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

PETITIONER'S REPLY BRIEF

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The government sets forth a theory of § 924(c) and the Sentencing Reform Act that is atextual, inconsistent, and unrealistic.

The government's position is atextual because it reads into both statutes a mandate to impose a predicate sentence "that would be appropriate" in a hypothetical world where "the defendant [is] not also subject to punishment under Section 924(c)." Resp't Br. 13. But neither statute says that—which becomes all the more clear when they are compared to other provisions that do impose such limits. Accordingly, the government's position rests less on the statutory text and more on its view of Congress's purpose. But purpose-based efforts to impose atextual limits on sentencing discretion are "impermissibl[e]." *Rodriguez* v. *United States*, 480 U.S. 522, 525–26 (1987) (per curiam).

The government's position is inconsistent because it offers an inexplicable exception to its own reading of the statute: A district judge *can* "account for" the defendant's § 924(c) sentence by (as the Sentencing Guidelines recommend) declining to impose a weapons enhancement for an underlying offense. Resp't Br. 47. But the government has no theory of § 924(c)'s text that would allow a district judge "to account for" a § 924(c) sentence *only* in this way. If the government's reading of § 924(c) were correct, this practice would be unlawful and the Guideline recommendation would be invalid. Nor can the government's rule explain its practice of arguing in cases remanded for resentencing that a district court can increase the predicate sentence if the § 924(c) conviction was vacated on appeal.

The government's position is unrealistic because it depends on an artificial conception of the sentencing

process in which a district judge attempts to apply *some* of the § 3553(a) factors to each count individually, while ignoring overarching factors pertinent to the other counts and their sentences. But it is impossible to apply "the factors set forth in section 3553(a)," § 3582(a), "in light of all the circumstances of the case," § 3551(a), and based on all relevant information, § 3661, without considering how long the defendant will actually spend in prison. That is true when a court exercises discretion to set the aggregate sentence under § 3584 (which § 924(c) forecloses), but it is also true when the court imposes sentence for a single count under § 3582—which § 924(c) leaves untouched.

The government tries to reframe Mr. Dean's argument as seeking a novel "regime" in which judges routinely "zero[ ] out" underlying sentences to a single day. Mr. Dean's position is far more modest: A judge can and should give at least some consideration to the effect of a mandatory § 924(c) sentence when imposing sentence on the underlying offense. The result of that process will necessarily depend on the exercise of the judge's discretion "in light of all the circumstances of the case." § 3551(a).

I. SECTION 924(c) SAYS NOTHING ABOUT THE LENGTH OF THE UNDERLYING SENTENCE.

1. The government adds a crucial phrase to § 924(c) that Congress did not use. Where the statute says "the punishment provided for such [a predicate] crime of violence or drug trafficking crime," the government reads this: "The 'punishment provided for such [a predicate] crime of violence or drug trafficking crime' *in the absence of a Section 924(c) conviction*." Resp't Br. 17 (alteration in original) (citation omitted) (emphasis added). But "Congress did not write the stat-

ute that way." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). Rather, Congress stopped after "punishment provided," and thus § 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"—namely, the underlying-offense statute and the Sentencing Reform Act. *United States* v. *Smith*, 756 F.3d 1179, 1185 (10th Cir. 2014); see Pet'r Br. 11–21.

Consequently, when § 924(c) instructs that its sentence be imposed "in addition to"—or, in the government's formulation, "over and above," Resp't Br. 16—"the punishment provided" for the predicate offense, it simply means the sentence must be imposed independently of and atop whatever punishment is lawfully imposed for the underlying conviction. The government insists that the phrase "in addition to" must do more than "merely instruct a sentencing judge to impose a separate sentence," *id.*, but that is precisely what it does. As part of the passage that sets forth the "distinctive 'combination' offense" that § 924(c) punishes, *id.* at 17, the "in addition to" clause clarifies that § 924(c) does not create a sentencing enhancement for the predicate crime, but rather, in Senator Mansfield's words, makes the "carrying of a gun in the commission of a crime a crime in and of itself," which carries a separate punishment. 116 Cong. Rec. 42150 (1970). That § 924(c) describes its sentence as being "in addition to *the punishment*" for the underlying offense simply reflects that the criminal code typically defines offenses by how they may be punished.

Section 3551 uses "in addition to" in precisely this way. A court may impose a financial penalty "in addition to any other sentence." § 3551(b). This language is not understood to say anything about what the

"other sentence" must be; it simply authorizes multiple, separate punishments. The same language in § 924(c) has "the same meaning." See *Smith* v. *City of Jackson* 544 U.S. 228, 233 (2005).

The government similarly claims that its reading of "in addition to" is necessary to avoid redundancy with § 924(c)'s ban on concurrent sentences. See Resp't Br. 16, 49. Not so. The "in addition to" clause confirms that § 924(c) creates a distinct offense punishable by a distinct sentence, while the concurrent-sentence ban prescribes the relationship between that distinct sentence and "any term of imprisonment imposed for" the predicate offense. § 924(c)(1)(D)(ii). Neither provision is rendered superfluous by this reading. It is, rather, the government's view that causes redundancy: If the "in addition to" clause actually required a § 924(c) sentence to be imposed "over and above" the punishment that would apply "in the absence of a Section 924(c) conviction," Resp't Br. 17, a concurrent sentence necessarily would be impermissible, because it would "offset the full impact" of the § 924(c) sentence, *id.* at 14.

Indeed, that § 924(c)(1)(D)(ii) refers explicitly to "any term of imprisonment imposed for" the underlying offense without mentioning the *length* of that term militates against the government's interpretation. This silence is particularly telling in light of the statute's separate probation restriction, which provides that "a court shall not place on probation any person convicted of a violation of this subsection." § 924(c)(1)(D)(i). The government opines that this restriction applies not only to the § 924(c) charge but also to the underlying offense. Resp't Br. 19 n.2, 37. Assuming that is correct, it only underscores that Congress did not impose an equivalent restriction on *the duration of imprisonment* for the predicate of-

fense. Indeed, the probation restriction's much broader language—which focuses on the overall punishment of the "person"—contrasts sharply with the language on which the government relies, which addresses only the sentence for the § 924(c) charge.

The government nevertheless asserts that § 924(c) will have no "practical force" unless the Court adopts its reading. Resp't Br. 17. Yet § 924(c) creates a distinct offense punishable by a separate, mandatory, consecutive sentence. The statute has ample "practical force," as Mr. Dean's mandatory 30-year sentence attests.[1]

2. The government's reading of § 924(c) also cannot explain the government's own position in this Court or in other cases.

Despite insisting that § 924(c) requires the imposition of an underlying sentence "that would be appropriate if the defendant were not also subject to punishment under Section 924(c)," Resp't Br. 13, the government says a sentencing judge *can* decline to apply a weapons enhancement for an underlying offense "to account for the fact that Congress has already provided a sanction in Section 924(c) for" using or carrying a gun during a predicate offense, *id.* at 47.

This argument shows just how far the government has departed from § 924(c)'s language. Having read into § 924(c) a restriction that is not there—*a judge may not account for a § 924(c) sentence in setting the underlying sentence*—the government is now forced to

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[1] The government's claim that the rule of lenity has "no application" here, Resp't Br. 49 n.9, is belied by the fact that its argument requires injecting tremendous meaning into the innocuous phrase "in addition to." *Cf. Whitman* v. *Am. Trucking Assn's*, 531 U.S. 457, 468 (2001). This is just the type of case where the rule of lenity applies. Pet'r Br. 32–34.

read a caveat into its invented restriction: . . . *except to avoid double-counting by virtue of a weapons enhancement*. The government notes that the Guidelines support this approach, Resp't Br. 43–44, but it never explains where *in the statute* it finds the authority to "account for" the § 924(c) sentence *only* in this way. Indeed, if the government's reading of § 924(c) were correct, the statute would flatly prohibit a judge from declining to impose a weapons enhancement "for [the] particular reason" of the § 924(c) sentence, *id.* at 47, because (in the government's view) a district judge must determine the underlying sentence as "if the defendant were not also subject to punishment under Section 924(c)," *id.* at 13, "even when the predicate-offense statute . . . itself includes a weapons-based sentencing enhancement," *id.* at 18–19; see *Smith*, 756 F.3d at 1188.

The government also cannot explain its practice of arguing in other cases that sentencing courts can and do account for the § 924(c) sentence. A district judge will sometimes impose a modest underlying sentence in light of the § 924(c) sentence, only to see the § 924(c) conviction overturned on appeal. In this scenario, the government has repeatedly argued, and courts have agreed, that it is proper for the district court to impose a higher underlying sentence on remand precisely to account for the absence of the § 924(c) sentence. See *id.* at 1188–89 & nn. 5–6 (collecting cases). But this argument necessarily assumes that the district court initially and properly accounted for the § 924(c) sentence by imposing a lower sentence than it otherwise would have. The government makes no effort to explain why it is permissible to consider a § 924(c) sentence whenever it helps the prosecution but not when it helps the defendant.

3. Section 924(c)'s language contrasts starkly with that of § 1028A. As the government acknowledges, § 924(c) "served as a starting point for" the "parallel[ ]" language in § 1028A, which likewise requires a fixed term of imprisonment "'in addition to,' and consecutively with," the sentence for the underlying offense. Resp't Br. 47. But § 1028A also contains language that is missing from § 924(c): "a court shall not in any way reduce the term to be imposed for [the predicate] crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for" a § 1028A violation. § 1028A(b)(3).

The government attempts to explain away this key difference between these otherwise-parallel provisions by arguing that § 1028A imposes a "more significant limit" on the sentencing judge's discretion. Resp't Br. 47. As just explained, the government says a court may decline to apply a weapons enhancement on an underlying offense "to account for" a § 924(c) sentence. *Id.* The government claims this discretion is lacking under § 1028A because Congress meant that provision to prohibit a district court from accounting for the mandatory consecutive sentence "in any way"—this difference, according to the government, explains the more restrictive language in § 1028A. *Id.* at 47–48.

This explanation fails because it cannot be squared with the government's own reading of § 924(c). As explained above, a straightforward application of the government's rule would preclude any exception for weapons enhancements, see *supra* p. 6, leaving no difference in meaning between § 924(c) and § 1028A that could account for their significant differences in language.

Regardless, it is not plausible that all of the additional language in § 1028A is intended merely to ensure that a judge must apply an identity-theft-based sentencing enhancement even when it would duplicate § 1028A's mandatory penalty. While it is true that Congress "may convey the same concept using different language" in different statutes, Resp't Br. 48 (citing *Tyler* v. *Cain*, 533 U.S. 656, 664 (2001)), the differences between § 924(c) and § 1028A go well beyond "us[ing] synonyms" to describe the same idea, see *Tyler*, 533 U.S. at 664. Section 924(c) does not merely contain a narrower restriction on "tak[ing] into account" the mandatory sentence, § 1028A(b)(3); it contains no such restriction at all. This significant difference invokes the strong presumption "that Congress acts intentionally and purposely" when it uses different language in similar provisions. *Russello*, 464 U.S. at 23 (citation omitted). "Had Congress intended to restrict" the sentence for a § 924(c) predicate, "it presumably would have done so expressly as it did in" § 1028A. *Id.*; see also *Rodriguez*, 480 U.S. at 525 (declining to read 18 U.S.C. § 3147 to bar suspended sentences where Congress amended other provisions, but not § 3147, to do so expressly); Pet'r Br. 25.

The temporal gap between § 924(c)'s relevant amendments and § 1028A's enactment does not "dilute[ ]" the force of this presumption. Resp't Br. 48. Congress has frequently amended § 924(c), including to add a new mandatory minimum provision (for armor-piercing ammunition) shortly after § 1028A was adopted in 2004.[2] It easily could have amended § 924(c) to impose the same type of restriction as § 1028A, but it did not. Cf. *Rodriguez*, 480 U.S. at

[2] Pub. L. No. 109-92, § 6(b), 119 Stat. 2095, 2102 (2005); *see also, e.g.*, Pub. L. No. 109-304, § 17(d)(3), 120 Stat. 1485, 1707 (2006).

525. In any event, the "axiom[ ] that such notable linguistic differences in two otherwise similar statutes are normally presumed to convey differences in meaning," *Smith*, 756 F.3d at 1186, has never been limited to statutes enacted contemporaneously, *e.g.*, *Meghrig* v. *KFC W., Inc.*, 516 U.S. 479, 485 (1996) (construing RCRA by comparison to the later-enacted CERCLA, which was "designed to address many of the same . . . problems").

4. The government's position here resembles its unsuccessful argument in *Rodriguez*. There, the Court considered 18 U.S.C. § 3147, which was, like relevant portions of § 924(c), enacted through the Comprehensive Crime Control Act of 1984. At the time, § 3147 imposed a two-to-ten-year sentence on anyone who committed an offense while on pretrial release "*in addition to* the sentence prescribed for the [underlying] offense." 480 U.S. at 523 n.1 (emphasis added). The government argued that a sentence imposed under § 3147 could not be suspended because the statute reflected Congress's intent to impose an "an additional period" of "mandatory" incarceration. *Id.* at 524–25. The Court rejected that view, explaining that suspended sentences were authorized unless otherwise specifically prohibited, and "[n]othing in the language" of § 3147 was "irreconcilable" with that general power. See *id.* at 524. The Court also warned against relying on the Crime Control Act's perceived purpose of "diminishing the sentencing discretion of judges," explaining that "no legislation pursues its purposes at all costs." *Id.* at 525–26.

Here too, "[n]othing in the language" of § 924(c) explicitly abrogates a sentencing judge's duty to impose an underlying sentence sufficient but not greater than necessary to serve § 3553(a)'s purposes. See *infra* pp. 12–15. And here too, it would be wrong to go

beyond the language of the statute simply because the government claims it would serve Congress's perceived purpose. See Pet'r Br. 26.

The government ignores *Rodriguez*, instead invoking *Abbott* v. *United States*, 562 U.S. 8 (2010), and *United States* v. *Gonzales*, 520 U.S. 1 (1997). *Abbott* held that a defendant is "not spared from [the § 924(c)] sentence by virtue of receiving a higher mandatory minimum on a different count of conviction." 562 U.S. at 13. *Gonzales* held that § 924(c)'s concurrent-sentence ban reaches state as well as federal sentences. 520 U.S. at 5. In neither case did the Court consider the defendants' underlying sentences.

Because it cannot rely on the inapposite holdings of these cases, the government instead repeatedly invokes *Abbott*'s observation that the "'longstanding thrust' of Section 924(c) is 'its insistence that sentencing judges impose *additional* punishment for § 924(c) violations.'" Resp't Br. 13 (quoting 562 U.S. at 20) (emphasis in original); see *id.* at 8, 18, 38. The government similarly points to *Gonzales*'s caution that "it is not for the courts to carve out statutory exceptions [from § 924(c)] based on judicial perceptions of good sentencing policy." 520 U.S. at 10.

Nothing in Mr. Dean's arguments is inconsistent with this "thrust," because a sentencing court must impose the §924(c) sentence in addition to whatever sentence the court, in the lawful exercise of its statutory discretion, imposes for the underlying crime. In any event, Congress does not legislate in "thrust[s]"; it uses words. And as explained above, the "straightforward statutory command" of § 924(c), *id.* at 6, precludes the government's tortured construction. It is therefore the government that seeks to "carve out statutory exceptions based on [its] perceptions of good

sentencing policy." *Id.* at 10. See also *Rodriguez*, 480 U.S. at 525.

Finally, the government makes much of Congress's abrogation of *Busic* v. *United States*, 446 U.S. 398 (1980), which held that § 924(c) did not apply to any predicate offense "which itself authorizes enhancement if a dangerous weapon is used." *Id.* at 399. Congress reversed that judgment in 1984 by clarifying that § 924(c) applies even if the predicate "provides for an enhanced punishment" for weapons use. § 924(c)(1)(A). In the government's view, this shows Congress's intent to impose additional punishment in all cases. Resp't Br. 18–21.

The issue here, however, is different. *Busic* carved out an entire category of predicate offenses to which § 924(c) could not apply at all, some of which (including the statute at issue in *Busic*) carried no minimum penalty for gun use. See § 111(b). *Busic* thus made it possible for a defendant to receive *no* punishment specifically for using a gun during a crime—a far cry from Mr. Dean's 30-year mandatory sentence. Congress's decision to close that loophole did nothing to restrict a sentencing judge's statutory discretion as to an underlying offense to which a § 924(c) sentence will definitely attach.

II. THE SENTENCING REFORM ACT'S PARSIMONY REQUIREMENT CANNOT BE APPLIED PIECEMEAL.

1. The government asserts that the Sentencing Reform Act creates a rigid, artificial process in which a district court sentencing for multiple offenses: (1) determines under § 3582 the appropriate sentence for each count, based on the § 3553(a) factors, as though no other counts existed; and then (2) determines under § 3584 whether the resulting sentences should be

consecutive, concurrent, or overlapping, again based on the § 3553(a) factors. See Resp't Br. 21–22. On this view, the first step is a largely hypothetical exercise; the district court must apply the § 3553(a) factors to each count individually, with the judge pretending (or trying to pretend) that she does not know the defendant will be sentenced for the other counts as well. The real action happens at the second step, when the judge sets the aggregate sentence by deciding whether the individual sentences are consecutive, concurrent, or overlapping. And, says the government, because § 924(c) withdraws the usual discretion at step two, a judge in a § 924(c) case has no power to influence the aggregate sentence in an effort to comply with § 3553(a). *Id.* at 26–28.

As an initial matter, the government attacks a straw man. It accuses Mr. Dean of arguing that, despite § 924(c)'s withdrawal of a judge's discretion under § 3584, the judge can still "determine th[e] total, aggregate [sentence] based on the judge's consideration of the Section 3553(a) factors." *Id.* at 28. That is not Mr. Dean's position. Rather, his argument is that § 924(c) leaves untouched a judge's discretion to set the sentence for the underlying count under § 3582, *supra* pp. 1–11, and it is impossible to conduct that exercise in compliance with §§ 3582 and 3553(a) without giving at least some thought to how long the defendant will ultimately spend in prison. See Pet'r Br. 11–18. That is, because the judge "shall consider the factors set forth in section 3553(a)" in determining the underlying sentence, § 3582(a), and because the § 3553(a) factors relating to public safety, general and specific deterrence, and rehabilitation require some consideration of the aggregate sentence, a judge may consider the fact of a § 924(c) sentence under § 3582.

The government never confronts this argument directly, instead contending that the court must consider "'the need for the sentence imposed' 'to reflect the seriousness of *the* offense' at issue and 'to provide just punishment for *th*[*at*] offense.'" Resp't Br. 29 (quoting § 3553(a)(2) (emphasis added)). While it is true that some of the § 3553(a) factors refer to "the offense," which the government interprets narrowly based on the use of the definite article, other § 3553(a) factors are not so narrowly drawn.

For example, a judge imposing a sentence for one of multiple counts must consider the other counts in order to apply coherently § 3553(a)(2)(C)'s instruction to "impose a sentence sufficient, but not greater than necessary . . . to protect the public from further crimes of the defendant." As Mr. Dean explained, a judge cannot determine what sentence *for the underlying offense* satisfies this criterion without "giv[ing] at least some consideration to the total amount of time th[e] defendant will spend in prison." *United States* v. *Franklin*, 499 F.3d 578, 587 (6th Cir. 2007) (Moore, J., concurring); Pet'r Br. 15–16. The same is true of the need "to promote respect for the law," § 3553(a)(2)(A); "to afford adequate deterrence to criminal conduct," § 3553(a)(2)(B); and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," § 3553(a)(2)(D). None of these factors focuses only on "the offense," and they require a judge to bear in mind that the defendant will already serve a substantial mandatory sentence under § 924(c). See Pet'r Br. 14–18.

Thus, § 3582 commands a district judge imposing a sentence for a single count to consider some circumstances beyond "the offense" itself, including the sentences arising from the other counts. And § 3551 rein-

forces that command: "[A] defendant . . . shall be sentenced . . . 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*." § 3551(a) (emphasis added). That is why "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 of any other crimes." *United States* v. *Bay*, 820 F.2d 1511, 1514 (9th Cir. 1987). And that is why "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).[3]

The government falls back to quotations from the 1983 Senate Report. Resp't Br. 21–26. In context, however, these snippets do not support the notion that a sentencing judge must impose a sentence for each count that ignores the other counts and their sentences. The passage the government quotes at pp. 21–22 does not even address §§ 3582 and 3584, much less § 3553; in explaining the duties of the Sentencing Commission under 28 U.S.C. § 994, it simply expresses the "intent that, to the extent feasible," sentences for "multiple offenses be determined sepa-

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[3] The government says a one-day sentence could never reflect the seriousness of an underlying offense standing alone, Resp't Br. 29, but that is a wholly separate question from whether § 3582 authorizes a court to *consider* a § 924(c) sentence. If the government believes a particular sentence does not properly comply with § 3553(a) "in light of all the circumstances of the case," § 3551(a), it can appeal, *United States* v. *Booker*, 543 U.S. 220, 261 (2005).

rately and the degree to which they should overlap be specified," so that if one conviction is reversed, "it will be unnecessary to recalculate the sentence." S. Rep. 98-225, at 176–77, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3359–60. This tidbit of legislative history cannot overcome "a sentencing judge's overarching duty under § 3553(a)," *Pepper* v. *United States*, 562 U.S. 476, 491 (2011), to "impose a sentence" for the underlying offense that is "sufficient, but not greater than necessary" to serve the Sentencing Reform Act's purposes.

2. The government says it "does not contend that a district court must blind itself to any relevant facts," and thus § 3661—which bars the "limitation" of "information" that a sentencing court "may receive and consider"—is irrelevant. Resp't Br. 45. In practice, however, that is precisely what the government demands: It says that both § 924(c) and the Sentencing Reform Act require a judge imposing an underlying sentence to disregard the § 924(c) conviction when conducting the § 3553(a) inquiry. *E.g.*, Resp't Br. 13 (court must impose an underlying sentence "that would be appropriate if the defendant were not also subject to punishment under Section 924(c)"). The government's position thus requires sentencing judges to "studiously ignore one of the most conspicuous facts about a defendant"—the minimum sentence he will serve. *Smith*, 756 F.3d at 1180. That cannot be squared with § 3661.

III. NOTHING IN THE LEGISLATIVE HISTORY SUGGESTS THAT CONGRESS INTENDED TO BAR COURTS FROM CONSIDERING A § 924(c) SENTENCE.

The government wades through reams of legislative history, Resp't Br. 29–36, to show that Senator Mans-

field particularly and Congress generally sought to amend § 924(c) to impose a "mandatory" sentence "solely for [the criminal's] choice to use a gun," *id.* at 31 (quoting 1969 Senate Hearings). But that basic point is uncontroverted. See Pet'r Br. 30. And Representative Poff's objective was the same. His bill included a "minimum mandatory sentence" intended to warn a would-be criminal that, "if he uses his gun" during a crime, then "he is going to jail." 114 Cong. Rec. 22231 (1968). That is why his bill completely prohibited probation, suspension, and a concurrent sentence. *Id.* And yet Representative Poff understood that these restrictions would *not* limit the district judge's usual discretion as to the "basic felony." *Id.* at 22237. Although the bill as enacted originally lacked these stricter elements, Senator Mansfield and others soon led the charge to restore them. Pet'r Br. 30.

Senator Mansfield's bill thus made "two major" changes to § 924(c). 115 Cong. Reg. 29461 (1969). First, "[u]nder no circumstances" could the 924(c) sentence "be suspended or assessed concurrently." *Id.* Second, a subsequent § 924(c) conviction would be punished with a twenty-five year mandatory prison term. *Id.* Notably, Senator Mansfield did not mention his amendment's "in addition to the punishment provided" language as a "major" change. See *id.* That omission is especially telling given that, in 1970, district judges still "exercised 'almost unfettered discretion' to select prison sentences." *Tapia* v. *United States*, 564 U.S. 319, 323 (2011). It would therefore have been remarkable for Congress to impose a restriction as unusual as the one the government proposes without it eliciting any commentary from its sponsor, much less to do so in such innocuous language.

If anything, the legislative history suggests that Senator Mansfield included this language only to underscore that § 924(c) made the "carrying of a gun in the commission of a crime a crime in and of itself" and to emphasize the ban on concurrent sentences. 116 Cong. Rec. 42150 (1970). The 1971 amendments thus left intact the sentencing judge's discretion as to the term of imprisonment for the "basic felony."

After exhausting decades of legislative history, the government points to only one instance in which Congress even arguably altered § 924(c) to limit a judge's normal range of sentencing discretion as to the *underlying* conviction: the 1984 amendment's clear prohibition on suspension, probation, or parole, which the government argues applied not only to the § 924(c) sentence but also the underlying sentence. Resp't Br. 37. As explained above, however, even if the government is right about the scope of these prohibitions, that supports Mr. Dean's position. Congress's decision to "express[ly]" alter a statutory regime to address one issue (here, suspension, probation, and parole for the underlying offense) while maintaining "silence" as to a related issue (the length of a term of incarceration for the underlying offense) indicates that Congress "did not intend" to legislate as to the latter issue. See *Wyeth* v. *Levine*, 555 U.S. 555, 574–75 (2009); *supra* pp. 6–7.[4]

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[4] As the government notes, Resp't Br. 35 n.7, Congress abolished the authority to suspend sentences and grant parole as a general matter during its overhaul of sentencing in 1984. These two prohibitions thus are no longer part of § 924(c), but the ban on probation is part of current § 924(c).

IV. MR. DEAN'S POSITION DOES NOT PRODUCE "ANOMALOUS" RESULTS BEYOND WHAT CONGRESS HAS DICTATED, BUT THE GOVERNMENT'S DOES.

1. The government misrepresents Mr. Dean's position while ignoring the troubling anomalies that spring from its own view. The government gives an example involving two defendants of differing culpability, one deserving two years in prison and the other deserving five, both of whom receive a mandatory five-year § 924(c) sentence. Resp't Br. 39. It contends that, under Mr. Dean's approach, a district judge should give both defendants five-year-and-one-day sentences, which would "perversely sanction the less culpable defendant much more severely." *Id*. at 40. But Congress has instructed district judges to "avoid unwarranted sentenc[ing] disparities[,]" § 3553(a)(6), and "a judge exercising discretion under [ ] § 3553(a) 'would [not] be *required* to sentence' a more culpable defendant to a lesser [or equal] term," *Abbott*, 562 U.S. at 22 (second alteration in original) (emphasis in original) (citation omitted). Here, for example, the district judge varied upward in the sentence for Mr. Dean's more culpable brother while varying downward in Mr. Dean's sentence. J.A. 50.

Moreover, even if a judge did conclude that § 3553(a) dictated identical underlying sentences for these defendants, that result would simply reflect that Congress has decided to treat all § 924(c) offenders the same way with respect to their gun use. All mandatory minimums have this "anomalous" feature. And the government's proposed solution strains credulity: The government would impose on *both* defendants a sentence that is greater than necessary.

That result is truly anomalous, and it has the further disadvantage of not being contemplated by statute.

2. The government says the "*only* apparent function" of Mr. Dean's position is to "frustrate[ ]" § 924(c)'s purpose by reducing "the predicate-offense sentence to a single day." Resp't Br. 40–41 (emphasis in original). But the "function" of Mr. Dean's argument is to permit sentencing judges to comply with "Congress' express directives in §§ 3661 and 3553(a)," *Pepper*, 562 U.S. at 480, by considering all relevant information and imposing "a sentence [that is] sufficient, but not greater than necessary," § 3553(a).

Likewise, the government's repeated invocation of a "one-day" sentencing regime is a distraction. Mr. Dean does not claim that in all or even in most cases a § 924(c) defendant should receive a one-day sentence for his underlying offense. Mr. Dean merely asks that a § 924(c) sentence be allowed to "bear legitimate relevance to the sentencing considerations" Congress established in § 3553(a). *Smith*, 756 F.3d at 1192. Here, the district judge believed a one-day predicate sentence would be appropriate based on Mr. Dean's relatively limited culpability and criminal history and his mandatory 30-year § 924(c) sentence. J.A. 25–26. In other cases, a longer sentence will suit.

V. THE GUIDELINES RECOGNIZE A SENTENCING COURT'S ABILITY TO ACCOUNT FOR A § 924(c) SENTENCE.

1. The Sentencing Guidelines reflect the necessity of considering punishment in the aggregate. In the case of multiple counts generally, the Guidelines instruct courts to group together "[c]losely [r]elated" counts for a single combined offense level and to count multiple groups with incremental increases to a single combined offense level. See U.S.S.G. §§ 3D1.2,

3D1.4. When one of the multiple counts is a consecutive mandatory minimum under § 924(c), certain Guidelines treat that count as part of an aggregate sentence. In the case of career offenders, the Guidelines instruct the district court to calculate an aggregate range under § 4B1.1(c) either by adding the § 924(c) mandatory minimum to the otherwise applicable career offender range for the other counts or by reference to a special table setting out ranges for the § 924(c) count, and to use whichever range is higher for the combined counts. U.S.S.G. § 4B1.1(c)(2), (c)(3). The Guidelines instruct the court to determine the appropriate sentence within that aggregate range, and then "apportion[ ]" that aggregated sentence among all the counts of conviction "to the extent possible." U.S.S.G. § 4B1.1 cmt. (n.3(D)); *id.* § 5G1.2(e) & cmt. n.4(A).

This is ordinarily achieved by imposing the mandatory minimum on the § 924(c) count, subtracting the mandatory minimum sentence from the combined sentence, and imposing the remainder as the sentence for the underlying count. See § 5G1.2 cmt. n.4(B)(i). In other words, the court is instructed to determine the appropriate sentence for all the counts in the aggregate, and then work backwards to comply with the statutory requirements. In this way, the sentence for the underlying count *necessarily* accounts for the § 924(c) sentence.

2. The government invokes two specific Guidelines provisions, but it misapprehends both.

The government first asserts that § 5G1.2(a) directs judges to impose underlying sentences "independently" from § 924(c) sentences. Resp't Br. 42–43. But, as Mr. Dean explained, that position is backwards. Rather than requiring an underlying sentence to be imposed independently of a mandatory minimum sen-

tence, § 5G1.2(a) requires the mandatory minimum sentence to be imposed independently of the underlying sentence. See Pet'r Br. 37–38. The government has offered no response to this point.

Second, the government invokes § 2K2.4. Resp't Br. 43–44. But this provision "expressly state[s] that a § 924(c) sentence *should* influence (and serve to reduce) a sentencing court's calculation of the guidelines range for the underlying offense." *Smith*, 756 F.3d at 1188 (emphasis in original). It advises courts not to apply a weapons enhancement to the underlying offense in order to "avoid double counting" with the § 924(c) sentence. § 2K2.4 n.4 & backg'd. If that is permissible—and the government agrees that it is, although it cannot explain why, Resp't Br. 43–44, 47–48—then a district judge can consider a § 924(c) sentence when setting the sentencing for the underlying felony. Conversely, if the government's reading of § 924(c) were correct, § 2K2.4's recommendation would be improper. *Smith*, 756 F.3d at 1188.

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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