No. 15-9260

IN THE

Supreme Court of the United States

LEVON DEAN, JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether *United States* v. *Hatcher* and related opinions from the U.S. Court of Appeals for the Eighth Circuit, which bar a district court from considering the consecutive mandatory minimum sentence required under 18 U.S.C. § 924(c) in determining the sentence for the underlying felony, are inconsistent with this Court's decision in *Pepper* v. *United States* and the Sentencing Reform Act, 18 U.S.C. §§ 3551, 3553, and 3661.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

COURT DOCUMENTS

STATUTES

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reprinted in the Joint Appendix (J.A.) at J.A. 45-67. It is also available at 810 F.3d 521 (8th Cir. 2015). The sentencing transcript of the United States District Court for the Northern District of Iowa is reproduced at J.A. 14-30.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its judgment on December 29, 2015, see J.A. 68-69, and denied a petition for rehearing *en banc* on February 12, 2016, see J.A. 70. The petition for a writ of certiorari was filed on May 4, 2016, and granted on October 28, 2016. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Sentencing Reform Act, as amended, 18 U.S.C. §§ 3551, 3553(a), 3661, 3582, 3584, are included as an appendix to this brief. The mandatory consecutive sentence provisions of 18 U.S.C. § 924(c) and § 1028A are also included in the appendix.

STATEMENT OF THE CASE

The Sentencing Reform Act authorizes a district court, in determining the proper sentence for a crime-of-violence offense, to consider the plainly relevant fact that the defendant will also serve a lengthy mandatory consecutive sentence under 18 U.S.C. § 924(c). The Act's centerpiece, § 3553(a), instructs a district court to impose a sentence "sufficient, but not greater than necessary," to comply with the purposes of sentencing enumerated in that statute. Properly

implementing that command requires taking into account a vast range of information about the defendant, including the plainly relevant fact that he will also serve a lengthy mandatory minimum sentence.

That conclusion is bolstered by § 3661, which, as this Court has repeatedly underscored, grants district courts discretion to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come." *Pepper* v. *United States*, 562 U.S. 476, 489 (2011) (quoting *United States* v. *Tucker*, 404 U.S. 443, 446 (1972)). The fact of a defendant's § 924(c) sentence is precisely the sort of information a district court may properly consider under this provision. Conversely, excluding that fact erects precisely the sort of "categorical bar" on certain information that this Court has repeatedly rejected. See *id.* at 491.

Nothing in § 924(c) is to the contrary. That provision merely imposes a mandatory minimum sentence on anyone who uses or carries a gun during a crime of violence. § 924(c)(1)(A). That sentence must be imposed consecutively "with any other term of imprisonment imposed on the [defendant], including any term of imprisonment imposed for the [underlying] crime of violence." § 924(c)(1)(D)(ii). It does *not* say that a district court must ignore the fact of the § 924(c) sentence in determining the sentence for the underlying offense. That silence is especially telling given Congress's decision to include such language in other statutes, *e.g.*, § 1028A, but not here. Section 924 therefore cannot be read to restrict the district courts' longstanding and broad sentencing discretion, as recognized and codified in §§ 3551, 3553 and 3661.

Factual Background

At issue in this case is Levon Dean, Jr.'s sentence for two robberies involving alleged drug dealing around Sioux City, Iowa. J.A. at 46–51. On April 15, 2013, Mr. Dean and his brother, Jamal Dean, were approached by two women, Sarah Berg and Jessica Cabbell, to provide the "muscle" to recover money from "J.R.," a drug user who owed Ms. Berg money. *Id*. at 46–47. Cabbell, a prostitute, had a "date" with J.R. and the group decided to go to the motel where the date was to take place. *Id.* at 47. At the motel, Berg confronted J.R. about the $400 debt, while Mr. Dean looked around for money and drugs. *Id*. Jamal, drew a firearm and hit J.R. on the head with it. *Id*. Berg took J.R.'s car keys, cell phone, and a pipe containing methamphetamine. *Id.* Subsequently, Berg and the Deans left the scene together. *Id.* at 48. On April 24, 2013, the Deans robbed a drug dealer. *Id*. Jamal, again hit the drug dealer with his gun and the two left with $300 in cash, 20 grams of methamphetamine, and some electronic equipment and old cell phones. *Id.*

Prosecution and Sentencing

In 2014, Mr. Dean and his brother were charged with conspiracy to commit robbery and robbery in violation of 18 U.S.C. §§ 2 and 1951 (Counts 1–3). *Id*. at 48-49. They were also charged with possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c), based on the presence of the guns at the robberies (Counts 6–7). *Id.* at 49. They were further charged with two counts of carjacking and two counts of being felons in possession of a firearm. *Id.* A jury returned verdicts of guilty for Mr. Dean on the conspiracy count, the robbery counts, and the two counts of possession of a firearm

in furtherance of a crime of violence. *Id.* The jury acquitted Mr. Dean on the carjacking counts and one count of being a felon in possession of a firearm. *Id.*

Pursuant to § 924(c), the district court was required to impose a mandatory consecutive sentence of five years (60 months) for the first possession of a firearm in furtherance of a crime of violence and 25 years (300 months) for the second, for a total of 30 years (360 months) to run consecutively with the sentence on any other counts. J.A. 50. The underlying robbery convictions did not carry a mandatory or consecutive sentencing requirement, and the U.S. Guidelines range for those offenses was 84–105 months. *Id.*

In light of the 30-year mandatory consecutive minimum under § 924(c), Mr. Dean requested a downward variance from the Guidelines range for the robbery offenses to impose a sentence of one day, which would result in a total sentence of 30 years and one day. J.A. 18. The Honorable Mark Bennett of the U.S. District Court for the Northern District of Iowa denied the variance. Judge Bennett explained that, "if [he] could look at a combined package" of all the offenses together, "360 months plus 1 day" would be "more than sufficient for a sentence in this case." J.A. 26; see also J.A. 21 (the prosecutor acknowledging that 30 years and one day "may very well be" reasonable). Nevertheless, Judge Bennett explained that he lacked discretion to "go down to one day" on the robbery counts because Eighth Circuit precedent required him "to look at [the underlying offenses] separately" from the § 924(c) counts. J.A. 25–26; see also J.A. 25 ("if it comes back [on remand], then I'll go down to one day [on the robbery counts]").

Accordingly, after considering the § 3553(a) factors in isolation from the 30-year mandatory sentence, Judge Bennett varied downward from the Guidelines

range of 84–105 months and imposed a sentence of 40 months for each robbery count, to run concurrently with each other. J.A. 25–27. Judge Bennett specifically noted that Mr. Dean did not have a violent criminal history, but had been involved only in "relatively minor things." JA 26. Further, the Judge determined a downward variance was appropriate because Mr. Dean "wasn't the weapons guy, and he wasn't kind of leading the charge [and] was much more of a follower." *Id.*; see also JA 22–23 (the prosecutor acknowledging that Mr. Dean "did not have the weapons," was "not as culpable" as his brother, and was "a follower").

Judge Bennett therefore imposed a total sentence of 400 months of imprisonment, comprising (i) the 60-month and 300-month mandatory minimums for the two § 924(c) convictions, to run consecutively to each other and to the other counts, and (ii) a 40-month sentence for each of the underlying offenses, to run concurrently with each other. J.A. 33.

Appellate Review

Mr. Dean appealed his sentence. He argued that *Pepper* v. *United States*, 562 U.S. 476 (2011), overruled the Eighth Circuit's precedent barring a court from considering a mandatory minimum sentence under § 924(c) when sentencing the defendant for the underlying felony offense. Petition for Writ of Certiorari at 6, *Dean* v. *United States* (No. 15-9260) (U.S. May 4, 2016).[1]

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[1] Mr. Dean also appealed his first conviction, arguing that the victim was not engaged in the business of trafficking drugs. Last Term, this Court resolved the evidentiary burden of the commerce element of Hobbs Act convictions. *Taylor* v. *United States*, 136 S. Ct. 2074, 2082 (2016).

Without addressing *Pepper* or the governing provisions of the Sentencing Reform Act, the Eighth Circuit affirmed Mr. Dean's sentence based on its own precedent in *United States* v. *Hatcher*, 501 F.3d 931 (8th Cir. 2007). J.A. at 66-67. *Hatcher* held that under U.S.S.G. § 5G1.2(a) a district court lacks discretion to sentence a defendant to one day of imprisonment for "crimes not subject to a mandatory minimum, solely because [of] the mandatory sentence." *Id.* at 66. Deeming Mr. Dean's case indistinguishable from *Hatcher*, the court below determined that his aggregate sentence of 400 months was reasonable. *Id.* at 67.

SUMMARY OF THE ARGUMENT

A district court need not blind itself to the fact of a defendant's mandatory consecutive sentence under § 924(c) when determining the appropriate sentence for the underlying offense. The Eighth Circuit's contrary holding conflicts with the plain language of 18 U.S.C. §§ 3551, 3553(a), and 3661, and is not supported – much less compelled – by the language of § 924(c). Moreover, § 924(c)'s legislative history supports Mr. Dean's interpretation, and the rule of lenity resolves any ambiguity in his favor.

I.A. The foundation of any federal sentence is the Sentencing Reform Act, namely § 3553, which sets forth the purposes a district court must satisfy in imposing a sentence: proportionality, deterrence, incapacitation, and rehabilitation. § 3553(a)(2). "[A] sentencing judge's overarching duty under § 3553(a) [is] to 'impose a sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in § 3553(a)(2)," after due consideration of these and other enumerated factors. *Pepper*, 562 U.S. at 491. The same factors govern the length of a sen-

tence of imprisonment for multiple offenses, including the determination of whether multiple sentences should be concurrent or consecutive. §§ 3582(a), 3584(b).

To discharge this duty, a district court must be able to consider the fact of a defendant's § 924(c) sentence. Without taking into account the fact that a defendant will serve a lengthy mandatory minimum sentence, a district court cannot coherently assess the quantum of additional punishment that is "sufficient, but not greater than necessary" to punish the defendant, deter others, protect the public, and rehabilitate the offender. See § 3553(a); *United States* v. *Smith*, 756 F.3d 1179, 1183 (10th Cir. 2014).

This case perfectly illustrates these problems. Mr. Dean received an aggregate 30-year sentence for his two § 924(c) convictions, J.A. 27, 33, which the district judge determined would have been "more than sufficient" by itself to satisfy § 3553's purposes, J.A. 26. Nevertheless, the Eighth Circuit's rule precluded the district court from accounting for Mr. Dean's mandatory consecutive minimums, and the court was thus compelled to impose a sentence for the underlying offenses that, by its own determination, was greater than necessary to serve § 3553(a)'s purposes. See *id.*

I.B. Barring consideration of a defendant's § 924(c) sentence also conflicts with § 3661, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" of a defendant that a district court "may receive and consider for the purpose of imposing an appropriate sentence." That provision "codifie[s] the 'longstanding principle that sentencing courts have broad discretion to consider various kinds of information'" in determining the proper sentence. *Pepper*,

562 U.S. at 488 (quoting *United States* v. *Watts*, 519 U.S. 148, 151 (1997) (per curiam)). This Court has emphasized that § 3661's "plain" and "broad" language "does not provide 'any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing.'" *Id.* at 491 (quoting *Watts*, 519 U.S. at 152). The holding below, however, erects just such a barrier.

I.C. Nothing in § 924(c) contradicts the clear and broad commands of these other provisions. Section 924(c) imposes mandatory minimum sentences for defendants who use firearms "during and in relation to any crime of violence or drug trafficking crime." § 924(c)(1)(A). The statute specifies that these sentences for the gun crime must be "in addition to" and not "concurrent[] with" any sentence for the underlying offense. § 924 (c)(1)(A) & (D)(ii). It says nothing, however, about what the sentence for the underlying offense must (or must not) be, or whether a judge may take into account the § 924(c) sentence in determining the appropriate sentence for the underlying offense. Section 924(c) thus overrides a sentencing judge's usual discretion under § 3584(b) to order concurrent rather than consecutive sentences. But it does no more than that. Consequently, there is nothing in § 924(c)'s language that could overcome the district courts' duty under §§ 3553 and 3661 to consider all relevant information and impose a sentence that is minimally sufficient to achieve the purposes of sentencing.

Elsewhere, Congress expressly barred consideration of mandatory minimums in the setting of sentence for an underlying offense, so a similar limitation should not be read into § 924(c). 18 U.S.C. § 1028A, which similarly imposes consecutive mandatory minimums for identity theft "during and in rela-

tion to" other specified crimes, makes plain what § 924(c) does not: it says explicitly that a district court "shall not in any way reduce" the underlying sentence based on, "or otherwise take into account," the mandatory minimum when determining the proper sentence for the underlying offense. That Congress chose to impose such a limitation in § 1028A, but included no such language in § 924(c), is further proof that the latter cannot be read to support the holding below. See § 1028A; see also *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, No. 15-513, slip op. (U.S. Dec. 6, 2016) (quoting *Marx* v. *Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) ("Congress' use of 'explicit language' in one provision 'cautions against inferring' the same limitation in another provision.").

II.A. The legislative history likewise shows that Congress did not intend to restrict district courts' traditional sentencing discretion as to the offense underlying a § 924(c) charge. Even as Congress debated and amended the provision that became § 924(c), it was careful to preserve that discretion, with key legislators even noting that § 924(c) would still permit a district judge to suspend entirely the underlying sentence. Moreover, in the pre-Guidelines environment, it would have made little sense for Congress to bar district courts from considering one specific fact during sentencing, as district courts had essentially unfettered discretion within the statutory ranges. *Burns* v. *United States*, 501 U.S. 129, 132–33 (1991). At the very least, if Congress intended such a novel change, there would be clearer evidence.

II.B. Even if the relevant statutory provisions contained an ambiguity that could support the government's position, the rule of lenity would require it to be resolved in Mr. Dean's favor. Indeed, for the government to prevail, it must show, based on "text,

structure, and history," that its reading of the statute is "unambiguously correct." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). It cannot make that showing. Accordingly, to the extent § 924(c) is unclear, Mr. Dean should still prevail.

III. The holding below is also contrary to the long history of affording trial courts broad discretion over the information used to determine sentence, which dates to the Founding. American courts have long "practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams* v. *New York*, 337 U.S. 241, 246 (1949). That venerated policy is now codified in the Sentencing Reform Act. The Court should not assume that Congress intended to depart further from this policy than § 924(c)'s plain language requires.

ARGUMENT

I. PLAIN STATUTORY LANGUAGE ESTABLISHES THAT A DISTRICT COURT MAY CONSIDER THE FACT OF A § 924(c) SENTENCE IN DETERMINING THE SENTENCE FOR THE UNDERLYING OFFENSE.

When a "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) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)). Here, the question presented—whether a district court may consider the fact of a defendant's mandatory § 924(c) sentence in determining the proper sentence for the underlying offense—is answered by the plain language of the Sentencing Reform Act and 18 U.S.C. § 3661, which

together set forth the factors a district court must consider in sentencing any federal defendant, and make clear that "possession of the fullest information possible" is "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence." *Pepper*, 562 U.S. at 488 (quoting *Williams*, 337 U.S. at 247). Considering a defendant's § 924(c) sentence is necessary, in at least some cases, to comply with these provisions.

Nothing in Section 924(c), is to the contrary. It states merely that the mandatory minimum sentence must be consecutive with the sentence for the underlying crime; it says nothing about what the underlying sentence must be. That silence is especially telling in light of Congress's decision to include in another statute—but not here—language restricting the district court's discretion to consider an automatic mandatory minimum sentence. Thus, § 924(c) does not contravene the commands of the Sentencing Reform Act and § 3661, which together foreclose the Eighth Circuit's rule.

A. The Sentencing Reform Act Authorizes District Courts To Consider A Defendant's § 924(c) Sentence.

The foundation of federal criminal sentencing is 18 U.S.C. § 3553(a), which sets forth the "factors to be considered in imposing a sentence" and commands the district court to "impose a sentence sufficient, but not greater than necessary, to comply with" those factors. At each step in the sentencing process, the statutory structure directs district courts to heed § 3553(a)'s instructions. That command cannot properly be implemented if district judges are forced to ignore the fact of a defendant's mandatory consecutive minimum sentence under § 924(c).

1. The Sentencing Reform Act of 1984 gave shape to the modern federal sentencing regime. Pub. L. No. 98–473, 98 Stat. 1837 (1984); see *Burns,* 501 U.S. at 132–33. Under that Act, federal sentencing begins with 18 U.S.C. § 3551, which directs that, "[e]xcept as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute . . . shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2)." § 3551(a).

Section 3553(a), in turn, directs that a district court "shall impose a sentence sufficient, but not greater than necessary, to comply with" four enumerated purposes:

> The need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

§ 3553(a). Underscoring the centrality of these four factors, § 3553(a) separately dictates that, "in determining the particular sentence to be imposed," a district court "shall consider" these factors along with (among other things) "the nature and circumstances of the offense and the history and characteristics of the defendant" and "the kinds of sentences available." § 3553(a)(1), (3). Thus, as the government recently

acknowledged in another case before this Court, § 3553(a) directs the "district court's ultimate exercise of sentencing discretion" and the judge "must always consider th[e] factors" it sets forth. See Reply Brief for the United States at 4, 8, *Beckles* v. *United* States (No. 15-8544) (U.S. Nov. 21, 2016).

Section 3553(a)'s "sufficient, but not greater than necessary" requirement is known as "the parsimony principle," *i.e.*, a directive to impose "the least severe alternative that will achieve the purposes of the sentence." Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 68, 82 (2005). "The parsimony principle recognizes that severe penalties are expensive and usually harmful to offenders and that the crime-control benefits of such penalties are uncertain and often quite limited. Severe penalties should therefore be used as sparingly as possible." *Id.* at 68. In turn, § 3553(a)(2)'s enumerated factors give substance to the parsimony principle by setting forth the purposes the sentence must satisfy: proportionality, deterrence, incapacitation, and rehabilitation. *Id.* at 82; see also *Rita* v. *United States*, 551 U.S. 338, 348 (2007). Effectuating the parsimony principle, with reference to these factors, is "a sentencing judge's overarching duty." *Pepper*, 562 U.S. at 491.

The same factors govern the length of a sentence of imprisonment, including when a defendant has been convicted of multiple offenses. Section 3582(a) sets forth the factors to be considered in imposing a term of imprisonment, and like § 3551, it directs the district court back to § 3553(a): "The Court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a)." § 3582(a). And § 3584(b) governs multiple sentences of imprison-

ment, again directing that, "in determining whether the terms imposed are to be ordered to run concurrently or consecutively, [the court] shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a)."

In short, § 3551 empowers the imposition of federal sentences generally; § 3582(a) deals with whether a jail sentence should be imposed and, if so, for how long; and § 3584(b) governs the consecutive-or-concurrent question. *All* of these provisions instruct the district court to look to § 3553(a), which provides the "general directive" of sentencing, *Gall* v. *United States*, 552 U.S. 38, 50 n.6 (2007): to impose "a sentence sufficient, but not greater than necessary, to comply with" § 3553(a)(2)'s enumerated purposes. A district court must therefore impose a sentence based on "an individualized assessment" that "consider[s] all of the § 3553(a) factors." *Id.* at 49–50 n.6; see also *Pepper*, 562 U.S. at 491.

2. These provisions squarely authorize a district court to consider "one of the most conspicuous facts about a defendant": that he will serve a lengthy sentence under § 924(c). See *Smith*, 756 F.3d at 1180 (Gorsuch, J.). That is because considering the fact of a defendant's § 924(c) sentence is often necessary to give effect to § 3553(a)'s overarching directive: the parsimony principle. See *Pepper*, 562 U.S. at 493. A court cannot "impose a sentence sufficient, but not greater than necessary" without taking into account how long the total sentence will actually be. See *id.* at 507 (because a "criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent . . . the trial court can reconfigure the [overall] sentencing plan . . . to satisfy the sentencing factors in 18 U.S.C. § 3553(a)"); *United*

States v. *Franklin*, 499 F.3d 578, 587–88 (6th Cir. 2007) (Moore, J., concurring) ("The § 3553(a) factors require the district court to give at least some consideration to the total amount of time that a defendant will spend in prison.").[2]

For example, consider § 3553(a)(2)(C)'s goal of "protect[ing] the public from further crimes of the defendant." The fact that a § 924(c) defendant will serve at least five years—or 25, or 30, or 105 years, *e.g.*, *Deal* v. *United States*, 508 U.S. 129, 131 (1993)—is surely relevant to whether any additional jail time is necessary to adequately protect the public from that defendant. See *Smith*, 756 F.3d at 1183 (noting that "the marginal benefit for public protection may appear quite different" as a defendant ages and is further removed from his criminal conduct); Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations in The Nurture Versus Biosocial Debate in Criminology* 377, 378 (Kevin M. Beaver et al. eds., 2015) ("It is now a truism that age is one of the strongest factors associated with criminal behavior."); see also *United States* v. *Presley*, 790 F.3d 699, 702 (7th Cir. 2015) ("Sentencing judges need to consider the phenomenon of aging out of risky occupations."). However, "if a

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[2] *See also*, *e.g.*, *United States* v. *Erpenbeck*, 532 F.3d 423, 438 (6th Cir. 2008) (evaluating whether the aggregate sentence complied with § 3553(a), and agreeing with the government that the allocation of the sentence among multiple counts made "no practical difference" to that analysis); *United States* v. *Santiago-Rivera*, 744 F.3d 229, 233–34 (1st Cir. 2014) (aggregate sentence was reasonable in light of the § 3553(a) factors); *United States* v. *Johnson*, 451 F.3d 1239, 1244 (11th Cir. 2006) (same); *cf. United States* v. *Bay*, 820 F.2d 1511, 1514 (9th Cir. 1987) ("It is incorrect to view the total sentence imposed upon [ ] a defendant as resulting from nothing more than a mathematical addition of each crime upon which he was convicted.").

district court determines that the history and characteristics of a particular defendant require incapacitation for a specific number of years, the [government's] rule would require the district court to sentence the defendant to that number of years *plus*" the mandatory minimum under § 924(c). *Franklin*, 499 F.3d at 588 (Moore, J., concurring) (emphasis added); see also *Smith*, 756 F.3d at 1183. That is nonsensical.

Likewise, consider § 3553(a)'s command that a sentence must "provide just punishment for the offense" and "afford adequate deterrence." § 3553(a)(2)(A), (B). The fact that the defendant is guaranteed a lengthy prison sentence under § 924(c) is unquestionably relevant to whether *additional* prison time is needed to appropriately punish him for the conduct underlying both offenses, or to deter others from engaging in that same conduct. Indeed, "sentencing courts . . . routinely consider the impact of a sentence already issued for one count of conviction when trying to determine the appropriate punishment under § 3553(a) for a related count of conviction." *Smith*, 756 F.3d at 1183 & n.1 (collecting cases). Considering this information is consistent with the courts' duty to account for "the kinds of sentences available" for the defendant. § 3553(a)(3). And not considering it would contravene the statute's command that a district court "shall consider" and impose a sentence "not greater than necessary" to serve § 3553(a)(2)'s enumerated purposes.[3]

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[3] Even those courts of appeals that require exclusion of the § 924(c) sentence as a consideration recognize that "the factors set out in § 3553(a) could lead the court to conclude that a shorter total sentence than the total specified for a § 924(c) conviction and recommended for the underlying crime would be appropriate." *United States* v. *Chavez*, 549 F.3d 119, 134 (2d Cir. 2008).

This case perfectly illustrates these problems. Mr. Dean received an aggregate 30-year sentence for his two § 924(c) convictions. J.A. 27, 33. That sentence will ensure that the public is protected from any recidivism until Mr. Dean is well into his fifties and decades removed from his most recent criminal act. That fact is plainly relevant to whether an additional four years (or seven years, or nine years, see *supra* p. 4) of incarceration for the underlying offenses is needed to adequately protect the public. It would make no sense, and would violate the parsimony provision of § 3553(a), for the district court to impose a sentence for Mr. Dean's underlying offenses that is independently sufficient to protect the public, and *then* tack on the mandatory minimums, yielding a far higher total sentence. Likewise, Mr. Dean's 30-year mandatory sentence is certainly relevant to whether any additional jail time is required to produce a total sentence that is proportionate and serves as a sufficient deterrent under §§ 3553(a)(2)(A) and (B).

The district court candidly acknowledged these problems at sentencing, observing that Mr. Dean's two § 924(c) sentences would have been "more than sufficient" by themselves to satisfy § 3553's purposes. J.A. 26. The district court was nevertheless compelled to impose a sentence for the underlying offenses that, by its own determination, violated the parsimony principle because it was greater than necessary to serve § 3553(a)'s purposes. See *id.* ("[I]f I could . . . I would sentence [Mr. Dean] to the two mandatory minimums which total 360 months and then give 1 additional day.").

Moreover, the exercise the Eighth Circuit's rule requires is at best highly artificial. A conscientious district judge will have great difficulty reconciling the statutory command to impose a sentence "not greater

than necessary" while at the same time disregarding the greater part of that very sentence. Even the most careful judge will not be able to simply disregard the multi-year (or multi-decade) § 924(c) sentence looming in the background. The Eighth Circuit's rule thus demands that district judges perform an essentially artificial exercise that reflects a significant departure from normal sentencing practice. Cf. *Bay*, 820 F.2d at 1514 ("[A] sentencing judge does not merely evaluate the gravity of each separate crime upon which a conviction was obtained, and then select a punishment that would be appropriate for each if considered independently . . . . ").

* * *

In short, "a sentencing judge's overarching duty under § 3553(a) [is] to 'impose a sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in § 3553(a)(2)," after due consideration of those and the other enumerated factors. *Pepper*, 562 U.S. at 491. And properly discharging that duty will require a district court to take into account the defendant's aggregate sentence, including any § 924(c) mandatory minimum. None of this is to say that a district court must *reduce* the defendant's underlying sentence; in some cases, the mandatory consecutive minimum properly will not change the district court's bottom-line determination. See *Smith*, 756 F.3d at 1192. But in other cases, it may make a difference—as it did here. Mr. Dean's sentence is, by the sentencing judge's own estimation, at least 40 months longer than necessary to serve the purposes Congress has instructed the courts to follow. See J.A. 26. Nothing in the Sentencing Reform Act contemplates that result.

B. Section 3661 Confirms That There Is "No Limitation" On A District Court's Discretion To Consider The Defendant's § 924(c) Sentence.

Section 3553(a)'s instruction is confirmed by § 3661, which is equally unequivocal: "*No limitation* shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661 (emphasis added). This provision "codifie[s] the 'longstanding principle that sentencing courts have broad discretion to consider various kinds of information'" in determining the proper sentence. *Pepper*, 562 U.S. at 488; see *infra* pp. 34–36. This Court has therefore "rejected proposal after proposal seeking to impose non-constitutional limits on the information a court may consider at sentencing." *Smith*, 756 F.3d at 1182 (collecting cases).[4]

This Court recently underscored the breadth of § 3661. See *Pepper*, 562 U.S. at 488–89. *Pepper* explained that this provision "expressly preserved the traditional discretion of sentencing courts to 'conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come.'" *Id.* at 489 (quoting *United States* v. *Tucker*, 404 U.S. 443, 446 (1972)). The Court therefore rejected "[a] categorical bar on the consideration of postsentencing rehabilitation ev-

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[4] Although § 3661 works hand in hand with the other Sentencing Reform Act provisions, it actually predates both the Act and § 924, having been enacted in 1970 as § 3577. *See* Pub. L. No. 91-452, § 1001(a), 84 Stat. 922, 951 (1970). It was renumbered to § 3661 in 1984 as part of the Act.

idence," emphasizing that § 3661's "plain" and "broad" language "does not provide 'any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing.'" *Id.* at 491.

The same principle applies here. For all the reasons explained above, a defendant's § 924(c) sentence is directly relevant to the determination of a proper overall sentence. *Supra* pp. 14–18. In fact, this Court has specifically rejected an effort to exclude information related to § 924(c), holding that § 3661 permits a sentencing court to enhance a defendant's sentence based on conduct alleged in a § 924(c) charge on which he was acquitted. *Watts*, 519 U.S. at 156–57. And "the case for applying § 3661 would seem a good deal more compelling here than there," as there are potential constitutional problems with enhancing a defendant's sentence based on facts not found by a jury, but "no one has identified any constitutional imperative that might prevent sentencing courts from applying § 3661 to reduce crime of violence sentences in light of simultaneously issued § 924(c) sentences." *Smith*, 756 F.3d at 1182–83.

In conjunction with § 3553(a), § 3661 gives force to the principle that "possession of the fullest information possible concerning the defendant's life and characteristics" is "'[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence.'" *Pepper*, 562 U.S. at 480 (quoting *Williams*, 337 U.S. at 246–47). The court below nevertheless enforced a "categorical bar" on considering this type of information, which "directly contravene[s] Congress' expressed intent in § 3661," see *id.* at 491, as well as this Court's "long recogni[tion] that sentencing judges 'exercise a wide discretion' in the types of evidence

they may consider when imposing sentence," *id.* at 480.

C. Section 924(c) Only Displaces A District Court's Discretion To Consider Whether Sentences Run Concurrently Or Consecutively.

Given the breadth and clarity of §§ 3553(a), 3661, and the other sentencing provisions discussed above, the Eighth Circuit's holding could be defensible only if § 924(c) squarely foreclosed consideration of the defendant's mandatory minimum sentence. It does not. Its sole effect here is to bar district courts from ordering § 924(c) sentences to run concurrently with the underlying sentence; no more, no less. Thus, the sentencing statutes say clearly that a district court may consider a § 924(c) sentence, and § 924(c) does not say otherwise. The holding below therefore violates the basic rule that "[w]here the text permits, congressional enactments should be construed to be consistent with one another." *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, 561 U.S. 89, 108 (2010).

1. Section 924(c)'s commands are clear—and limited. First, § 924(c)(1) simply sets forth the relevant mandatory minimum sentences:

> (A) . . . 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;
>
> . . .
>
> (C) In the case of a second or subsequent convic-

> tion under this subsection, the person shall—
>
> (i) be sentenced to a term of imprisonment of not less than 25 years . . . .

§ 924(c)(1)(A), (C).[5] This provision specifies that these minimum sentences must be imposed "in addition to the punishment provided for [the underlying] crime of violence or drug trafficking crime," § 924(c)(1)(A), but it says nothing about what that punishment must be.

Next, § 924(c)(1)(D) sets forth the relevant restrictions on the types of punishment to which a § 924(c) defendant is subject. It provides in full:

> 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.

§ 924(c)(1)(D).

Section 924(c) thus sets forth two requirements relevant to the relationship between the § 924(c) sentence and the underlying sentence: (i) the specified mandatory minimum must be imposed "in addition to the punishment provided for" the underlying offense,

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[5] Clauses (c)(1)(A)(i)–(ii), (c)(1)(B), and (c)(1)(C)(ii) specify further mandatory minimums based on the type of weapon involved (*e.g.*, a machinegun) or the manner of its use (*e.g.*, brandished or discharged). These provisions are not relevant here.

and (ii) it may not "run concurrently with . . . any term of imprisonment imposed for" that offense. That is all.

In light of its clear and limited language, § 924(c)'s interaction with the Sentencing Reform Act is easy to apprehend: "[C]onsecutive sentences must be issued even if the district court thinks concurrent sentences [are] sufficient to meet § 3553(a)'s policy objectives." *Smith*, 756 F.3d at 1184. Section 924(c) thus overrides a sentencing judge's usual discretion under § 3584(b) to order concurrent rather than consecutive sentences. Compare § 924(c)(1)(D)(ii), *with* § 3584(b). Indeed, that is the government's position. See Brief in Opposition at 16, *Dean* v. *United States* (No. 15-9260) (U.S. Sept. 9, 2016) (arguing that, in § 924(c), "Congress partially displaced the court's authority under Section 3584(b) to tailor the *aggregate* sentence").

But § 924(c) stops there. Thus, as the government acknowledges, Congress only "partially" displaced the district court's usual authority. *Id.* Section 924(c) does not say that a district court must disregard § 3553(a)(2)'s purposes in setting the defendant's underlying sentence (as would be required to override § 3553(a)). It does not say that a district court must ignore the fact of the § 924(c) sentence in making that determination (as would be required to override § 3661). In fact, "it does not say *anything* about how the underlying crime of violence must be punished." *Smith*, 756 F.3d at 1184. Rather, it requires only that the § 924(c) sentence must be "in addition to the punishment provided" for the underlying offense—whatever that punishment may be—and consecutive with "*any* term of imprisonment" for the underlying offense—whatever that term may be. See *id.* at 1185–86 (§ 924(c) "takes it as given that the proper

scope of punishment for a defendant's underlying crime is '*provided*' by some other lawful source").

As a result, the imposition of a sentence for the underlying offense that accounts for the § 924(c) sentence does not contravene any of that statute's terms. Even a sentence of one day for the underlying offense, as the district judge wanted to impose here, J.A. 26, still would be "in addition to" the § 924(c) sentence, § 924(c)(1)(A), and still would not "run concurrently with" that sentence, § 924(c)(1)(D)(ii). There is thus no conflict between § 924(c)'s plain language and either § 3553(a)'s parsimony principle or § 3661's directive that there is "[n]o limitation" on the facts a sentencing court may consider.

2. Section 924(c)'s silence as to the underlying sentence is particularly telling in light of Congress's explicit instructions in a parallel statutory provision, § 1028A. Much like § 924(c), § 1028A criminalizes identity theft "during and in relation to" certain specified felonies, § 1028A(a)(1), imposes a mandatory minimum sentence for the identity theft "in addition to the punishment provided for" the underlying offense, *id.*, and requires that the mandatory minimum sentence run consecutively to the sentence for the underlying offense, § 1028A(b)(2). But § 1028A *also* says what § 924(c) conspicuously does not: "[I]n determining any term of imprisonment to be imposed for the [underlying] felony . . . , *a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account*, any separate term of imprisonment imposed or to be imposed for a violation of this section." § 1028A(b)(3) (emphasis added).

It is thus clear that Congress "knows exactly how to alter traditional sentencing practices when it wishes, that when it does so it does so in ways and places

clear enough for all to see—and that it has done nothing of the kind in § 924(c)." *Smith*, 756 F.3d at 1185. And as this Court recently reiterated, "Congress' use of 'explicit language' in one provision 'cautions against inferring' the same limitation in another provision." *State Farm Fire & Cas. Co.*, No. 15-513, slip op. (U.S. Dec. 6, 2016) (quoting *Marx*, 133 S. Ct. at 1177); see also, *e.g.*, *United States* v. *Ressam*, 553 U.S. 272, 277 (2008) (where Congress added specific phrasing to § 924(c) but not another similar statute, the difference in language "virtually command[ed]" that the two provisions be construed differently); *N. Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 530 (1982) ("[A]lthough two statutes may be similar in language and objective, we must not fail to give effect to the differences between them."). By the same token, reading § 924(c) to bar consideration of a defendant's mandatory minimum sentence would presumably mean that § 1028A's distinct language actually has no effect, see *Smith*, 756 F.3d at 1186–87, which would contravene the Court's "duty 'to give effect, if possible, to every clause and word of a statute," *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quoting *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955)). Section 1028A thus illustrates perfectly that § 924(c) cannot be read as the government would read it.

3. Despite all of this, some courts have suggested that considering a defendant's § 924(c) sentence "thwarts the will of Congress," because, by requiring the mandatory minimum to be imposed "in addition to" the underlying sentence, Congress must have intended the underlying sentence to have teeth as well. *E.g.*, *Chavez*, 549 F.3d at 135. This view rests on three fundamental errors.

First, as explained above, Congress said nothing in § 924(c) about the nature or extent of "the punishment provided for [the underlying] crime of violence or drug trafficking crime." § 924(c)(1)(A). To assume nevertheless that Congress must have intended that punishment to satisfy some unstated quantum of severity is to pursue Congress's perceived purpose at the expense of the words it actually used. "But no legislation pursues its purposes at all costs . . . and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525–26 (1997); see also *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

Second, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *Am. Trucking Assn's*, 531 U.S. 457, 468 (2001). But reading the anodyne phrase "in addition to" as dramatically restricting the district court's broad discretion under §§ 3553(a) and 3661 requires one to assume that Congress has done just that. See *Smith*, 756 F.3d at 1184. If Congress wanted to go even further beyond § 924(c)'s *explicit* departures from the usual sentencing regime, it surely could have said so—as it did in § 1028A. *Supra* pp. 24.

Third and in any event, allowing district courts to consider a defendant's § 924(c) sentence does not defeat Congress's purpose. To be sure, Congress meant § 924(c) to ensure increased punishment for defendants who use guns. *Infra* pp. 28–32. But § 924(c) accomplishes that purpose by "guarantee[ing] that—whatever the defendant's sentence for his underlying

offense—he will *at least* and *always* serve a certain number of years for his gun crime." *Smith*, 756 F.3d at 1185. And reading the statute to preserve a district court's obligations under §§ 3553(a) and 3661 while sentencing for the underlying offense is consistent with that purpose as expressed in the statute itself. All Congress did was create a floor (by imposing mandatory minimums) below which a defendant's total sentence may not drop via the mechanism of concurrent sentencing. It went no further.

Indeed, to transform the specific instructions in § 924(c) into general directives about the sentence for the underlying offense would be to totalize them in a way that defeats other congressional purposes. Section 924(c) must be interpreted "in the context of the *corpus juris* of which [it is] a part." *Branch* v. *Smith*, 538 U.S. 254, 281 (2003). Anything more would both undermine the manifold and specific purposes of other statutes as well as distort Congress's general purpose—to enact a coherent body of law that serves multiple ends simultaneously.

* * *

Nothing in the text of § 924(c) limits the broad mandates that Congress has explicitly set forth in §§ 3553 and 3661. This omission is no accident. As § 1028A demonstrates, Congress knows exactly how to specify that a district court may not consider the effect of an additional mandatory minimum sentence when determining the proper sentence for the underlying conviction. To nevertheless infer that § 924(c) simply must be understood to limit judicial discretion as to the underlying sentence is to embrace the "false notion that the spirit of a statute should prevail over its letter." Antonin Scalia & Bryan A. Garner, *Reading Law, The Interpretation of Legal Texts*, 343 (2012).

II. TRADITIONAL TOOLS OF STATUTORY INTERPRETATION CONFIRM THE DISTRICT COURT'S DISCRETION TO CONSIDER A § 924(c) SENTENCE.

A. Congress Has Never Intended § 924(c) To Strip A District Judge's Sentencing Discretion As To The Underlying Offense.

Congress has never intended § 924(c) to cabin a sentencing court's discretion as to the underlying offense beyond generally applicable limits. Present-day § 924(c) first arose as a House floor amendment to the Gun Control Act of 1968. *Simpson* v. *United States*, 435 U.S. 6, 13 (1978) (superseded by statute on other grounds). The House members debating the Gun Control Act perceived a "wave of unbridled crime" sweeping the country, 114 Cong. Rec. 22238 (1968), and decided it was "high time [to] deal with the criminal[s]." *Id.* at 22231.

In the context of this debate, Representative Robert Casey of Texas introduced a bill to impose an additional set of "stiff mandatory sentences" on a person convicted of using a gun in connection with certain crimes. *Id.* at 22229–22230. Although Representative Casey's bill included high mandatory minimum sentences, it did not prohibit a district judge from using the traditional tools of sentencing discretion such as suspension and concurrent imposition to determine the actual amount of time the convicted person would spend in prison. *Id.* at 22230.

Representative Harding Poff of Virginia then proposed an amendment to Representative Casey's bill. The Poff amendment substituted a range of years for the Casey bill's high mandatory minimums, but it also prohibited a district judge from ameliorating the

additional sentence through suspension, probation, or an order that the sentence run concurrently with the sentence for the underlying offense. *Id.* at 22231; see also *Busic* v. *United States*, 446 U.S. 398, 405-06 (1980) (explaining that Rep. Poff's comments are "crucial material" in determining the purpose of § 924(c)); *Simpson*, 435 U.S. at 13–14 (describing Rep. Poff's remarks as "clearly probative" and "certainly entitled to weight").

Although House members debated several aspects of the Casey bill and the Poff amendment, much of the debate concerned which legislation would *best preserve* a district judge's sentencing discretion. See *id.* at 22233–22237. For instance, Representative Frank Thompson of New Jersey threw his support behind the Poff amendment because its range of years gave the district judge "infinitely more discretion" than the Casey bill's high mandatory minimums. *Id.* at 22236. Representative Thompson's remarks drew a response from Representative Casey, who claimed that the trial "judge would have discretion" under his bill as well, because the judge "could suspend all or part" of the sentence. *Id.* Representative Poff then countered by noting that even his amendment would "not deny the trial judge the opportunity to suspend the sentence if imposed on the basic felony." *Id.* at 22237.

After additional debate, the House approved the Poff amendment. *Id.* at 22248. The Senate, however, revised the Poff amendment during the conference process to remove some of its more restrictive features. H.R. Rep. No. 90–1956 at 31–32 (1968). Most notably, the enacted version did not prohibit the district court from suspending the § 924(c) sentence or granting probation for a first-time offender, and it did

not prohibit concurrent sentences at all. Pub. L. No. 90–618, 82 Stat. 1224 (1968).

The key restrictions of the original Poff amendment were grafted back into the law in the ensuing years. Senator Michael Mansfield of Montana introduced a bill as part of the Omnibus Crime and Control Act of 1970 that reinserted the prohibition on concurrent sentences. 115 Cong. Rec. 29461–29462 (1969); Pub. L. No. 91–644, 84 Stat. 1890 (1970). And a 1984 amendment reinserted the prohibition on suspended or probationary sentences for first time offenders; it also clarified that the prohibition on concurrent sentences applied to both the first and any § 924(c) subsequent conviction (the 1970 Act was ambiguously worded in this regard). Pub. L. No. 98–473, 98 Stat. 2138–39 (1984). Finally, the 1984 amendment substituted much higher mandatory minimums for the range of years in the original law. Pub. L. No. 98–473, 98 Stat. 2138–39 (1984). Congress has made additional changes over the last three decades as well, but these changes have mostly just tailored § 924(c) to specific crimes or weapons. *E.g.*, Pub. L. No. 101–647, 104 Stat. 4829 (1990) (providing specific sentence for use of "short-barreled shotgun").

The legislative history of § 924(c) shows that, even as Congress has imposed tough (and ever-tougher) mandatory minimum sentences on persons who commit a crime with a gun, it has imposed these additional sentences against the consistent background assumption of judicial discretion, within general statutory limits, as to the length of the sentence for the underlying conviction. To be sure, the Congresses that shaped present-day § 924(c) intended "the gun offender" to "serve a separate and additional sentence for his act of using a gun." 116 Cong. Rec. 42150 (1970). The debate between Representatives Casey

and Poff demonstrates that the 1968 House intended the district judge to maintain discretion even as to the duration of the § 924(c) sentence. The mandatory minimums of present-day § 924(c) have now taken this discretion away. But what Congress has never taken away is the district judge's ability to account for the mandatory minimum in setting the consecutive sentence for the underlying offense. Representative Poff—the original author of what is now § 924(c)—believed that a district judge would continue to possess usual sentencing discretion in regard to "the basic felony." 114 Cong. Rec. 22237 (1968). Congress has never enacted anything to the contrary in § 924(c).

Moreover, Congress's intent to preserve the district judge's discretion as to the underlying conviction comports with the broader context in which it was working when it passed § 924(c). "Before the [Sentencing Reform] Act, Congress was generally content to define broad sentencing ranges, leaving the imposition of sentences within those ranges to the discretion of individual judges, to be exercised on a case-by-case basis." *Burns*, 501 U.S. at 132–33. Accordingly, it would have been bizarre—in fact, pointless—for Congress to intend that a district judge not consider the fact of a § 924(c) sentence, because district judges had essentially unfettered discretion with the given statutory ranges anyway. There was thus no reason for the 1968 or 1970 Congresses to think that preventing a district judge from considering one specific fact in the sentencing process would have any effect.

At the very least, if Congress had intended § 924(c) to create a unique exception to this default practice, it surely would have said so. In fact, however, Congress said just the opposite. Between the enactment of § 924(c) in 1968 and the 1970 Act amendments, Con-

gress passed present-day 18 U.S.C. § 3661, which of course places "no limitation" on the information a trial judge may consider when determining a sentence. Pub. L. No. 91-452, 84 Stat. 951.

Taken as a whole, the legislative history of § 924(c) makes clear that, while Congress intended to provide additional (and eventually mandatory consecutive) punishment for gun crimes, it never intended to cabin district courts' discretion to impose a sentence for the underlying offense that was appropriate in its pre-Guidelines discretion or consistent with § 3553(a) in the post-Guidelines era.

B. If The Relevant Statutory Language Were Ambiguous, The Rule Of Lenity Would Require It To Be Interpreted In Petitioner's Favor.

If this Court has any doubts as to whether § 924(c) might be interpreted to impinge *sub silentio* on the trial judge's otherwise unlimited discretion to consider any information relevant to the defendant's sentence, it should "choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992). The text and structure of §§ 3551, 3553(a), and 3661 demonstrate that a trial judge both can and ought to consider the full range of available information when determining the appropriate sentence. Section 924(c) in no way countermands these statutory provisions—and as the legislative history shows, it was never meant to. Accordingly, the basic tools of statutory interpretation—text, structure, and history—all support Mr. Dean.

However, even if the government could make a colorable claim that the relevant provisions can be read as it would like, Mr. Dean should still prevail. This

Court has long held that it will "apply the rule of lenity and resolve the ambiguity in [the defendant's favor]" whenever the "text, structure and history fail to establish that the Government's position is *unambiguously* correct." *Granderson*, 511 U.S. at 54 (emphasis added); see also *Bifulco* v. *United States*, 447 U.S. 381, 400 (1980) (applying the rule of lenity to a sentencing issue).

The rule of lenity is simple: where there is ambiguity, "the tie must go to the defendant." *United States* v. *Santos*, 553 U.S. 507, 514 (2008); see also *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010) (quoting *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998)) (rule of lenity applies when there is a "grievous ambiguity or uncertainty in the statute"). This rule furthers deeply rooted legal principles. It protects a person from being "subjected to punishment that is not clearly prescribed" and it "keeps [the] courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514.

These principles mean that any ambiguity in the relevant statutes must be resolved in Mr. Dean's favor. And for all the reasons explained above, it is impossible to read § 924(c) as *unambiguously* barring district courts from considering or accounting for a defendant's mandatory minimum sentence. Neither § 924(c)'s plain language nor its structure clearly resolves this issue for the government. If Congress did in fact intend the more restrictive sentencing approach the government advocates, then the onus is on Congress to speak more clearly (as it did in § 1028A). To rule for the government in this case would be to expand criminal punishment. If that is to happen, it should not be done by the courts, and it cannot come at the expense of Mr. Dean, who should not "lan-

guish[] in prison unless the lawmaker has clearly said [he] should." *R.L.C.*, 503 U.S. at 305.

III. BARRING A DISTRICT COURT FROM CONSIDERING A § 924(c) SENTENCE IS CONTRARY TO THE LONGSTANDING POLICY OF SENTENCING DISCRETION AND INCONSISTENT WITH THE SENTENCING GUIDELINES.

Although the textual, structural, and contextual considerations above are more than sufficient to resolve this case, there is another reason § 924(c) should not be interpreted as the court below read it: That view contravenes the venerable policy of our judicial system that "[p]ermitting sentencing courts to consider the widest possible breadth of information about a defendant ensures that the punishment will suit not merely the offense but the individual defendant." *Pepper*, 562 U.S. at 488. That policy, which dates to the Founding, is now preserved in 18 U.S.C. §§ 3553(a) and 3661. In order to ensure that the Guidelines are advisory only, district courts must be permitted to vary from the applicable Guideline range "based on appropriate consideration of all the factors listed in § 3553(a)." *Id.* at 490.

A. The Holding Below Contravenes The Longstanding Policy Of Broad And Individualized Sentencing Discretion.

The Eighth Circuit's rule "sits uncomfortably with . . . the historical practice" of sentencing in this country. *Smith*, 756 F.3d at 1182. Dating back "both before and since the American colonies became a nation," this Court has repeatedly recognized the tradition of giving district courts broad discretion to fashion an appropriate sentence. *Williams*, 337 U.S. at 246. This tradition arises from a time when "courts

in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id*.

Indeed, this Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *United States* v. *Booker*, 543 U.S. 220, 233 (2005); see also *Pepper*, 562 U.S. at 487–88 (collecting cases); *Gall*, 552 U.S. at 51 (affirming that an appellate court reviews a sentence under an abuse-of-discretion standard "[r]egardless of whether the sentenced imposed is inside or outside the Guidelines range"). "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon* v. *United States*, 518 U.S. 81, 113 (1996).

The few limits imposed on this discretion are carefully tailored. Apart from the Sentencing Reform Act, district courts are of course bound by "the range of sentencing options prescribed by the legislature," *Apprendi* v. *New Jersey*, 530 U.S. 466, 481 (2000), and they cannot impose a sentence based on facts that increase the permissible punishment unless such facts have been admitted or found by the jury, *Alleyne* v. *United States*, 133 S. Ct. 2151, 2163 (2013). There is no strict limit, however, on a district court's ability to deviate from a Guidelines sentence. *Rita*, 551 U.S. at 355. A district court is even free to choose a sentence based on a policy disagreement with the Guidelines. *Kimbrough* v. *United States*, 552 U.S. 85, 101–02 (2007).

Nor does this discretion evaporate in the presence of a mandatory minimum. Obviously, a district court generally cannot go below the floor a mandatory minimum creates. Cf. § 3553(e) (authorizing sentences below the mandatory minimum for substantial assistance). But under most mandatory minimum statutes—like § 924(c), but unlike § 1028A—the court retains its full discretion as to the proper sentence for any other counts of conviction.

In short, this policy of discretion reflects the reality that the sentencing judge is best positioned to gather and assess the whole kaleidoscope of facts that may bear on the proper sentence. "As part of this tradition, sentencing courts may examine and consider the impact of contemporaneously issued sentences." *Smith*, 756 F.3d at 1184. To artificially restrict that discretion by barring consideration of a crucial fact about the defendant's sentence is to "transform the act of sentencing . . . from a searching and fact-sensitive inquiry aimed at finding a fitting punishment into an enterprise built on a fiction, even a suspension of disbelief." *Id.* at 1181. The Court should not assume that Congress intended to effect such a change without saying so explicitly.

B. The Advisory Sentencing Guidelines Do Not Answer The Question Presented Here And In Any Event Recognize The Relevance Of A Defendant's Sentence Under § 924(c).

The question presented here is resolved by the statutory provisions discussed above, especially when considered in light of their history and context. Further, this case concerns the district court's desire to *vary* from the Guidelines range, an act that is not governed by anything in the Guidelines. See *Pepper*, 562 U.S. at 490 (district courts must be able to vary

"based on appropriate consideration of all of the factors listed in § 3553(a)" (citing *Gall*, 552 U.S. at 49–51)). The lower court, however, relied on its pre-*Gall* decision in *United States* v. *Hatcher*, which held that the Sentencing Guidelines bar a district court from varying from the Guideline range based on a defendant's § 924(c) sentence. 501 F.3d at 933 (citing U.S.S.G. § 5G1.2(a)). That reliance was misplaced. This case is not governed by anything in the Guidelines, and in any event, § 5G1.2 does not support the holding below.

The Guidelines specifically recommend that district courts consider a defendant's § 924(c) conviction when determining an appropriate sentence for the underlying offense. Section 2K2.4, for example, provides that district courts should not apply a weapons enhancement on the underlying offense when a defendant is convicted of § 924(c) because doing so would result in "duplicative punishment[s]." See *Smith*, 756 F.3d at 1188 (citing U.S.S.G. app. C, amend. 599; § 2K2.4 cmt. n.4). But if "the statute's text barred district courts from considering § 924(c) punishments when issuing sentences for underlying offenses, the guidelines' concern about double-counting would violate this textual command." See *id.* at 1188 & n.4; *United States* v. *Rodriguez*, 112 F.3d 26, 30 (1st Cir. 1997) ("That the [§ 924(c)] sentence had to be calculated independently does not mean that the sentence on the [underlying] counts did not depend on the existence of that sentence; to the contrary, the Guidelines specify such a relationship.").

Section 5G1.2 is not to the contrary. *Hatcher* read § 5G1.2(a)'s instruction backwards. 501 F.3d at 933–34. Rather than requiring an underlying sentence to be "imposed independently" of a mandatory minimum

sentence, this provision requires the reverse: "[T]he sentence to be imposed *on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment*, shall be determined by that statute and imposed independently." U.S.S.G. § 5G1.2(a) (emphasis added). Here, of course, the "count[s] for which" a statute requires a mandatory consecutive sentence are the § 924(c) counts, not the underlying offenses. And "[a]bsent in § 5G1.2(a) is any suggestion that the sentence *for the underlying crime* must be calculated without reference to the existence of the § 924(c) sentence." *Smith*, 756 F.3d at 1188 n.4.

In any event, § 5G1.2(a) at most concerns the Guidelines calculation and does not (and cannot) control the ultimate sentence the district court imposes for the underlying offense pursuant to 3553(a). See *id.*; accord *United States* v. *Vidal-Reyes*, 562 F.3d 43, 55 (1st Cir. 2009). After all, the Guidelines "are advisory only," *Kimbrough*, 552 U.S. at 91, and thus cannot be read to bar a district court from accounting for information that a statute expressly authorizes it to consider, see *Dorsey* v. *United States*, 132 S. Ct. 2321, 2327 (2012) (noting that "sentencing statutes . . . trump[] the Guidelines"); cf. *Gall*, 552 U.S. at 53 & n.9 (in properly "consider[ing] all of the § 3553(a) factors," the district court "gave specific consideration to [a] fact–not directly taken into account by the Guidelines"); *Watts*, 519 U.S. at 158 (Scalia, J., concurring) (the Sentencing Commission has no authority to declare that information within the scope of § 3661 "may not be considered").

CONCLUSION

For the reasons stated above, the Court should reverse the judgment below and order the case remanded for resentencing.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

18 U.S.C. § 3551

(a) In general.—Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, including sections 13 and 1153 of this title, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) Individuals.—An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

(c) Organizations.—An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

(1) a term of probation as authorized by subchapter B; or

(2) a fine as authorized by subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

18 U.S.C. § 3553(a)

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

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[1] So in original. The period probably should be a semicolon.

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3661

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 924(c)

(c)(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.

18 U.S.C. § 1028A

(a) Offenses.—

(1) In general.—Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

(2) Terrorism offense.—Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

(b) Consecutive sentence.—Notwithstanding any other provision of law—

(1) a court shall not place on probation any person convicted of a violation of this section;

(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section; and

(4) a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by

the Sentencing Commission pursuant to section 994 of title 28.

(c) Definition.—For purposes of this section, the term "felony violation enumerated in subsection (c)" means any offense that is a felony violation of—

(1) section 641 (relating to theft of public money, property, or rewards), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or section 664 (relating to theft from employee benefit plans);

(2) section 911 (relating to false personation of citizenship);

(3) section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm);

(4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7);

(5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud);

(6) any provision contained in chapter 69 (relating to nationality and citizenship);

(7) any provision contained in chapter 75 (relating to passports and visas);

(8) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823) (relating to obtaining customer information by false pretenses);

(9) section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card);

(10) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or

(11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408, 1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act).