette*, 257 F.3d 581, 586-587 (6th Cir. 2001); *Studifin*, 240 F.3d at 421-424; *United States* v. *Alaniz*, 235 F.3d 386, 386-390 (8th Cir. 2000), cert. denied, 533 U.S. 911 (2001). In addition, three of those circuits have held, in conflict with *Whitley*, that the "except" clause refers only to mandatory minimum sentences for the Section 924(c) offense, and does not refer to sentences for any

other count of conviction, including another firearms-related crime. See *Abbott*, 574 F.3d at 209-211; *Easter*, 553 F.3d at 524-527; *Studifin*, 240 F.3d at 421-424.

The government petitioned for en banc review in both *Whitley* and the decision below, alerting the Second Circuit to the unanimous contrary authority in the other courts of appeals. The Second Circuit denied both of those petitions, thereby indicating that it was unwilling to reconsider its interpretation of Section 924(c). This Court's resolution of the circuit conflict is now warranted.

C. The Question Presented Is Important And Squarely At Issue In This Case

1. The question presented is important to the administration of the federal criminal justice system. Because firearms are commonly used, carried, or possessed in connection with drug trafficking and violent crimes, defendants are frequently charged with violating both Section 924(c) and the statute that defines the predicate offense. In addition, recidivist offenders are often charged under both the ACCA and Section 924(c) when they employ a firearm in connection with another crime. The proper interpretation of the "except" clause determines the minimum sentence in these recurring circumstances. Under the Second Circuit's interpretation, a defendant receives no sentence for the Section 924(c) count if he is subject to a higher mandatory minimum for the ACCA violation or the predicate offense. Under the position adopted by other courts of appeals, by contrast, such a defendant is subject both to the mandatory minimum sentence for the Section 924(c) crime and the mandatory sentence for any other count of conviction. The disagreement between the Second Circuit and the

other courts of appeals therefore yields large disparities in the sentences in a significant number of cases.

2. a. This case squarely presents the issue on which the courts of appeals are divided. Respondent was convicted of violating both 21 U.S.C. 841(b)(1)(A), which carries a mandatory minimum sentence of ten years, and Section 924(c)(1)(A)(i), which requires a consecutive mandatory sentence of at least five years. Based on its interpretation of the "except" clause, the court of appeals ordered the district court to resentence respondent without any separate term of imprisonment for the Section 924(c) offense. The eight other circuits to address the issue would reach a different holding on these facts and would affirm a sentence that included both mandatory minimums.

b. Unlike other pending petitions for a writ of certiorari addressing the meaning of the "except" clause,[4] this case squarely presents that question in a de novo posture. Although respondent did not invoke the "except" clause in the district court or in his initial brief in the court of appeals, the Second Circuit applied a de novo standard of review on the ground that, "if [respondent's] reading of *Whitley* and the 'except' clause are correct, the plain error standard of review would be met." App., *infra*, 4a n.2. That conclusion was based on the government's concession to that effect in *Whitley*, see 529 F.3d at 152 n.1, which in turn rested on controlling Second Circuit decisions holding that plain error review is either "relax[ed]" or inapplicable in certain sentencing contexts. See, *e.g.*, *United States* v. *Sim-*

[4] See *Pulido* v. *United States*, No. 09-5949 (filed Aug. 14, 2009); *London* v. *United States*, No. 09-5844 (filed Aug. 11, 2009); *Lee* v. *United States*, No. 09-5248 (filed July 9, 2009); *McSwain* v. *United States*, No. 08-9560 (filed Mar. 26, 2009).

mons, 343 F.3d 72, 80 (2d Cir. 2003); *United States* v. *Sofsky*, 287 F.3d 122, 125 (2d Cir. 2002). Whatever the merit of those cases, because the Second Circuit decided this case under a de novo standard in light of the government's concession, the case comes to this Court on de novo review. Cf. *United States* v. *Gaudin*, 515 U.S. 506 (1995) (deciding issue de novo where government did not assert plain error in seeking a writ of certiorari).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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