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3 Respondent.

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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 09-479, Abbott v. United States, and the  
5 consolidated case, 7073, Gould v. United States.

6 Mr. Horan.

7 ORAL ARGUMENT OF DAVID L. HORAN

8 ON BEHALF OF THE PETITIONER IN NO. 09-7073

9 MR. HORAN: Mr. Chief Justice, and may it  
10 please the Court:

11 The statutory interpretation question here  
12 is what laws trigger section 924(c)(1)(A)'s "except"  
13 clause. Mr. Gould offers an interpretation that gives  
14 meaning and effect to every word and phrase of section  
15 924(c)(1)(A) and that follows this Court's recent  
16 holdings regarding the broad scope of the phrase "any  
17 other provision of law."

18 The government, on the other hand, advocates  
19 a narrow construction that is not supported by the text  
20 and defends it primarily on the basis that section  
21 924(c) supposedly should always produce the most severe  
22 mandatory minimum sentence for every defendant.

23 Respectfully, the government's  
24 interpretation is incorrect. Its reading gives no  
25 practical effect to the phrase "any other provision of

1 law," and the government has not cited and has yet to  
2 even attempt to distinguish this Court's recent  
3 interpretation of the very same phrase, "any other  
4 provision of law," in Republic of Iraq v. Beatty just  
5 last year.

6 Unlike the government's, Mr. Gould's  
7 interpretation is true to the text; it is true to this  
8 Court's holdings; and it's true to Congress's evident  
9 purpose in 924(c)(1)(A), and in particular in its  
10 "except" clause.

11 JUSTICE ALITO: Well, if the text of this is  
12 so clear, how is it that Mr. Gould and Mr. Abbott  
13 propose different interpretations of this provision?

14 MR. HORAN: Your Honor, as a judicial  
15 matter, I would note that I think our interpretations  
16 are not that far apart. But --

17 JUSTICE ALITO: But they are not the same,  
18 are they?

19 MR. HORAN: They are not. And our  
20 interpretation, we believe, is the closest to the actual  
21 text. Our interpretation requires reading no language  
22 into the text. It --

23 JUSTICE ALITO: Isn't there -- isn't it --  
24 there is a missing prepositional phrase in this -- in  
25 the provision that we are looking at?

1                   It says, "except to the extent that a  
2   greater minimum sentence is otherwise provided." For  
3   what? And all of you have to -- are filling in the  
4   prepositional phrase. For an offense of conviction,  
5   for -- for an offense that's part of the --of the  
6   underlying transaction, for a violation of this  
7   particular provision or one that's very similar to it.

8                   There is just no way of getting around the  
9   fact that something has to be read in there. Something  
10  is implied; isn't that right?

11                  MR. HORAN: Your Honor, respectfully, I  
12  believe under our interpretation, it -- there is -- you  
13  do have to understand something to be in there, but we  
14  are not actually reading anything into the text. That  
15  is the reason -- to be sure, the words "any kind of  
16  conviction" are not in there.

17                  However, the most natural reading of the  
18  text, without adding anything to it, is that  
19  924(c)(1)(A) requires a 5-year -- at least a 5-year  
20  minimum sentence, in addition to any sentence for the  
21  predicate drug trafficking or violent crime, except to  
22  the extent that a greater minimum sentence is provided  
23  for the defendant by subsection 924(c) or by any other  
24  provision of law.

25                  JUSTICE GINSBURG: So that means there would

1 be no punishment, added punishment, at all for the  
2 possession of the gun; that is, you have the -- the  
3 possession with intent to distribute, no gun involved,  
4 and you get 10 years mandatory minimum for that. That  
5 automatically would wipe out any add-on for the gun,  
6 under your reading.

7 MR. HORAN: Yes. Yes, Justice Ginsburg.  
8 And to follow on that, it is true that our  
9 interpretation -- we think that the plain text dictates  
10 that if the "except" clause is triggered, the lesser  
11 mandatory minimum sentence under 924(c)(1)(A) shall not  
12 be imposed; that is --

13 JUSTICE SOTOMAYOR: I'm sorry. You keep  
14 saying that you're not reading anything into the statute  
15 under your interpretation, but you are. You are  
16 limiting the -- the "any other provision of law" to any  
17 other provision of law specified in the charging -- in  
18 the counts of conviction, correct?

19 MR. HORAN: That is the -- yes, Your Honor.  
20 We are recognizing that limitation.

21 JUSTICE SOTOMAYOR: So you -- you said to  
22 Justice Alito that you weren't reading anything in, but  
23 you are. You're reading into it that the other  
24 provision of -- of law to refer to counts of conviction  
25 at sentencing, correct?

1 MR. HORAN: That is correct, Your Honor.

2 JUSTICE SOTOMAYOR: All right. So why is  
3 that read-in logical, meaning it's giving no extra  
4 punishment for the possession of a firearm?

5 MR. HORAN: Your Honor, two things --

6 JUSTICE SOTOMAYOR: Which was, I think,  
7 Justice Ginsburg's --

8 JUSTICE GINSBURG: Yes. I think you weren't  
9 finished answering my question.

10 MR. HORAN: If I may -- and I think then --  
11 I think it will help in answering your question, Justice  
12 Sotomayor. That is correct. The only thing I would  
13 say -- the thing I would additionally say, though, is  
14 that there is, under the sentencing guidelines, which  
15 must be applied even now, as -- to provide a recommended  
16 range, there would in each of these instances be a  
17 firearm enhancement that enhances the underlying  
18 predicate offenses' sentence that the defendant would be  
19 facing and also how the -- the district court would  
20 work. So I believe --

21 JUSTICE GINSBURG: But that is not  
22 mandatory?

23 MR. HORAN: That is no longer mandatory.  
24 That is correct.

25 And then with regard to your question,



1 Justice --

2 JUSTICE GINSBURG: So you're saying that the  
3 gun possession can be accounted for by the judge as a  
4 matter of discretion using guidelines, but there's no  
5 mandatory at all?

6 MR. HORAN: Yes, Your Honor. That is  
7 correct. There would no longer be a mandatory sentence  
8 for -- or mandatory additional punishment for the  
9 firearm possession.

10 JUSTICE SCALIA: And -- and I suppose the  
11 prosecution can alter the consequence based on what it  
12 chooses to bring in a single prosecution.

13 I mean, if it has other -- other  
14 enhancements, it should bring a separate prosecution for  
15 that. So long as it brings it in one suit, you say, in  
16 one prosecution, you get the break. But if -- if the  
17 other enhancement is brought -- has been brought in a  
18 separate prosecution, you don't get it.

19 MR. HORAN: Justice Scalia, I think that's  
20 correct to an extent. The -- the main exception to  
21 that -- and I think it's a significant one -- is that  
22 the "except" clause would most often be triggered in the  
23 mine run of cases by the predicate drug trafficking or  
24 violent crime that carries with it a greater mandatory  
25 minimum sentence. That is, for double jeopardy

1 purposes, the same offense as 924(c).

2 So, in fact, there is a significant  
3 constraint on the prosecution, that it cannot bring a  
4 separate prosecution for 924(c) and its predicate drug  
5 or trafficking -- drug trafficking or violent crime. So  
6 it's a significant limitation on this --

7 JUSTICE SCALIA: Yes. Yes, I understand  
8 what you're saying.

9 MR. HORAN: Okay. And Justice Sotomayor, to  
10 return to your question, if I could answer it in two  
11 parts. First -- and I didn't mean to overstate, if I  
12 did -- we are not reading additional language into it.  
13 Our reading is contained within the context and the  
14 actual text that -- that is confined to section 924(c).

15 JUSTICE SOTOMAYOR: Explain how, because you  
16 just said to Justice Scalia that if the mandatory  
17 minimum is in a separate charging instrument, then it  
18 doesn't affect you at all. It only affects you if the  
19 count is in a count of conviction at sentencing.

20 MR. HORAN: Yes, Your Honor. That is  
21 correct.

22 JUSTICE SOTOMAYOR: So what in the language  
23 of 924(c) sets forth that limitation?

24 MR. HORAN: Your Honor, I would say that it  
25 is the words "is otherwise provided" and the context in

1    which any textual reading --

2                   JUSTICE SOTOMAYOR:  But -- but there  
3    "otherwise provided by law" could be Federal, State  
4    laws.  It could be in the indictment, not in the  
5    indictment.  You're proposing that we limit this  
6    somehow, but I want to see what the language is that  
7    you're relying upon to limit it.

8                   MR. HORAN:  Your Honor, it is -- first of  
9    all, the statute begins by directing the defendant -- I  
10   mean, directing the district court to "any person."  So  
11   they're focusing on the defendant.  That is the  
12   offense-defining provision, to be sure, of the sentence.

13                   But the -- throughout the text, it also  
14   directs the district court to take account of minimum  
15   sentences that are provided for other crimes; for  
16   instance, primarily the predicate --

17                   JUSTICE SOTOMAYOR:  In relationship to what?  
18   Isn't that the government's argument, which is that you  
19   have to say in relationship to something, whether it's  
20   the indictment or, as the government would have it, in  
21   relationship to the possession or carrying of a firearm?  
22   Why isn't that the more natural reading?

23                   MR. HORAN:  Your Honor, because that --  
24   because the statute as a whole is essentially  
25   instructions to the district court on how to sentence a

1 defendant, if at all, for the 924(c)(1)(A) offense.

2 It directs them to, after considering the  
3 person in front of them, to impose a sentence of 5 years  
4 or less, in addition to the predicate -- any penalty for  
5 the -- the predicate drug trafficking or violent crime,  
6 except to the extent that a greater minimum sentence is  
7 otherwise provided.

8 The natural reading of that is -- and must  
9 be -- that it is a -- a greater minimum sentence is  
10 provided for that defendant; that is, before the  
11 particular district court with the particular offenses  
12 that he has before him at sentencing.

13 JUSTICE GINSBURG: Don't most crimes of  
14 violence and drug trafficking carry more than a 5-year  
15 sentence?

16 MR. HORAN: Many of them do, Your Honor. In  
17 fact, those that carry a mandatory minimum sentence  
18 largely carry -- all carry, in fact, 10 years.

19 There are some -- there are some both  
20 predicate drug trafficking offenses and predicate  
21 violent crimes that carry either no minimum at all or a  
22 mandatory minimum of 5 years or less, and so would not  
23 trigger the except clause.

24 JUSTICE SCALIA: So let's suppose somebody  
25 commits a rape and a maiming in the same -- in the same

1 criminal act. You're saying that the prosecution -- and  
2 let's assume it's his third. It's his third violent  
3 crime. So he would get the enhancement as being, you  
4 know, a three-time violent crime loser.

5           You're saying he could get that enhancement  
6 and the enhancement under this -- under this gun -- he  
7 had a gun at the same time. He can get it if the  
8 prosecution charges rape in one prosecution, for which  
9 he will get the three-time loser enhancement, and then  
10 in a separate prosecution, it charges maiming and the  
11 use of a firearm. Then he gets both enhancements,  
12 right?

13           MR. HORAN: That's correct, Your Honor.

14           JUSTICE SCALIA: That seems --

15           JUSTICE BREYER: I'm not sure that that's  
16 right. I think that -- that this may well apply to the  
17 crime that is being -- that is being prosecuted where  
18 the crime is defined as a real offense in the world,  
19 with the limitations put on that term by the guidelines.  
20 I would think that would be a natural reading, in which  
21 case you'd look to the conduct of the person.

22           And if the conduct of the person is such  
23 that it calls for a mandatory minimum of a certain kind,  
24 there we are. And if that exceeds this amount, there we  
25 are. You can't apply it. And if it doesn't, you do

1     apply it.

2                   MR. HORAN:   Yes.

3                   JUSTICE BREYER:   Have you looked into that?

4     I mean, that was my reading of it as -- in the most  
5     natural way.   The word "crime" is ambiguous.   Sometimes  
6     it means words in a statute.   Sometimes it means an  
7     affair in the world.   And I thought this one probably  
8     meant the affair in the world.

9                   MR. HORAN:   Well, in answering your  
10    question, Justice Breyer, in answering Justice Scalia's  
11    question, my assumption was that there were, in fact,  
12    mandatory minimums such that this would play out with  
13    one being greater than the other.

14                   JUSTICE SCALIA:   Well, he's disagreeing with  
15    you.   He -- your theory -- you're not reading "crime" to  
16    mean an affair in the world.   You're reading it to mean  
17    a particular prosecution for a particular violation of a  
18    statute.   Right?

19                   MR. HORAN:   No, that's correct.

20                   JUSTICE BREYER:   Well, I read that --

21                   JUSTICE SCALIA:   He wants to read it as an  
22    affair in the world, whatever that means.

23                   JUSTICE BREYER:   If that's so, then this  
24    gives tremendous power to the prosecutor to decide what  
25    the sentence will be in terms of how he manipulates the

1 charge. And I thought that probably this, read with the  
2 guidelines, is designed not to -- not to permit that.  
3 It's to minimize the discretion, not to maximize.

4 MR. HORAN: Your Honor, there will be  
5 circumstances in which a -- the prosecutor and the  
6 government, based on how it makes its charging  
7 decisions, can affect the floor that's created by the  
8 minimum sentence.

9 It's a different situation than Deal, which  
10 was actually determinant sentences. It's not actually a  
11 circumstance where the government can determine the  
12 punishment itself. That would still be to the district  
13 court.

14 But we maintain that this is the most  
15 natural reading. And, in fact, for instance, when this  
16 concern came up in Deal, that was to confirm the most  
17 natural reading of the plain text. The government would  
18 actually turn that analysis on its head under these  
19 circumstances.

20 JUSTICE SOTOMAYOR: Justice Breyer is  
21 reading a bit what your co-counsel is advocating, what  
22 Mr. Abbott is arguing?

23 MR. HORAN: No, Your Honor. I --

24 JUSTICE SOTOMAYOR: No?

25 JUSTICE BREYER: I mean, I don't know if it

1 makes any difference. I mean, has there ever been such  
2 a case where the prosecutor worked this in such a way  
3 that he would produce this?

4 Are you aware if any such case ever  
5 happened?

6 MR. HORAN: No, I'm -- I'm not aware of  
7 that, Your Honor, in part because the "except" clause is  
8 -- there aren't that many instances of the "except"  
9 clause having been actually applied.

10 JUSTICE SCALIA: And there has never been  
11 the incentive to do so, until we accept your  
12 interpretation. Then there will be means to do so.

13 MR. HORAN: There may be -- Justice Scalia,  
14 there may be some incentive do so, subject to other  
15 constraints, including the -- the usual practice of  
16 charging, for instance, most offenses as they come under  
17 the transaction in the same indictment. There will be  
18 counterincentives, to be sure.

19 Your Honors, for the -- in addition to the  
20 fact that our interpretation does not involve, we think,  
21 adding anything into the text that others must, we think  
22 it establishes -- it advances an evident purpose that  
23 Congress had in this, which was to ensure that a  
24 defendant who is convicted under 924(c)(1)(A) receives  
25 some sufficient minimum punishment.



1           After 1998, the 1998 amendments, section  
2   924(c)(1)(A) was trafficking, in essence, in minimum  
3   sentences. And that's what this is about. So this way,  
4   a defendant will receive a sufficient minimum sentence  
5   by way of 924(c) -- I see that my time is up.

6           Mr. Abbott will be represented by Mr. Ryan  
7   at this time.

8           CHIEF JUSTICE ROBERTS: Thank you, counsel.

9           MR. HORAN: Thank you.

10          CHIEF JUSTICE ROBERTS: Mr. Ryan.

11          ORAL ARGUMENT OF JAMES E. RYAN

12          ON BEHALF OF THE PETITIONER IN NO. 09-479

13          MR. RYAN: Mr. Chief Justice, and may it  
14   please the Court:

15                I'd like to spend some time on the second  
16   question in our petition regarding whether other  
17   firearms offenses are included within the scope of the  
18   "except" clause.

19                But before I do, I'd like to make a couple  
20   of points about the first question, which is common to  
21   our case and to Mr. Gould's.

22                Justice Sotomayor asked: Why isn't the  
23   government's reading the most natural? And the answer  
24   is pretty simple. The government's reading leaves one  
25   half of the "effect" clause with absolutely no practical

1 effect.

2           The government has, in its current  
3 interpretation, suggested that the "except" clause  
4 applies to one provision of law outside of 924(c).  
5 That's 3559(c). And yet with respect to that provision,  
6 the "except" clause does absolutely no work, both for  
7 practical reasons and because of the way 3559(c) is  
8 written.

9           JUSTICE SOTOMAYOR: 930(c): A person who  
10 kills any person in the course of bringing a firearm  
11 into a Federal facility shall be punished as provided in  
12 sections setting forth minimums for murder and  
13 manslaughter. So it would also have an effect in  
14 930(c), no?

15           MR. RYAN: It's not clear from the  
16 government's argument, Justice Sotomayor.

17           JUSTICE SOTOMAYOR: I wasn't sure why it  
18 didn't list 930(c), but --

19           MR. RYAN: As I understand the government's  
20 argument, the sentence that -- the only sentence that  
21 would count outside of 924(c) would be a sentence  
22 specifically for a 924(c)(1)(A) offense --

23           JUSTICE SOTOMAYOR: I know, but its brief  
24 does two formulations. It says --

25           MR. RYAN: Exactly right.

1 JUSTICE SOTOMAYOR: -- anything that affects  
2 924(c), and then in other places in its brief, it says  
3 the -- the "except" clause refers to any higher minimum  
4 sentence for possessing, using, or carrying a firearm in  
5 relationship to a drug or -- drug offense or a crime of  
6 violence. Those are two different formulations.

7 MR. RYAN: That's exactly right, Justice  
8 Sotomayor. And if the --

9 JUSTICE SOTOMAYOR: I'm focusing on the  
10 second formulation.

11 MR. RYAN: Okay. That point actually  
12 demonstrates why the government's justification for this  
13 limitation doesn't hold up. As the government argues at  
14 one point, the reason to read "any other provision of  
15 law" to include only sentences for 924(c)(1)(A) crimes  
16 is because the "except" clause, when it refers to this  
17 subsection, refers only to sentences for section  
18 924(c)(1)(A) offenses.

19 Yet, that is not the case. As this Court  
20 indicated in O'Brien, 924(c)(1)(B) is a separate  
21 offense. Well, if 924(c)(1)(B) can trigger the "except"  
22 clause, and it's not the same offense as 924(c)(1)(A),  
23 the government's argument about excluding other offenses  
24 that might be separate from 924(c)(1)(A) no longer holds  
25 up.

1           The other difficulty with the government's  
2   reading, to go back to the practical point, is that if  
3   you apply it just to 3559(c), it can have no effect  
4   because as a practical matter no one can serve a term of  
5   years after successfully completing a life sentence,  
6   which is what's required under 3559(c); and 3559(c)  
7   itself has a provision that, the "notwithstanding"  
8   provision, that makes clear that only the life sentence  
9   should be imposed when 924(c) is the third strike for  
10  purposes of 3559(c).

11           That, in turn, just leaves future  
12  applications, and there the government's scenario under  
13  which the language that currently has no effect might  
14  have some effect is nothing short of far-fetched. It  
15  would require Congress to amend the sentence of  
16  924(c)(1)(A) outside of 924(c)(1)(A) and not indicate  
17  how those two penalties should interact.

18           Now, if I could turn to the questions about  
19  a transactional limitation, which we suggest. The point  
20  of suggesting that the "except" clause should be limited  
21  to sentences for the same transaction is suggested by  
22  some of the questions directed to Mr. Gould's counsel.  
23  We think that it's the more natural reading of the  
24  statute in part because of concerns recognized by this  
25  Court in the United States v. Deal, namely that the

1 statute is not designed and should not be read to give  
2 prosecutors unreviewable discretion as to when the  
3 minimum sentence in 924(c) ought to be applied or not.

4 It also would preclude the equally odd  
5 situation of a defendant being able to benefit from the  
6 "except" clause in a multi-count indictment when the  
7 defendant has -- faces a higher mandatory minimum  
8 sentence for a completely unrelated -- unrelated charge.

9 JUSTICE ALITO: Where would we look to find  
10 the definition of a criminal transaction for these  
11 purposes?

12 MR. RYAN: You could look into 924(c)  
13 itself. Our view is that it would be no different than  
14 the transaction that would give rise to the 924(c)  
15 charge itself and so, for that reason, would necessarily  
16 include the predicate offense or another firearms  
17 offense.

18 JUSTICE ALITO: What if there were several  
19 924(c) offenses committed during a rather brief period  
20 of time? What if on the same afternoon an individual  
21 engaged in a number of drug trafficking offenses and  
22 during each of those used or carried a firearm? Would  
23 they -- would they be part of the same criminal  
24 transaction?

25 MR. RYAN: No. Just as different --

1 different transactions can lead to multiple 924(c)  
2 charges, which is what happened in Deal, that could also  
3 occur here.

4 JUSTICE ALITO: Well, you say "different  
5 transactions," but I'm looking for the definition of a  
6 criminal transaction. The criminal law has labored with  
7 this for a long time. It's not a self-defining concept,  
8 is it, a criminal transaction?

9 MR. RYAN: No, it's not, but -- Your Honor,  
10 but I don't see how it would be any more difficult to  
11 determine the transaction than to look at what would  
12 constitute the 924(c) offense. It would be the same set  
13 of operative facts that could lead to a 924(c) charge  
14 which would count as the transaction.

15 JUSTICE GINSBURG: Mr. Ryan, I thought that  
16 you had three positions, and now you're talking about  
17 the second one, which is any greater minimum sentence  
18 arising from the same criminal episode. But I thought  
19 your first position was any greater minimum sentence  
20 applicable to the defendant at sentencing.

21 MR. RYAN: That is Mr. Gould's position.  
22 Our position is limited to the same transaction. Our  
23 alternative position, which I'd like to turn to now --

24 JUSTICE SOTOMAYOR: Whether charged or  
25 not --

1                   MR. RYAN: Well, the way it would have to  
2 work is that there would have to be a previous  
3 conviction.

4                   Now, if I could turn to the firearms  
5 argument. Our argument here is straightforward.

6                   JUSTICE SCALIA: Excuse me, before you go  
7 on. Your last remark -- it has to be a previous  
8 conviction. So why doesn't that leave it in the hands  
9 of the prosecutor whether to bring that conviction, that  
10 other case, prior or subsequent?

11                  MR. RYAN: I -- I misspoke, Justice Scalia.  
12 You're exactly right. It would include uncharged. It  
13 would -- it would prohibit prosecutors from being able  
14 to use charging instruments to determine whether 924(c)  
15 would apply. I was thinking of a particular example,  
16 but in the general case, you're right. I apologize for  
17 that misstatement.

18                  Now, if I could just spend a little bit of  
19 time on our second question. Our argument here is  
20 fairly straightforward and fairly modest, and it relies  
21 on the fact that 924(c) is essentially a firearms  
22 offense. And the punishment provided in the different  
23 paragraphs in 924(c) are primarily about firearms. And  
24 so, in looking to determine the meaning of "any other  
25 provision of law," it is quite natural, as both the

1 First Circuit recognized and as the government  
2 recognized in Whitley, the Second Circuit case, to  
3 include provisions of law outside of 924(c) that punish  
4 firearms offenses.

5 Now, to be sure, this particular limitation  
6 is not commanded by the plain language of the statute  
7 and rests, like the government's argument, on context  
8 and purpose. But the difference is that this argument  
9 still gives some effect to the "except" clause. It  
10 would apply, as here, to other firearms offenses outside  
11 of 924(c) like the Armed Career Criminal Act.

12 JUSTICE ALITO: Well, it gives broader  
13 effect. It gives broader effect to the "except" clause,  
14 but the government's argument gives effect to the  
15 "except" clause, doesn't it?

16 MR. RYAN: It gives no practical --

17 JUSTICE ALITO: 3559(c), which was enacted  
18 at the same time as this "except" clause, wasn't it, and  
19 makes explicit reference to -- to 924(c)?

20 MR. RYAN: Two points, Justice Alito.  
21 First, the government's reading has no practical effect.  
22 It leaves the "except" clause with no practical effect.  
23 You could take the "except" clause away, and there would  
24 be no difference in terms of the sentence under 3559(c).

25 As for the enactment of 3559(c), the



1 government's argument is actually different. The  
2 government argues that when 3559(c) was amended to  
3 include possession --

4 JUSTICE ALITO: Yes.

5 MR. RYAN: -- it was at that point that the  
6 "except" clause also entered into 924(c).

7 The difficulty with that argument, as we  
8 explain in our brief, is that 3559(c) was already linked  
9 with 924(c) insofar as both addressed use. And because  
10 3559(c) and 924(c) were already linked, and the  
11 "notwithstanding" provision within 3559(c) indicated  
12 that if the 924(c) offense is your third strike, you get  
13 the life sentence, that's it. Well, the fact that  
14 Congress then amended 3559(c) to make another connection  
15 with 924(c) can't possibly explain why there is a sudden  
16 need for the "except" clause.

17 But the question is an -- is an important  
18 one because it goes to the fact that the government has  
19 offered three different interpretations of the language  
20 in this case. The first -- one of the first was in  
21 Whitley, where it suggested "any other provision of law"  
22 includes other firearms offenses outside of 924(c),  
23 provided that they impose a consecutive sentence. That  
24 argument was rejected for the idea that, instead,  
25 924(c)'s "except" clause actually applies to no existing

1 provisions of law. And now the Government argues that  
2 it applies to one, 3559(c), and it has come up with a  
3 new theory as to why the "except" clause exists in the  
4 first place.

5 But that theory doesn't hold up, and the  
6 government's shifting interpretations, if nothing else,  
7 suggest that the government has not hit upon the most  
8 natural reading.

9 JUSTICE GINSBURG: But you have offered  
10 three different readings, so one can't say that this  
11 statutory text has a clear meaning, which I think is  
12 your first argument -- that it has a clear meaning. And  
13 yet, we have Mr. Gould's reading and then the two  
14 readings that you've offered us, same episode and same  
15 gun.

16 MR. RYAN: Yes, Justice Ginsburg. We think  
17 our first argument is the most natural and the clearest,  
18 but I take your point. And the only response I would  
19 make is, if shifting interpretations or different  
20 interpretations suggest that at the end of the day the  
21 language is ambiguous and grievously so, under the rule  
22 of lenity, we ought to prevail. So I'm perfectly  
23 comfortable with that conclusion.

24 If there are no further questions, I'd like  
25 to reserve the remainder of my time for rebuttal.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Mr. McLeese.

3 ORAL ARGUMENT OF ROY W. MCLEESE

4 ON BEHALF OF THE RESPONDENT

5 MR. MCLEESE: Mr. Chief Justice, and may it  
6 please the Court:

7 A district court judge in --

8 JUSTICE SOTOMAYOR: Counsel, could I just  
9 ask one simple question, the one I started with earlier,  
10 which was, which of the two statements are you  
11 advocating? That the "except" refers to a provision  
12 that imposes a greater minimum sentence for violating  
13 924(c) explicitly, or are you saying the "except"  
14 clause -- and I'm quoting from your brief, in two  
15 different places -- the "except" clause refers to a  
16 higher minimum sentence for possessing, using a firearm  
17 in relationship to a crime of violence or a drug  
18 offense?

19 MR. MCLEESE: I don't think there needs to  
20 be an explicit reference. I think that the "except"  
21 clause is triggered by an offense which has a greater  
22 mandatory minimum and which has the same elements as and  
23 is the same offense as a section 924(c) offense.

24 JUSTICE SOTOMAYOR: All right. If that's  
25 the case, your adversary just said, Mr. Abbott's

1 attorney just said, that you don't believe that section  
2 924(c)(1)(A) is trumped by 924(c)(1)(B) or by 18 U.S.C.  
3 section 930(c). Is his allegation correct or is he  
4 wrong?

5 MR. MCLEESE: He is incorrect.

6 JUSTICE SOTOMAYOR: Okay.

7 MR. MCLEESE: First, with respect to the  
8 internal structure of 924(c), 924(c) as it was amended  
9 in 1998 is a somewhat complex statute. It has a mix of  
10 sentencing enhancements and elements which create  
11 aggravated versions of the offense, but it is all a  
12 single offense for double jeopardy purposes, for  
13 purposes of what punishment to impose. And, therefore,  
14 the "except" clause operates consistent with the  
15 definition I just suggested quite sensibly and tells a  
16 district court judge imposing sentence if a defendant  
17 has brandished a firearm and also discharged it, you  
18 pick one of the 924(c) menu items, they are all a single  
19 offense, and you impose a single mandatory minimum  
20 sentence that is the greatest of those which are  
21 applicable.

22 Now, with respect to 930(c) --

23 JUSTICE SOTOMAYOR: I'm sorry. So that if  
24 he discharges a firearm, and it says it is a sentence of  
25 not less than 10 years, and he -- and that firearm is

1 also a short-barrelled rifle with a 10 year minimum,  
2 does he get 10 years, or does he get 20 years?

3 MR. MCLEESE: He gets 20 years.

4 JUSTICE SOTOMAYOR: How?

5 MR. MCLEESE: Because there are -- the  
6 "except" clause says look to your defendant, look to see  
7 which -- whether there is any provision of law which  
8 carries with it a greater mandatory minimum which  
9 punishes the section 924(c) offense. In that instance,  
10 there are two. One of them provides for a 7-year  
11 mandatory minimum; one of them provides a 20-year  
12 mandatory minimum. The "except" clause --

13 JUSTICE SOTOMAYOR: So if it was a machine  
14 gun, where there's a 30-year minimum, does he get 40 or  
15 30?

16 MR. MCLEESE: He gets 30. You always get --  
17 the "except" clause operates internally to section  
18 924(c) to tell the district court judge, very helpfully  
19 in light of the complexity of the provision: You impose  
20 one mandatory minimum sentence for each 924(c)  
21 violation, whether aggravated or less aggravated.

22 CHIEF JUSTICE ROBERTS: But that's not -- I  
23 can't imagine a single district judge getting that  
24 wrong. To think that, oh, my gosh, here it says 10  
25 years if you discharge the firearms, and here it says 5

1 years if you have one, which one do I use in a case when  
2 it's discharged?

3 MR. MCLEESE: That's not --

4 CHIEF JUSTICE ROBERTS: You don't need this  
5 provision, the -- your argument can't be that this  
6 language is to make sure the district judge knows in  
7 that case to use the 10-year rather than the 5-year.

8 MR. MCLEESE: That point, Mr. Chief Justice,  
9 applies in support of our position, because everyone  
10 agrees that the primary function, the first half of the  
11 "except" clause, does exactly that. That's all it does.  
12 It does nothing else. To the extent -- the "except"  
13 clause says "except to the extent a greater minimum  
14 sentence is provided by this subsection," the only  
15 function --

16 JUSTICE SCALIA: But that would include (B).  
17 That would include (B). (B) is part of the same  
18 subsection, isn't it?

19 MR. MCLEESE: Yes.

20 JUSTICE SCALIA: So, you know, I -- I think  
21 what the Chief Justice says is very obvious when you are  
22 just talking about (c)(1)(A), but it isn't obvious to me  
23 that if -- if the firearm is discharged and in addition  
24 it's a machine gun or destructive device, that you'd  
25 only get -- you'd only get the 30 rather than the 30

1 plus 10.

2 MR. MCLEESE: Quite so. And the --

3 JUSTICE SCALIA: That isn't obvious to me.

4 And -- and the "except" clause would -- would handle  
5 that.

6 MR. MCLEESE: Correct. And it's important  
7 to realize when --

8 CHIEF JUSTICE ROBERTS: Well, I would have  
9 -- I guess things are obvious to different people. I  
10 would have thought it would be odd to say when there are  
11 increased minimums that the highest minimum applicable  
12 isn't the one that applies.

13 MR. MCLEESE: I agree with that, but it's  
14 important to realize that another issue that a district  
15 court judge might confront is whether you should  
16 cumulate them. So it should be, as Justice Sotomayor's  
17 question suggests, that if there are several available,  
18 that you get 20 because it's a machine gun and 10  
19 because it was discharged. And from the perspective of  
20 busy district court judges, a provision which says, in  
21 figuring out how to sentence a 924(c) offender, you  
22 don't have to look through this complex statute to  
23 figure out what your sentencing enhancements, do some  
24 double jeopardy analysis; all you need to do is simple  
25 math. You are directed to look to, of all the ones that

1 are available, the one that is longest of the mandatory  
2 minimums.

3           The point I was trying to make, though,  
4 Mr. Chief Justice, is all of this, the idea that it  
5 really isn't that critical even to clarify in the first  
6 half of the "except" clause what to do, is consistent  
7 with our position, which is the "except" clause all  
8 together, both internally to section 924(c) and as it  
9 reaches externally, is about clarifying something that,  
10 it may be true, district court judges otherwise would  
11 have been able to figure out, had they done a lot of  
12 analysis. But it makes it much simpler, and the  
13 practical utility of it is to clarify a sentencing  
14 judge's options with respect to a statute that had been  
15 made much more complex.

16           CHIEF JUSTICE ROBERTS: But your main -- the  
17 meat of your argument focuses on 3559(c), right? There  
18 is this significant provision out there that does  
19 provide a greater mandatory minimum. And I just don't  
20 see, as a practical matter, why people would worry about  
21 that. Under 3559(c), you get life. And you're saying,  
22 well, they put in the "except" clause to be sure that  
23 the judge would add another 5 years at the end of a life  
24 sentence.

25           MR. MCLEESE: Mr. Chief Justice, I think the



1 effect of the "except" clause is the opposite, which is  
2 it makes sure that a judge imposes only life and does  
3 not add additional sentences.

4 CHIEF JUSTICE ROBERTS: Yes, exactly. Yes,  
5 I'm sorry.

6 MR. MCLEESE: And I agree, from the  
7 perspective of a defendant, that may not be most  
8 consequential. But this is a provision which, taken as  
9 a whole, was clarifying, not just externally to 924(c),  
10 but also internally, what district court judges should  
11 do with a complex menu --

12 CHIEF JUSTICE ROBERTS: Okay. Well, just so  
13 I make sure I understand, the basic point you're making  
14 is that there are some things under your reading that  
15 this deals with. One is the internal point, and we can  
16 disagree as to whether that's necessary or not, and the  
17 other is 3559(c), where it seems to me it doesn't make  
18 any difference whether you're in there for life or life  
19 and the additional 5 years.

20 MR. MCLEESE: I agree, it's not practically  
21 significant to a defendant, although sentences of life  
22 plus additional terms or consecutive life are not at all  
23 uncommon in the code. But it is of significance to  
24 district court judges, who are trying to figure out what  
25 sentence to impose. And this provision --

1 JUSTICE SOTOMAYOR: What do you do with  
2 930(c)? Don't leave without answering my question.

3 MR. MCLEESE: Yes. I do not interpret  
4 930(c) as subject to the "except" clause. I believe it  
5 is a separate offense with different elements, and under  
6 the double jeopardy analysis that would apply, it is  
7 possible --

8 JUSTICE SOTOMAYOR: But your answer to me  
9 was you read the "except" clause as applying to any  
10 higher minimum sentence for possessing, using, or  
11 carrying a firearm in relationship to a drug offense or  
12 crime of violence. Isn't killing a person a crime of  
13 violence?

14 MR. MCLEESE: Yes. Although 930(c) does not  
15 --

16 JUSTICE SOTOMAYOR: And isn't the bringing  
17 of a firearm into a Federal facility the carrying of a  
18 firearm?

19 MR. MCLEESE: Yes. Although 930(c) does not  
20 require the killing of a person, it extends to  
21 attempts --

22 JUSTICE SCALIA: Where is 930(c)? Can you  
23 tell me where it is in the --

24 MR. MCLEESE: I don't believe -- it is  
25 referred to only in Petitioner Abbott's brief at a page

1 number I don't recall. It's not one of the provisions  
2 that --

3 JUSTICE SOTOMAYOR: No, but I'm still trying  
4 to understand your position, which is -- I read what you  
5 said to me the "except" clause means, and I'm applying  
6 it to 930(c), and I couldn't figure out why you didn't  
7 list it.

8 MR. MCLEESE: Because 930(c) does not  
9 require an actual killing of a person. It extends to  
10 conspiracy and attempt. And, therefore, one can violate  
11 930(c) without violating 924(c) and vice versa. And,  
12 therefore --

13 JUSTICE SOTOMAYOR: How?

14 MR. MCLEESE: By conspiring --

15 JUSTICE SOTOMAYOR: A person who kills any  
16 person --

17 MR. MCLEESE: -- or by attempting to do so.  
18 So 930(c) has a broader reach because of these vicarious  
19 and inchoate forms of liability. So a defendant could  
20 be convicted separately of 930(c) and of 924(c). They  
21 are not the same offense for double jeopardy --

22 JUSTICE BREYER: So there are two possible  
23 readings now of the "except" clause where it says -- the  
24 words are this subsection doesn't apply where a  
25 mandatory -- where any other provision of law sets forth

1 a higher mandatory. Now, one possible reading, which is  
2 yours, is what this means is that, judge, where you are  
3 operating under that provision you just mentioned, and  
4 you're going to -- the guy has committed two serious  
5 924(c) things and so he is entitled to life -- this is  
6 just what the Chief Justice said -- this is done to  
7 remind the judge don't give him life plus 25 years,  
8 because it would be 25 years under this statute, not 5.  
9 That's one possible reading.

10 The other possible reading is, judge, where,  
11 in fact, you have a pretty -- you have the underlying  
12 drug offense that's going to get you up into the 30s and  
13 it's -- you know, in the guidelines, it's going to be  
14 probably 10, 5 years, or whatever it is. You have a  
15 pretty high drug offense already. And now we give him 5  
16 extra years, say, for having a gun under this, unless  
17 he's already gotten, say, a mandatory minimum of 7  
18 years.

19 And if he's already gotten the mandatory  
20 minimum of 7 years, here's what's happening: Judge,  
21 turn to the guidelines, and the guidelines will tell you  
22 to add 3 or 4 extra years. So in one -- that -- those  
23 are the two possible readings.

24 Now, the first reading to me makes very  
25 little sense. The second reading to me says, yes, this

1 is serving a purpose. It's once you're sure this guy  
2 has to go to jail for 5, 6, 7, maybe 10 or 20 years for  
3 sure, extra amounts are controlled by the guidelines,  
4 which is administered by a judge.

5 Now, if you just came across that for the  
6 first time, which would you think was most probable.

7 MR. MCLEESE: Well, I think when you place  
8 this in the context of the 1998 amendments that enacted  
9 the "except" clause, it is quite clear that the former  
10 is more plausible. And the reason I say that, there are  
11 really five features of the 1998 amendments that  
12 illustrate that the "except" clause is not to be read as  
13 eliminating any sentence for a section 924(c) offense,  
14 but rather is clarifying which sentence to impose.

15 The first is that the 1998 amendments,  
16 setting aside the "except" clause for a moment, in every  
17 respect substantially increased the scope and severity  
18 of section 924(c). It changed what had been mandatory  
19 sentences to mandatory all the way to life. It -- it  
20 responded to this Court's decision in Bailey by  
21 increasing the substantive scope of the provision. It  
22 increased the -- it created increased mandatory minimums  
23 for 7-year and 10-year offenses.

24 So it would be odd to think that in the  
25 second half of a presumptively narrow exception clause,

1 Congress at the same time ran in the direct opposite  
2 direction and had a substantial rollback of pre-existing  
3 section 924(c) sentencing provisions. And that's -- to  
4 be clear, at the time of the 1998 amendments, these  
5 Petitioners would have been subject to the mandatory  
6 minimum sentences that they received. They would have  
7 been subject to 10 years in one of the cases for the  
8 drug offense and 5 additional years mandatory and  
9 consecutive under 924(c). For the other, they would  
10 have -- he would have been subject to 15 years for being  
11 a felon in possession and an armed career criminal and 5  
12 additional under 924(c).

13 So one of the features that is key is  
14 putting this in the context of the 1998 amendments,  
15 which were in every respect --

16 JUSTICE SCALIA: Wait, but it -- but it  
17 does -- it does subject them to less, at least with  
18 respect to those -- those enhancements set forth within  
19 the subsection itself.

20 MR. MCLEESE: That is true, but that is not  
21 a rollback of pre-existing provisions. It's a way of --

22 JUSTICE SCALIA: Why?

23 MR. MCLEESE: Because none of -- in prior  
24 924(c) law, there wasn't a body of law that would have  
25 given anybody who would get the benefit of the "except"

1 clause under 924(c) a higher sentence. What -- all the  
2 "except" clause does is it makes clear under this more  
3 complicated scheme that when we are increasing these  
4 provisions, a 7 or a 10, you shouldn't telescope them  
5 all inside 924(c). You shouldn't add them all together;  
6 you pick the highest.

7 And so it -- the "except" clause is not a  
8 rollback. It is a way of accommodating and giving clear  
9 direction to the complexity of the newly enacted  
10 provision. And --

11 JUSTICE BREYER: When -- when did Congress  
12 pass the statute that they amended in 1998? The one  
13 with -- you're saying -- I mean, it's a good point. You  
14 have a point, that this would make it more lenient, the  
15 interpretation. But the "it" was passed when?

16 MR. MCLEESE: Well, section 924(c) in its  
17 original form I think was passed in the 1960s.

18 JUSTICE BREYER: So that's way before the  
19 guidelines. So what they are trying to do now is the --  
20 in 1998, is they're trying to -- see, in 1998 what  
21 they're trying to do is take some of these old  
22 provisions and reconcile them with this new system that  
23 has come along. So I agree you have a point there.

24 But it -- it does make a certain amount of  
25 sense, because what it is saying is, in these cases

1 where you have a whoppo mandatory minimum anyway, so  
2 you're sure he's got it; now, the additional amount will  
3 be controlled by the guidelines, which are subject to  
4 not much discretion. They are pretty close to mandatory  
5 minimums, but there's a little wiggle room.

6 MR. MCLEESE: On the general approach of  
7 Congress under 924(c), it also bears note that in the  
8 last 25 years Congress has amended section 924(c) six  
9 times, and setting aside for a moment the "except"  
10 clause, in all of those amendments Congress has  
11 uniformly expanded its scope or increased the severity  
12 of sentences. So the "except" clause would be the sole  
13 provision in which Congress rolled back section 924(c).  
14 And there are several other features of the 1998  
15 amendment that make clear that that is not what Congress  
16 did.

17 JUSTICE GINSBURG: How do you answer  
18 Mr. Ryan's argument that you can read it this way, you  
19 can read it that way; therefore, he wins under the rule  
20 of lenity?

21 MR. MCLEESE: Well, this Court's cases make  
22 clear that the rule of lenity comes into play at the end  
23 of the analysis only if there is grievous ambiguity  
24 after all the considerations of statutory construction  
25 have been considered. We haven't yet discussed all of



1    them, and I think when all of them are discussed, there  
2    is no grievous ambiguity.  In fact, the reading that we  
3    suggest is the only reasonable reading, all factors  
4    considered.

5                   And if I can turn back to a couple of other  
6    features of the 1998 amendments, another feature is  
7    the -- the title of the act itself, which is an Act to  
8    Throttle the Criminal Use of Guns.  And, again, it's  
9    just inconsistent with the provision that has these  
10   features and has that act, that it would be a  
11   substantial important decrease in the mandatory minimum  
12   sentences applicable to a large class of --

13                   CHIEF JUSTICE ROBERTS:  But that's a  
14   difficult -- you're saying, because Congress wanted to  
15   get tough on the people who use firearms in this  
16   provision, every ambiguous clause should be read in a  
17   way that makes it tougher on the criminal defendant?

18                   MR. MCLEESE:  I don't -- that would push the  
19   argument too far.  I think it is highly relevant to  
20   construing this -- the statute as a whole, that that was  
21   the clear overall function of that amendment.

22                   Now, there are two other features of the  
23   1998 amendment, which are, it did as has been previously  
24   noted -- also, the only other thing that Congress did in  
25   the 1998 amendment, other than modifying section 924(c),

1 is it made a corresponding change in section 3559(c) to  
2 -- to correspond. So we know that section 3559(c) was  
3 front and center in Congress's mind as it was enacting  
4 the 1998 amendments. And it is very natural, when  
5 Congress is creating a more complex statute and giving  
6 district court judges guidance about which mandatory  
7 minimums to select under that statute, to mention and  
8 have language that accommodates the fact that there  
9 is --

10 CHIEF JUSTICE ROBERTS: So, with respect to  
11 3559(c) they were in fact being more lenient, not  
12 stricter, right?

13 MR. MCLEESE: No, I think they were  
14 clarifying --

15 CHIEF JUSTICE ROBERTS: I thought you said  
16 earlier that the purpose of this, what it does, is it  
17 makes sure that you don't add 5 extra years on the  
18 people who are sentenced to life.

19 MR. MCLEESE: I think it clarifies the  
20 relationship, and, in fact, arguably it could have  
21 clarified the situation in a way that would have been  
22 beneficial to defendants. And the reason I say that is  
23 when Congress enacted the first half of the "except"  
24 clause, which said pick one and only one mandatory  
25 minimum and impose it -- we're talking internally to

1 section 924(c) -- if it hadn't mentioned 3559(c), there  
2 could have been the idea that if there -- if Congress  
3 didn't direct the same approach with respect to 3559(c),  
4 there's an implication that in fact you should impose  
5 both.

6 And so what it really was doing was  
7 clarifying what would have been unclear. And it is,  
8 again, only half of a presumptively narrow provision  
9 which is just clarifying the relationship --

10 CHIEF JUSTICE ROBERTS: Which is right.  
11 You're saying when you get life, or you get 5, just  
12 serve life; don't serve the extra 5.

13 MR. MCLEESE: Yes. Yes, but it's not saying  
14 that to defendants. It's saying that to busy district  
15 court judges, who just need to know in a simple, clear  
16 way what am I supposed to -- what sentence am I supposed  
17 to --

18 JUSTICE SCALIA: And that's the only thing  
19 that that additional language which says "otherwise  
20 provided by this subsection or by any other provision of  
21 law" -- why didn't they just mention 3559(c)?

22 MR. MCLEESE: Well --

23 JUSTICE SCALIA: That's the only thing it  
24 covers, that tiny little thing, which has no effect at  
25 all, except for the benefit of the busy district judges,

1     you say.  I -- I find that quite implausible.

2                   MR. MCLEESE:  Well, remember that it was --  
3     although it is not hugely consequential to defendants,  
4     it was a provision that Congress was directly  
5     considering then.

6                   But there is another function, which is it  
7     creates a default rule for future similar provisions  
8     like 3559(c).  And so there -- and had, again -- so it's  
9     not limited to its function with respect to 3559(c); it  
10    also serves, as Congress often provides, a default rule.

11                   And so, again, there is a fifth feature of  
12    the 1998 amendments for those of whom this is concern,  
13    which is that the legislative history of the provision  
14    strongly corroborates our interpretation.

15                   JUSTICE BREYER:  Oh, it's not strongly.  The  
16    -- what is it an example?  You're saying the other --  
17    this thing also serves the purpose that perhaps someday  
18    Congress will pass a new statute, a totally different  
19    one, and a busy district judge might think that he  
20    should add the 5 or 25 years from this provision on to  
21    whatever sentence this hypothetical new statute  
22    provides, but this will tell him not to do so.  Did you  
23    have anything in mind?

24                   MR. MCLEESE:  Well, I -- there are -- there  
25    are other provisions that, like 924(j), which do provide

1 sentences for 924(c) offenses that are codified  
2 elsewhere in the code. And with respect to other  
3 offenses, that's also quite common. So there's nothing  
4 implausible about the idea that --

5 JUSTICE BREYER: I take it in those other  
6 offenses there are other things in the code, and the odd  
7 thing about this one is there is no other thing in the  
8 code except the one we've been discussing. And so I  
9 just wondered if there -- was there at the time anybody  
10 thinking of adding some new thing that this might have  
11 been applicable to? Or have you come across anything?  
12 I take it your answer is no.

13 MR. MCLEESE: I'm not aware that -- that  
14 Congress had some particular pending legislation in  
15 mind. My point more generally, though, is that it is  
16 quite common for Congress to provide penalties for  
17 offense A in a different section, and so creating a  
18 default rule is a perfectly reasonable thing for  
19 Congress to have done while it was clarifying the  
20 internal relationships among the various 924(c)  
21 provisions and the provision in 3559(c), which is front  
22 and center in front of it.

23 With respect to the legislative history, the  
24 "except" clause language was proposed by Senator Jesse  
25 Helms. In the legislative history of the provision,

1   there is nowhere any comment by anyone suggesting that  
2   anyone understood it as rolling back pre-existing  
3   section 924(c) penalties or as reflecting a new policy  
4   different from the fundamental policy of section 924(c),  
5   which has always been defendants who commit drug  
6   trafficking offenses or violent crimes and who involve a  
7   weapon will get an additional --

8                   CHIEF JUSTICE ROBERTS:   Is there any  
9   evidence in the legislative history that the reason they  
10   put this in was to ensure that people who got life would  
11   not get life plus 5 years?

12                   MR. MCLEESE:   There's no explicit reference  
13   to that.   But that is, I think, a -- a good inference  
14   from the fact that all of the other explanations are far  
15   more implausible.

16                   And there is something -- there are two  
17   things which support that inference more specifically,  
18   one of which is, again, that Congress did have in front  
19   of it section 3559(c) and was amending it.

20                   The second is that the sole reference  
21   anywhere in the legislative history to the "except"  
22   clause is in the testimony of a witness at a hearing,  
23   and what that witness said about it was that it will  
24   prevent confusion with other provisions.

25                   And so there is, I think, a -- a strong

1 indication --

2 JUSTICE SCALIA: It's one witness at a  
3 hearing? At a hearing? And you really think that the  
4 rest of the Congress knew about that hearing?

5 MR. MCLEESE: I don't. My point is really  
6 more the negative, which is if the "except" clause, in  
7 the second half of an exception that is in its first  
8 part intended to clarify, was instead a major policy  
9 shift from the pre-existing policy of section 924(c),  
10 additional mandatory consecutive sentences, and instead  
11 a shift over to sentences which we will try to adjust or  
12 ameliorate in light of other --

13 JUSTICE BREYER: No, no, no. It's a shift  
14 over to the sentencing guidelines, which say a person  
15 like this one will receive an extra 3 or 4 or 5 years  
16 depending on the circumstances. Will receive it, just  
17 like a mandatory. Unless, of course, it is an unusual  
18 case. That's what it's a shift to.

19 MR. MCLEESE: Two responses --

20 JUSTICE BREYER: Am I wrong?

21 MR. MCLEESE: Two responses, Justice Breyer,  
22 one of which is that Congress has amended 924(c) both  
23 before and after this provision, and it's clear that  
24 Congress is not shifting away from a mandatory minimum  
25 regime to a regime that -- where the guidelines are

1     relied upon to provide the minimum sentence that  
2     Congress requires.

3                 And it is a shift not just to a guidelines  
4     regime, because if this a major policy shift into a  
5     different world, there -- it poses a question of  
6     statutory construction as well, not just about  
7     guidelines.

8                 And that's the -- the next topic, which  
9     is --

10                JUSTICE SCALIA: Well, wait. I mean, the  
11     guidelines can't be, as Justice Breyer said, just like a  
12     mandatory. They can't be, can they?

13                JUSTICE BREYER: I didn't say that --

14                JUSTICE SCALIA: Oh, you did. I quoted you.

15                MR. MCLEESE: They could not have been, even  
16     in the pre-Booker world. Certainly, in the post-Booker  
17     world, they cannot. But the --

18                JUSTICE SCALIA: Advisory.

19                MR. MCLEESE: But -- but the point is that  
20     Congress -- if Congress was shifting in the "except"  
21     clause, there's a question: What's the nature of that  
22     policy shift?

23                If you were going to try to reduce 924(c)  
24     sentences to accommodate sentences on other provisions  
25     of law, instead of just making them an add-on always,



1 then there's a question: What policy should you pick?  
2 Should you pick any other sentence the defendant is  
3 facing at this sentencing? Should you pick any other  
4 sentence arising out of this transaction?

5 That's not a guidelines issue. That's a  
6 question of what is the policy reflected by the statute?

7 CHIEF JUSTICE ROBERTS: You should pick any  
8 other violent crime or drug trafficking offense that  
9 already provides a higher minimum.

10 MR. RYAN: That --

11 CHIEF JUSTICE ROBERTS: No, it seems to me  
12 the perfectly natural reading is to say, look, we are  
13 providing some minimum sentences when this happens, when  
14 this is the violent crime and you use a gun, but if you  
15 have already got a higher sentence for the violent  
16 crime, then this doesn't apply.

17 MR. MCLEESE: That is a possible policy, to  
18 be sure, but one thing -- it's certainly not the only  
19 reasonable policy. You could focus on the transaction  
20 or you could focus on what the defendant is facing at  
21 the sentencing. All those are among the policy options  
22 you would consider.

23 And what's interesting is that Petitioners  
24 can't agree among those policy options. And they can't  
25 agree among those policy options because section 924(c)

1 has no guidance about it. And the reason section 924(c)  
2 has no guidance about it is because Congress wasn't  
3 making that policy choice at all. Congress was simply  
4 clarifying how to implement the preexisting policy under  
5 section 924(c), which is always impose, for a section  
6 924(c) violator, an additional separate mandatory  
7 minimum sentence. But here is advice about how to do  
8 that. Here is advice about how to do that internal to  
9 section 924(c). Here is advice about how to do that  
10 external to 924(c) under 3559(c) and with a default rule  
11 for other similar provisions. That's the -- the modest  
12 objective that Congress was attempting to achieve. And  
13 as everyone agrees --

14 JUSTICE SCALIA: Excuse me. For other  
15 provisions anywhere in the code? I mean, regardless of  
16 whether those provisions are being prosecuted in this  
17 particular indictment?

18 I mean, you're --

19 MR. MCLEESE: No --

20 JUSTICE SCALIA: You're saying that the  
21 other side has to say, well, it's only those that are in  
22 this -- in this particular criminal transaction, or only  
23 those in the particular indictment.

24 Do you escape that necessity?

25 MR. MCLEESE: I think we do, and the reason

1 we do is because, in our view, this provision operates  
2 only when you're talking about prosecution for the same  
3 offense in double jeopardy purposes. And so it's not  
4 possible for -- under our submission, for the Government  
5 to prosecute somebody for one of these variants of  
6 section 924(c) and then come back again later and  
7 prosecute again and manipulate the overall structure of  
8 sentences, because they are the same offense.

9           If you move outside that into things that  
10 are not the same offense for double jeopardy purposes,  
11 then the prospects do open up for irrational patterns of  
12 outcome based on the order in which things are  
13 prosecuted and, in addition, irrational patterns of the  
14 mandatory minimums based on --

15           JUSTICE SOTOMAYOR: So how is your reading  
16 different than Mr. Abbott's?

17           MR. MCLEESE: Mr. Abbott has two readings,  
18 and our reading differs from each of them. The first of  
19 Mr. Abbott's readings is transactional in nature. Ours  
20 is focused on the section 924(c) offense itself.

21           The second of our readings is -- the second  
22 of Mr. Abbott's readings is focused on a firearm, just  
23 the fact that a firearm is involved. And, again, ours  
24 is focused on the use of a firearm in a way that  
25 constitutes the section 924(c) offense. So those are

1 the differences.

2 But if I could just point out the other  
3 anomalies, there are two other anomalies that we have  
4 not yet touched upon. One of them is that Petitioners'  
5 submissions create anomalous patterns of floors of  
6 statutory minimums, as we've discussed in the briefs.

7 If a defendant under Petitioners'  
8 submission, principal submission, has committed a drug  
9 offense that carries a 5-year mandatory minimum sentence  
10 and brandishes a firearm, it is -- carrying a 7-year  
11 minimum, the floor is 12 years. If that defendant's  
12 drug offense is more aggravated and carries a greater  
13 sentence so that there's a 10-year mandatory minimum,  
14 the overall mandatory minimum, under Petitioners'  
15 submission, reduces to 10.

16 And there is the further anomaly that for  
17 offenses that are different, Petitioners' submission is  
18 that the defendant will end up, although adjudicated  
19 guilty of a section 924(c) offense, with no sentence  
20 whatsoever. There will be a free-floating adjudication  
21 of guilt. And because the defendant, let's say, is a  
22 felon in possession and is sentenced under the Armed  
23 Career Criminal Act, when the judge goes to sentencing,  
24 the judge, on Petitioners' view, says: I will give you  
25 15 years under the Armed Career Criminal Act; that

1 triggers the "except" clause, and therefore, I impose no  
2 sentence whatsoever under section 924(c). That also is  
3 an anomaly.

4 CHIEF JUSTICE ROBERTS: As Justice -- as  
5 Justice Breyer has pointed out, he can take that into  
6 account in figuring out what sentence he would want to  
7 impose beyond the greater minimum.

8 MR. MCLEESE: That is true. My point about  
9 the anomaly is just that it is very strange, to my  
10 knowledge unheard of, to have a judge go to sentencing  
11 and have a series of adjudications and to tell the judge  
12 as to one of them it's not the greater or lesser  
13 included offense of another; you don't even need to  
14 impose a sentence on that -- on that adjudication. The  
15 backdrop basic assumption is, on each of the  
16 adjudications, you impose a sentence.

17 Now, that's not true if offenses are greater  
18 or lesser or are the same offense, for double jeopardy  
19 purposes. But under Petitioners' submission, that is  
20 true with respect to offenses like being a felon in  
21 possession of a firearm and being someone who violated  
22 924(c) that are different offenses in double jeopardy  
23 law and have always been given separate judgments,  
24 separate punishments.

25 If the Court has no further questions, we

1 would request that the judgments below be affirmed.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 Mr. McLeese.

4 Mr. Ryan, you have 3 minutes remaining.

5 REBUTTAL ARGUMENT OF JAMES E. RYAN

6 ON BEHALF OF PETITIONER IN NO. 09-479

7 MR. RYAN: I'd like to make two points on  
8 rebuttal.

9 There has been a great deal of discussion  
10 about the general purpose of 924(c), but as this Court  
11 has indicated, the best indication of a statute's  
12 purpose is the statute's language, and although the  
13 government argues that the sole purpose of 924(c) was to  
14 enhance punishment for defendants, the "except" clause  
15 belies that simplistic assertion of the purpose. The  
16 "except" clause actually mediates the punishment that is  
17 provided in 924(c).

18 The government's reading, at the end of the  
19 day, wants to rely on purpose in order to give no effect  
20 to the "except" clause. The idea that 3559(c) is an  
21 instruction to busy district court judges, even putting  
22 aside the impossibility of serving an additional  
23 sentence after completing a life sentence, doesn't hold  
24 up, because the government never disputes the fact that  
25 3559(c) begins with the statement, "Notwithstanding any

1 other provision of law."

2 So the busy district court judge never needs  
3 to turn to the "except" clause in 924(c)(1)(A) to know  
4 that you impose a life sentence when the third strike is  
5 a 924(c).

6 JUSTICE ALITO: Whenever Congress uses a  
7 phrase like that, "notwithstanding any other provision  
8 of law," does that mean that Congress must think that  
9 there is some provision of law that falls within that?

10 MR. RYAN: Possibly, yes, and that -- here,  
11 the other provision of law would be 924(c), and so the  
12 point would be --

13 JUSTICE ALITO: Doesn't Congress commonly do  
14 that to make sure that something covers any existing  
15 statute there might be that would fall within that,  
16 without necessarily saying, well, there are two of  
17 them -- if there are two, maybe there are three? Going  
18 through the entire code to find out how many there might  
19 be, or if there is any?

20 MR. RYAN: Yes, Justice Alito, and that's  
21 consistent with my point, is that --

22 JUSTICE ALITO: But it's not consistent with  
23 your main argument about the "except" clause, is it?

24 MR. RYAN: Well, yes, it is, because the  
25 "except" clause would also apply to any other provision

1 of law.

2 JUSTICE ALITO: No, but your argument is the  
3 "except" clause has to have some pretty substantial  
4 effect, or otherwise the "any other provision of law"  
5 part of it -- otherwise, they wouldn't have put it in.

6 MR. RYAN: Oh, I apologize. I misunderstood  
7 your -- your question.

8 The "notwithstanding any other provision of  
9 law," in the context of 924(c), would not have any  
10 effect if the "except" clause was considered first. But  
11 3559(c) applies to many other triggering offenses, and  
12 so with regards to those -- and the government has not  
13 suggested that 3559(c) has -- has no effect.

14 The last point I'd like to make is that  
15 there's no doubt that regardless of one's view about  
16 mandatory minimum sentences as a matter of policy, no  
17 one doubts that Congress has the authority, if it  
18 chooses to exercise it, to stack one mandatory minimum  
19 sentence on top of another.

20 But as this Court's cases make clear,  
21 Congress, under the rule of lenity, needs to make that  
22 choice clear. And if nothing else, the government's  
23 shifting views indicate that Congress has not exercised  
24 that choice clearly in this case.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.



1 The case is submitted.

2 (Whereupon, at 12:06 p.m., the case in the  
3 above-entitled matter was submitted.)

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