No. 22-____

IN THE

Supreme Court of the United States

EFRAIN LORA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

District courts have discretion to impose either consecutive or concurrent sentences unless a statute mandates otherwise. 18 U.S.C. § 3584(a). Section 924(c)(1)(D)(ii) of Title 18 includes such a mandate, but only for sentences imposed "under this subsection." Efrain Lora was convicted and sentenced under a different subsection, Section 924(j), which does not include such a mandate. Lora therefore argued that the district court had discretion to impose concurrent sentences because Section 924(j) creates a separate offense not subject to Section 924(c)(1)(D)(ii); yet the Second Circuit ruled that the district court was required to impose consecutive sentences because Section 924(j) counts as "under" Section 924(c). This Court, however, has held that provisions like Sections 924(c) and 924(j) define separate offenses, not the same offense, because they set forth different potential punishments based on different elements. *Alleyne v. United States*, 570 U.S. 99, 100 (2013).

Four circuit courts have agreed with the Second Circuit's conclusion, although for distinct reasons (the Third, Fourth, Eighth, and Ninth). At least two circuits have disagreed (the Tenth and Eleventh). In addition to the numerous appellate decisions, this issue recurs in district courts frequently, because Section 924 is one of the most frequently charged federal criminal statutes. The question presented is:

Whether 18 U.S.C. § 924(c)(1)(D)(ii), which provides that "no term of imprisonment imposed … under this subsection shall run concurrently with any other term of imprisonment," is triggered when a defendant is convicted and sentenced under 18 U.S.C. § 924(j).

PARTIES TO THE PROCEEDING

Petitioner, who was a Defendant-Appellant in the Second Circuit, is Efrain Lora.

Respondent, who was the Appellee in the Second Circuit, is the United States.

In addition, Oscar Palmer, Dery Caban, Luis Trujillo, and Luiz Lopez were Defendants in the district court. However, they were not parties to the proceedings in the court of appeals, and are not parties in this Court.

RELATED PROCEEDINGS

United States v. Palmer, et al., No. 14-CR-0652, U.S. District Court for the Southern District of New York. Judgment entered Dec. 23, 2019.

United States v. Lora, No. 20-33, U.S. Court of Appeals for the Second Circuit. Judgment entered Feb. 15, 2022.

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INTRODUCTION

This case presents a clear, deep, and intractable split among at least seven circuits that has been explicitly acknowledged by several courts of appeals on a question of statutory interpretation: whether the provision of 18 U.S.C. § 924(c) that prohibits concurrent sentencing for sentences "imposed … under this subsection" is triggered by a conviction and sentence imposed under Section 924(j), a separate subsection. In a series of decisions, the Second Circuit has improperly held that a Section 924(j) sentence cannot run concurrently with a Section 924(c) sentence. In so holding, the Second Circuit has sided with the Third, Fourth, Eighth, and Ninth Circuits. Notably, there is disagreement over how to interpret these two provisions even among the circuits on that side of the split and one circuit (the Tenth) has reversed its prior decision on the Second Circuit's side of the split. The Tenth and Eleventh Circuits, by contrast, have interpreted Section 924(j) not to impose a sentence "under" Section 924(c) and therefore have held that district courts have discretion to impose concurrent or consecutive sentences. The conflict is deepening and requires resolution by this Court.

The Second Circuit's approach also is wrong. As then-Judge William Pryor explained at length in *United States v. Julian*, 633 F.3d 1250 (11th Cir. 2011), the statute's plain text means that a conviction *under* Section 924(j) does not count as a conviction *under* Section 924(c). The statutory context confirms this reading: the two offenses are set forth in separate subsections and Congress chose neither to include Section 924(c)(1)(D)(ii)'s limited prohibition on concurrent sentences in Section 924(j) nor to mention

Section 924(j) in Section 924(c)(1)(D)(ii). The Second Circuit's approach also renders Section 924(c)(5) superfluous, because that provision uses identical language to Section 924(j)'s to prescribe the punishment for causing death while using armor-piercing ammunition and appears under Section 924(c). And this Court's Fifth and Sixth Amendment decisions distinguishing between elements and sentencing factors further supports treating Section 924(j) as a "separate" offense from—not a conviction under—Section 924(c). *Alleyne v. United States*, 570 U.S. 99, 100, 115 (2013). Indeed, the approach to this question by multiple courts of appeals on the Second Circuit's side of the split effectively resurrects the distinction between sentencing factors and elements eliminated in *Alleyne* and would allow enhancing punishments based on elements neither included in the indictment nor submitted to the jury for proof beyond a reasonable doubt.

The question presented is also important and recurring—determining whether at least scores of defendants each year have the opportunity to even argue for concurrent sentences following conviction of frequently charged offenses. And the question is available for efficient resolution in this case, which presents an ideal vehicle for the writ because the question is preserved, dispositive, and unaffected by extraneous issues.

Because the Second Circuit's decision incorrectly extends the preexisting circuit split on an important and recurring question, the petition for *certiorari* should be granted.

OPINION BELOW

The decision of the U.S. Court of Appeals for the Second Circuit affirming the petitioner's judgment of conviction is not reported in the Federal Reporter but is available at 2022 WL 453368 and is reproduced at Pet.App.1a–11a.

JURISDICTION

The Second Circuit issued its opinion and entered judgment on February 15, 2022. Pet.App.1a. On May 9, 2022, Justice Sotomayor extended the time to file this petition until July 15, 2022. No. 21A693 (U.S.). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Subsection (c) of Section 924 of Title 18 of the United States Code provides that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." 18 U.S.C. § 924(c)(1)(D)(ii). Subsection (j) provides that "[a] person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall-- (1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life …." *Id.* § 924(j). Both subsections are reproduced in full at Appendix B (Pet.App.12a–15a).

STATEMENT

A. Statutory Background.

Section 924 is one of the most frequently invoked federal criminal statutes and defines various offenses involving firearms. As relevant here, Section 924(c) prohibits using or carrying a firearm during or in relation to any crime of violence or drug trafficking crime, as well as possessing a firearm in furtherance of such a crime. That offense carries a five-year mandatory minimum term of imprisonment. *See* 18 U.S.C. § 924(c)(1)(A)(i). Meanwhile, other provisions of subsection (c) set forth factual elements that correspond to higher mandatory minimum terms (*i.e.*, distinct offenses). *See, e.g.*, *id.* § 924(c)(1)(A)(ii) (seven-year minimum if the firearm is brandished); *id.* § 924(c)(1)(B)(ii) (30-year minimum if the firearm is a machinegun or destructive device).

Section 924(c) also contains a limited prohibition on concurrent sentencing. It provides that "no term of imprisonment imposed on a person *under this subsection* shall run concurrently with any other term of imprisonment imposed on the person." *Id.* § 924(c)(1)(D)(ii) (emphasis added). The question presented here is whether that provision is triggered when a defendant is convicted and sentenced under Section 924(j). That subsection prohibits "caus[ing] the death of a person through the use of a firearm" while violating Section 924(c). If the killing constitutes a murder under federal law, Section 924(j) authorizes imposing the death penalty or any term of imprisonment.

Separately, Section 3584 provides district courts with discretion to run multiple terms of imprisonment

imposed at the same time either concurrently or consecutively, unless "the statute mandates that the terms are to run consecutively." *Id.* § 3584(a). Therefore, a district court would have discretion to run a Section 924(j) sentence consecutively with another sentence unless Section 924(c)(1)(D)(ii)'s limited mandate applies.

B. Factual Background.

On November 4, 2015, a grand jury in the Southern District of New York returned a superseding indictment adding Efrain Lora and Luis Lopez as co-defendants in the Section 924(j) offense alleged in the original indictment of Oscar Palmer, Dery Caban, and Luis Trujillo. The original indictment alleged that on August 11, 2002, Palmer, Caban, and Trujillo used and carried firearms, or aided and abetted the use and carrying of firearms, in furtherance of a conspiracy to distribute cocaine and, while committing that crime, murdered Andrew Balcarran—the operator of a rival drug trafficking organization in the Bronx.

On May 11, 2016, the Government obtained a superseding indictment against Lora that added a drug trafficking conspiracy charge and a charge for causing the intentional killing of Balcarran in furtherance of that conspiracy, in violation of 21 U.S.C. § 848(e)(1)(A).[1]

C. District Court Proceedings.

On June 24, 2016, the jury found Lora guilty of all three counts. In his sentencing memorandum, Lora

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[1] Further factual background may be found in the Memorandum Opinion and Order of *United States v. Palmer*, No. 14-CR-0652, 2021 WL 3932027, at *1–4 (S.D.N.Y. Sept. 1, 2021).

contended that the district court was not required to impose a consecutive sentence. At sentencing, the district court nevertheless repeatedly stated that it had to impose "mandatory consecutive" sentences and so imposed a five-year term of imprisonment for Lora's conviction under Section 924(j) to run consecutively with a 25-year sentence on the remaining counts. Sentencing Tr. 12:23, 14:23, 15:11, 25:1–2, *United States v. Lora*, No. 14-CR-0652 (S.D.N.Y. Jan. 17, 2020), Dkt. No. 210. The district court also imposed five years' supervised release.

Lora appealed, arguing that Section 924(j) does not require a court to impose a consecutive sentence under Section 924(c)(1)(D)(ii) and relying on Judge Pryor's detailed opinion in *Julian*, 633 F.3d 1250, holding so.

D. The Second Circuit's Decision.

The court of appeals affirmed the district court's imposition of consecutive sentences. Pet.App.3a. In a footnote to the summary order's conclusion, the Second Circuit explained: "Lora briefly argues that 18 U.S.C. § 924(j) did not require the district court to impose a consecutive sentence. But, as he acknowledges, that argument is foreclosed by our case law." Pet.App.11a n.3 (citing *United States v. Barrett*, 937 F.3d 126, 129 n.2 (2d Cir. 2019)).

In *Barrett*, the Second Circuit had held in a precedential opinion that:

> In sentencing Barrett under § 924(j), the district court cited *United States v. Young*, 561 F. App'x 85, 93–94 (2d Cir. 2014), a non-precedential summary order construing § 924(j) to incorporate the § 924(c) penalty enhancements. Other panels

> of this court recently reached the same conclusion, again summarily. *See United States v. Ventura*, No. 15-2675, [742 Fed.Appx. 575], 2018 WL 3814729, at *2 (2d Cir. Aug. 10, 2018); *United States v. Nina*, 734 F. App'x 27, 36 (2d Cir. 2018). While Barrett urges us to reject *Young*'s, *Ventura*'s, and *Nina*'s reasoning, we are not persuaded.

Barrett, 937 F.3d at 129 n.2 (alterations in original).

Each of the three prior Second Circuit decisions cited the split with the Eleventh Circuit in *Julian*, along with various other decisions on the Second Circuit's side of the split. *See United States v. Ventura*, 742 F. App'x 575, 579 (2d Cir. 2018); *United States v. Nina*, 734 F. App'x 27, 35–36 (2d Cir. 2018); *United States v. Young*, 561 F. App'x 85, 93–94 (2d Cir. 2014); *see also United States v. Santiago-Ortiz*, 797 F. App'x 34, 39 n.3 (2d Cir. 2019) (citing the circuit split, though failing to recognize that the Tenth Circuit had switched sides by that time). Across these decisions, the Second Circuit has made clear its view that Section 924(j) "incorporates the entirety of [Section 924(c)]," including the bar on consecutive sentences in Section 924(c)(1)(D)(ii). *E.g.*, *Young*, 561 F. App'x at 93. None of the Second Circuit's decisions cited this Court's decision in *Alleyne*, 570 U.S. 99, which reaffirmed that statutory provisions that include different punishments based on different elements are separate offenses.

This petition follows.

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question that divides at least seven courts of appeals regarding the correct interpretation of 18 U.S.C. § 924(c)(1)(D)(ii), which bars concurrent sentencing for certain federal firearms offenses. The Second Circuit's series of decisions on this question has expressly recognized that conflict and held that Section 924(c)(1)(D)(ii)'s bar on concurrent sentences is triggered when a defendant is convicted and sentenced under Section 924(j).

The Second Circuit's decision below adds to the preexisting circuit conflict. This intractable split only continues to deepen and requires this Court's intervention to provide uniformity within our federal courts. Further percolation serves no purpose. The decision is wrong as a matter of statutory interpretation, especially when considered in light of the Fifth and Sixth Amendments and this Court's decision in *Alleyne*, 570 U.S. 99. The question presented is both important and likely to recur. And this case presents an ideal vehicle for the writ because the question presented was considered and preserved at each stage, is dispositive, and is unaffected by any extraneous issues.

For these reasons, this Court should grant the petition to resolve the circuit split, reverse the Second Circuit's deeply flawed decision, and bring clarity to this important and recurring question of federal criminal law.

I. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT REGARDING THE CORRECT INTERPRETATION OF 18 U.S.C. § 924(C)(1)(D)(II).

The Second Circuit has candidly recognized that the question whether Section 924(c)(1)(D)(ii) is triggered when a defendant is convicted and sentenced under Section 924(j) has divided its sister circuits. That divide has lasted for over a decade and even seen one court of appeals change sides (from the flawed interpretation adhered to below to the correct interpretation best expressed by the Eleventh Circuit). The decision below deepens the preexisting, longstanding circuit conflict and warrants this Court's review.

1. Since the Second Circuit's first decision on which the decision below relied, that court has recognized the divide among circuits on the question presented. *See Young*, 561 F. App'x at 93–94. The first court of appeals to have considered the issue in a published opinion was the Tenth Circuit, which has since reversed course. *United States v. Battle*, 289 F.3d 661, 665–69 (10th Cir. 2002), *cert. denied*, 537 U.S. 856 (2002), *rev'd*, *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018), *cert. denied*, 139 S. Ct 494 (2018). In the following decades, the **Eighth** (*United States v. Dinwiddie*, 618 F.3d 821 (8th Cir. 2010), *cert. denied*, 562 U.S. 1263 (2011)), **Third** (*United States v. Berrios*, 676 F.3d 118 (3d Cir. 2012), *cert. denied*, 568 U.S. 1143 (2013)), and **Fourth** (*United States v. Bran*, 776 F.3d 276, 282 (4th Cir. 2015), *cert. denied*, 577 U.S. 1068 (2016)) Circuits have held that Section 924(c)(1)(D)(ii) is triggered when a defendant is

convicted and sentenced under Section 924(j). [2] Notably, even these circuits disagree as to the reasoning for their holdings.

For example, both the Eighth Circuit and the Tenth Circuit's since-overruled decision relied on the premise that Section 924(j) "does not set forth a discrete crime" from Section 924(c), but instead merely imposes additional "sentencing factors" for the Section 924(c). *Battle*, 289 F.3d at 667; *see Dinwiddie*, 618 F.3d at 837 (relying on *United States v. Allen*, 247 F.3d 741, 769 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 953 (2002), which held that Section 924(j) is a sentencing factor and not a separate offense). This Court has directly foreclosed that approach, holding that the Fifth and Sixth Amendments require any fact that changes a defendant's potential punishment (like the homicide required for liability under Section 924(j)) must be included in the indictment and proven to a jury beyond a reasonable doubt. *See Alleyne*, 570 U.S. at 100, 115; *Hamling v. United States*, 418 U.S. 87, 117 (1974).

By contrast, the Third Circuit "declin[ed] to follow the Eighth and Tenth Circuits" to hold that Section 924(j) sets forth sentencing factors. *Berrios*, 676 F.3d at 142. Instead, the Third Circuit reasoned that Sections 924(j) and 924(c) "are part and parcel of the

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[2] In unpublished opinions, the **Ninth** Circuit also has held that consecutive sentencing is required. *United States v. Charley*, 417 F. App'x 627, 629 (9th Cir. 2011); *United States v. Staggs*, 152 F.3d 931, 1998 WL 447943, at *3 (9th Cir. 1998) (reasoning that the "interplay between [the two subsections] clearly indicates that Congress intended to impose cumulative punishment[s]").

same statutory scheme, and jointly provide the legal basis for the sentence." *Id.* at 143. The Fourth Circuit similarly concluded that Section 924(j)'s language "suggests" that a sentence must be consecutive and reasoned that allowing concurrent sentencing would produce an "absurd result with perverse incentives"—namely, "a defendant facing life or a term of years could create a more favorable sentencing environment for himself by committing a murder during his commission of the [Section] 924(c) offense." *Bran*, 776 F.3d at 281–82. The Second Circuit's non-precedential decisions generally follow the Third and Fourth Circuits' reasoning. *E.g.*, *Young*, 561 F. App'x at 94 (holding that Section 924(j) "incorporates the penalty enhancements of [Section 924(c)]"); *Nina*, 734 F. App'x at 36 (quoting *Bran* at length).

2. By contrast, the Eleventh Circuit has held, in a lengthy and carefully reasoned opinion authored by Judge Pryor, that Section 924(c)(1)(D)(ii) is not triggered when a defendant is convicted and sentenced under Section 924(j). *See Julian*, 633 F.3d at 1252–57. The Eleventh Circuit stated that it was "unpersuaded by the decisions of the Eighth and Tenth Circuits that sentences imposed under [S]ection 924(j) must run consecutively based on [S]ection 924(c)(1)(D)(ii)." *Id.* at 1257.

The Eleventh Circuit first determined that the defendant's "interpretation is supported by the plain language of … [S]ection 924(c)(1)(D)(ii)." *Id.* at 1253. The court noted that Section 924(c)(1)(D)(ii) is triggered only by a "term of imprisonment imposed … under this subsection." *Id.* The court reasoned that "Section 924(j), not [S]ection 924(c), provided [the defendant's] sentence." *Id.* The court added that such

an interpretation was consistent with the interpretation given by other courts that had considered the question whether Section 924(c)(1)(D)(ii) is triggered when a defendant is convicted and sentenced under Section 924(o), which prohibits conspiring to commit an offense under Section 924(c). *Id.* (collecting cases). This line of reasoning directly contradicts the core holdings of the Third, Fourth, and Second Circuits since. *See supra* Part I.1.

The Eleventh Circuit then proceeded to "reject" the conclusion of the Eighth and Tenth Circuits that "[S]ection 924(j) is a sentencing factor for [S]ection 924(c) and not a distinct offense." *Id.* at 1257. The court reasoned that "Congress placed the punishment for homicides that occur in the course of violations of [S]ection 924(c) in the separate [S]ection 924(j)." *Id.* at 1254. Furthermore, Section 924(j) "defines a crime and is followed by subsections that provide sentences." *Id.* The Eleventh Circuit concluded that Section 924(j) "establish[es], as an element of a separate offense, a fact—a resultant homicide—that could subject a defendant to the ultimate punishment: the death penalty." *Id.* at 1255.

The Eleventh Circuit also rejected the government's argument that a contrary interpretation was needed to "avoid the anomaly that a criminal would have to receive a consecutive sentence for any violation of [S]ection 924(c) except for those violations that cause death." *Id.* at 1256. Again foreshadowing the later decisions of the Third, Fourth, and Second Circuits, Judge Pryor's opinion reasoned that interpreting Section 924(j) as separate from Section 924(c) "does not prevent a district court from imposing a sentence

under [S]ection 924(c) that must run consecutive to a separate sentence imposed under [S]ection 924(j)." *Id.* Rather, the Eleventh Circuit simply treated Section 924(j) "as creating a separate punishment for a crime that results in death" and allowed "district courts to run concurrently sentences for crimes of violence and drug trafficking crimes that are predicates for a conviction under [S]ection 924(c)." *Id.* *Julian* further recognized that the "main point of [S]ection 924(j) is to extend the death penalty to second-degree murders that occur in the course of violations of [S]ection 924(c)," not to increase sentences under Section 924(c). *Id.* (citing Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60013, 108 Stat. 1796, 1973, which added Section 924(j) under the heading "Death Penalty for Gun Murders During Federal Crimes of Violence and Drug Trafficking Crimes").

3. *Julian* has proven persuasive to judges across numerous courts of appeals since it was published.

First, a unanimous decision by all active judges on the Tenth Circuit reversed its prior decision in *Battle*, 289 F.3d at 665–69, and joined the Eleventh Circuit. *Melgar-Cabrera*, 892 F.3d at 1058–60 & n.3 (en banc footnote). That court even went so far as to raise the issue *sua sponte* as plain error because the circumstances "strongly impl[ied] a fundamental defect or error of sufficient magnitude to undermine our confidence that justice was served." *Id.* at 1058 (quoting *United States v. Santistevan*, 39 F.3d 250, 256 (10th Cir. 1994)).

While this Court may have believed the circuits were, at one point, moving toward uniformity, the

Tenth Circuit's reversal demonstrates that the split is deepening and unlikely to be resolved absent intervention by this Court.

Julian also inspired a thorough dissent from the Fourth Circuit's decision in *Bran*. 776 F.3d at 282–85 (King, J., dissenting in part). Judge King first explained the "compelling" reasons to adopt Judge Pryor's position in *Julian* as to the statute's plain text. *Id.* at 282–84. His dissent then comprehensively rejected the Fourth Circuit panel's reliance on the supposedly "absurd result" that a defendant convicted under Section 924(j) would "face a more lenient sentencing scheme" than one convicted under Section 924(c). *Id.* at 283–85. In particular, Judge King noted that the absurd results canon is unavailable where, as here, the statute's plain terms resolve the issue. *Id.* at 284. And, in any event, enforcing those plain terms does not produce an absurd result or perverse incentives for at least two reasons: the death penalty available under Section 924(j) hardly "creates a more lenient sentencing scheme than a non-death sentence under" Section 924(c) and "a person contemplating commission of a [Section] 924(c) offense is not likely to commit murder merely to avoid the consecutive sentence mandate." *Id.*

At bottom, each of these opinions recognized that Section 924(j) provides an offense that is separate from a Section 924(c) offense and that "must be treated accordingly." *Id.* at 283; *see Melgar-Cabrera*, 892 F.3d at 1058–60.[3]

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[3] The Sixth Circuit has similarly concluded that Section 924(c)(1)(D)(ii) does not require consecutive sentences for a

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Despite Lora's repeated citation of *Julian*, the Second Circuit doubled down on its disagreement. *See* Appellant Efrain Lora's Br. 41–42, *United States v. Lora*, No. 20-33 (2d Cir. Jan. 27, 2021); *see also* Pet.App.11a n.3; *Barrett*, 937 F.3d at 129 n.2.

In short, of the seven circuit courts to have decided whether Section 924(c)(1)(D)(ii) requires a district court to impose a sentence under Section 924(j) as a sentence under Section 924(c), five say yes and two say no.[4] Two more circuits say no in the closely related context of Section 924(o). *See supra* Note 3.

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sentence under Section 924(o), which prohibits conspiracy to commit an offense under Section 924(c) and imposes a life sentence "if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler." 18 U.S.C. § 924(o); *see United States v. Fowler*, 535 F.3d 408, 422–23 (6th Cir. 2008). So too has the Eighth Circuit, although another Eighth Circuit panel acknowledged that its decisions on 924(j) and 924(o) are inconsistent. *Compare United States v. Clay*, 579 F.3d 919, 933 (8th Cir. 2009) (Section 924(o), *with Dinwiddie*, 618 F.3d at 837 & n.6 (8th Cir. 2010) (holding that Section 924(j) is not a separate offense from Section 924(c) and acknowledging that this decision is inconsistent with *Clay*).

[4] An additional court of appeals has explained that sentences under Section 924(j) do not need to be imposed consecutively with sentences under Section 924(c), based on congressional intent. *United States v. Gonzales*, 841 F.3d 339, 356–58 (5th Cir. 2016). However, the Fifth Circuit also held that the two Sections are *not* separate offenses for purposes of the Double Jeopardy Clause. *Id.* (citing *Battle*, 289 F.3d at 667). *But see Alleyne*, 570 U.S. at 107–08 (reaffirming *Apprendi*'s holding that facts that increase the maximum penalty for an offense are elements that must be submitted to a jury and therefore create a separate offense).

With only a few courts of appeals yet to address this issue and no sign that the circuits are coalescing on a single (let alone correct) interpretation, this Court should resolve the confusion in the Circuits that has led to this clear, meaningful conflict.

II. THE DECISION BELOW IS INCORRECT.

The disagreement among the courts of appeals is enough to warrant *certiorari*. But the gravity of the Second Circuit's error also compels review. At each step of the analysis, familiar tools of statutory interpretation confirm that a conviction *under* Section 924(j) does not count as a conviction *under* Section 924(c). Moreover, requiring consecutive sentences for Section 924(j) convictions effectively resurrects the distinction between sentencing factors and elements that this Court eliminated in *Alleyne* under multiple circuit courts' approaches to this question.

1. As the Court has repeatedly held, "a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citing *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 407 (2011); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)).

That basic principle resolves this case. Section 924(c)(1)(D)(ii) provides that "no term of imprisonment imposed on a person *under this subsection* shall run concurrently with any other term of imprisonment imposed on the person" (emphasis added). As the Court has explained, "Congress ordinarily adheres to a hierarchical scheme in

subdividing statutory sections," and the word "subsection" generally refers to a subdivision denoted by a lower-case letter. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60–61 (2004) (capitalization altered). So here, Section 924(c)(1)(D)(ii) is triggered only by a "term of imprisonment imposed … under *this* subsection"—*i.e.*, under subsection (c). Section 924(c)'s numerous other references to "this subsection"—all of which unambiguously refer to subsection (c)—reinforce this reading. *See* 18 U.S.C. § 924(c)(1)(A), (c)(1)(B), (c)(1)(C), (c)(1)(D)(i), (c)(2), (c)(3), (c)(4), (c)(5).

The statutory context further confirms this reading. When Congress amended Section 924 in 1994 to add what is now subsection (j), Congress chose to create a "new subsection" "at the end" of the Section, rather than to locate the provision within (*i.e.*, under) Section 924(c). *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60013, 108 Stat. at 1973. Moreover, Congress chose *neither* to include a provision like Section 924(c)(1)(D)(ii) in Section 924(j) itself, nor to broaden the provision that is now Section 924(c)(1)(D)(ii) so that it could be triggered by a term of imprisonment imposed under Section 924(j). Congress also did not address this issue when it codified Section 924(c)(1)(D)(ii) in its present form in 1998. *See* Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1, 112 Stat. 3469, 3470. Where Congress includes specific language in one part of a statute but omits it in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

2. With this plain meaning and confirming statutory context, the court below should have stopped. *Food Mktg. Inst.*, 139 S. Ct. at 2364. But to the extent that there is any ambiguity in Section 924(c)(1)(D)(ii)'s limitation to offenses "under this subsection," additional tools of statutory construction confirm that Judge Pryor's analysis in *Julian* is correct.

First, the Second Circuit's reading of Section 924(j) runs afoul of the canon against surplusage by rendering Section 924(c)(5)(B) superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Section 924(j) uses identical language to Section 924(c)(5)(B), which prescribes the punishment for criminals who use armor-piercing ammunition in relation to a crime of violence or drug trafficking crime and cause death. "Because any crime where 'death results from the use of [armor-piercing] ammunition,' [18 U.S.C. § 924(c)(5)(B)], is also a crime that 'causes the death of a person through the use of a firearm,' *id.* § 924(j), [S]ection 924(c)(5) would be surplusage if no difference existed between the sentences that these two provisions prescribed." *Julian*, 633 F.3d at 1255–56. Interpreting the two provisions to create discrete offenses (and therefore to permit concurrent sentences under Section 924(j)) gives meaning to both subsection (j) and subsection (c)(5).

Second, the fact that Sections 924(j) and 924(c) are discrete offenses under this Court's precedent supports the Eleventh Circuit's interpretation, whereas the treatment of Section 924(j) as an offense "under" Section 924(c) can lead to constitutional issues and therefore should be avoided. *See Gomez v. United States*, 490 U.S. 858, 864 (1989).

In 2013, this Court held that *any* fact that increases the mandatory minimum sentence for a crime is an "element" of the crime, not a sentencing factor, and must be submitted to the jury. *Alleyne*, 570 U.S. at 99. *Alleyne* overruled *Harris v. United States*, 536 U.S. 545 (2002), a case that circuit courts relied on when holding that Section 924(j) is a sentencing factor of Section 924(c) rather than a separate crime. *See, e.g.*, *Berrios*, 676 F.3d at 143 n.17. The *Alleyne* Court reasoned that:

> *Harris* drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that this distinction is inconsistent with ... the original meaning of the Sixth Amendment. Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.

Alleyne, 570 U.S. at 103. *Alleyne* thus reaffirmed *Apprendi*'s holding that any fact that increases the maximum potential penalty is an element. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Alleyne confirms that Section 924(j) defines a discrete offense (that must be submitted to a jury) and is followed by subparagraphs (j)(i) and (j)(ii), which provide sentencing guidelines. Homicide is not a "special feature[]" of the way Section 924(c) may be violated. *See Castillo v. United States*, 530 U.S. 120, 126 (2000). There are significant differences in degree and kind between the use of a firearm without any resultant injury (Section 924(c)) and the use of a firearm to cause death (Section 924(j)). There is also

a considerable increase in the maximum possible sentence between the two provisions, from life imprisonment to the death penalty. *See Julian*, 633 F.3d at 1255–56. Therefore, under *Apprendi* as reaffirmed by *Alleyne*, Sections 924(j) and 924(c) are "separate" offenses. 570 U.S. at 100, 115.

Because Section 924(j) establishes a separate offense from those found in Section 924(c), Lora's conviction under Section 924(j) can only be punished under Section 924(j), not under Section 924(c). Lora was charged with, and convicted of, a violation of Section 924(j). And Section 924(j) governed the term of imprisonment the district court could impose. Because "Section 924(j), not [S]ection 924(c), provided [Lora's] sentence," *Julian*, 633 F.3d at 1253, Section 924(c)(1)(D)(ii) was inapplicable, and the Second Circuit was incorrect in holding that the district court lacked discretion to impose concurrent sentences. Moreover, the Eighth Circuit's current approach and the Tenth Circuit's former approach to this statutory interpretation question, whereby those courts reasoned that Section 924(j) does not set forth a discrete crime, lead to the Fifth and Sixth Amendment issues decisively resolved in *Alleyne*. *See Dinwiddie*, 618 F.3d at 837.

3. This correct reading does not give rise to "absurd" or "anomalous" results or "perverse incentives" that Congress would have opposed. Prior Second Circuit decisions have suggested anomalies might occur if a defendant convicted under Section 924(c) were subject to a mandatory consecutive sentence only for crimes that do not result in a death caused by use of a firearm. *E.g.*, *Nina*, 734 F. App'x

at 36.[5] The Second Circuit has cited no legislative history to support these hypotheses, and such pure speculation provides no basis to override the statutory text's plain meaning.

Moreover, these theories are inapplicable and misguided. First, because Section 924(j) establishes a distinct offense, Lora was not convicted under Section 924(c). Next, even where the government separately charges and convicts a defendant under Sections 924(c) and 924(j), a district court still has the authority to impose a Section 924(c) sentence and then run a Section 924(j) sentence consecutively. *See Julian*, 633 F.3d at 1256. The question here is limited to the district court's discretion. More specifically, there is nothing absurd, or even anomalous, about *Julian* and Lora's construction. In amending the statute to add what is now subsection (j), Congress could have concluded that, because a defendant who is convicted and sentenced under that subsection usually will receive a longer sentence than someone who is convicted and sentenced under subsection (c) or may receive a sentence of death, it was unnecessary to require any sentences for other offenses to run consecutively. Lastly, "a person contemplating commission of a [Section] 924(c) offense is not likely to commit murder merely to avoid the consecutive sentence mandate." *Bran*, 776 F.3d at 284 (King, J., dissenting in part).

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[5] In any event, this supposedly absurd result is not "required" in all cases under Lora's interpretation and therefore not able to override the statute's plain language. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). Section 924(j) still permits consecutive sentences; it just does not require them.

Congress is presumed to have assessed these considerations when it enacted Section 924(j) and its separation of the two Sections should not be judicially amended. *See Russello*, 464 U.S. at 23.

4. Although Section 924(j) prohibits conduct that occurs in the course of violating Section 924(c)—and thereby incorporates the elements of a Section 924(c) offense—a defendant convicted and sentenced under Section 924(j) does not therefore have his term of imprisonment imposed under Section 924(c) *and* Section 924(j). And even if that construction were plausible, it would run afoul of the rule of lenity, which "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose," because Lora's interpretation is at least as plausible. *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *see United States v. Bass*, 404 U.S. 336, 348 (1971) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.").

* * *

In short, the Second Circuit's approach is unmoored from the statutory text and relies on modes of interpretation that this Court has rejected. The approach below also contradicts *Alleyne*'s command to treat an element that changes a minimum or maximum sentence (like in Section 924(j)) as a separate offense, not a sentencing factor. The Court should grant review to correct the deeply flawed approach of the Second Circuit's decision and resolve the confusion among the circuits on the correct interpretation of Section 924(c)(1)(D)(ii).

III. THE QUESTION PRESENTED IS IMPORTANT AND LIKELY TO RECUR.

1. The question whether 18 U.S.C. § 924(j) represents a separate offense could hardly be more significant: it determines the length of already substantial prison sentences and implicates core constitutional issues. And its resolution has similarly important consequences for interpreting other offenses prohibited by Section 924.

Even if the death penalty is not implicated for a particular Section 924(j) indictment, the stakes are still extremely high for defendants. In one study of cases from 2003 to 2009, 181 of 367 cases involving a Section 924(j) charge resulted in a prison sentence of at least 30 years. Kyle Graham, *Crime, Widgets and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CALIF. L. REV. 1573, 1574 n.2, 1621 (2012). Ninety percent of Section 924(j) defendants who went to trial and were found guilty on at least one count received sentences of 30 years or more. *Id.* at 1621. Defendants charged with at least one count under Section 924(j) who went to trial were acquitted of only five percent of all the crimes with which they were charged. *Id.* The government also has a great deal at stake in Section 924(j) prosecutions, since this offense often serves federal prosecutors as a stand-in for a murder charge, over which the federal government has no jurisdiction. *Id.* at 1620. As a result, the government invests a great deal of time and resources in preparing these cases, especially because they tend to be high-profile prosecutions. *Id.* at 1620–21. Thus, both the government and defendants share an interest in

ensuring that courts correctly sentence defendants under Section 924(j).

Under the Sixth Amendment, defendants in all cases are entitled to jury findings for any fact that increases their maximum or minimum punishment. *See Alleyne*, 570 U.S. at 116; *Ring v. Arizona*, 536 U.S. 584, 589 (2002). If Section 924(j) allows the government to seek the death penalty but does not require factual findings beyond those necessary for Section 924(c), for which the maximum penalty is life in prison, defendants would be denied this Sixth Amendment right. *See Julian*, 633 F.3d at 1255 (explaining these Sixth Amendment concerns). These defendants also would be denied their Fifth Amendment right to have each element of offense alleged in their indictment. *See id.* (citing *Hamling*, 418 U.S. at 117). Multiple courts of appeals have taken this incorrect approach by reasoning that Section 924(j) is an offense under Section 924(c), which should be corrected. *See, e.g.*, *Dinwiddie*, 618 F.3d at 837.

Moreover, adopting the Second Circuit's expansive reading could have implications not only for defendants who are convicted and sentenced under Section 924(j), but also for defendants who are convicted and sentenced under the numerous other subsections of Section 924 that define discrete firearms offenses, including subsection (o). *See Julian*, 633 F.3d at 1253. As discussed, at least two courts of appeals are facing that exact question. *See supra* Note 3. Thus, bringing clarity to this application of Section 924(c)(1)(D)(ii)'s limited bar on concurrent sentencing would provide valuable

guidance in numerous other cases beyond just Section 924(j) cases.

2. The question presented is likely to recur. As discussed above, there were 367 cases involving a Section 924(j) charge between 2003 and 2009. *See* Graham, *supra*, at 1621. Moreover, courts of appeals have addressed the question in numerous published and unpublished opinions over the past two decades, including one circuit that has reversed its position on the question. *See Melgar-Cabrera*, 892 F.3d at 1060 ("[W]e erred when we held in *Battle* that [Section] 924(j) was merely a sentencing enhancement rather that [sic] a discrete crime.").

The Court can now resolve this confusion by holding that Section 924(j) represents an offense separate from Section 924(c), with the result that a court may impose either concurrent or consecutive sentences.

IV. This Case Presents an Ideal Vehicle for Review.

Lastly, for several reasons, this case presents an ideal vehicle to resolve this narrow, albeit important, question of statutory interpretation. The question presented was considered and preserved at each stage of the case. Whether the district court was required to impose consecutive sentences is dispositive of Lora's appeal. And no extraneous issues are lurking to complicate the Court's consideration. The circuit conflict and manifest errors on one side of the split have percolated enough.

CONCLUSION

This Court should grant the petition.

July 15, 2022

Respectfully submitted,

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