No. 22-49

In The
Supreme Court of the United States

EFRAIN LORA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers is a nonprofit bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes.

NACDL was founded in 1958. It has a nationwide membership of thousands of members, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defense and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of criminal justice. Each year, NACDL files *amicus* briefs in this Court and others in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. NACDL has a fundamental interest in the equitable administration of the criminal justice system through clear laws that are properly applied in accordance with the Constitution, the will of Congress, and the decisions of this Court.

NACDL has a particular interest in this case because the government's counter-textual interpretation of 18 U.S.C. § 924 is contrary to, and undermines, the

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

longstanding discretion entrusted to district courts to determine whether sentences will run concurrently or consecutively.

INTRODUCTION AND SUMMARY OF ARGUMENT

"'From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion.'" *Concepcion v. United States*, 142 S. Ct. 2389, 2398 (2022) (quoting K. STITH & J. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998)). This "unbroken tradition" has characterized federal-court sentencing since the founding. *Id.* at 2399. For just as long, a key component of that broad discretion was the right to select concurrent or consecutive sentences for multiple convictions. In federal court, this longstanding discretion is codified in 18 U.S.C. § 3584, which provides that "[m]ultiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively." *Id.* § 3584(a).

The issue presented here is whether a statute—Section 924(j)—"mandates" that the sentence under that provision and the sentences under other statutes of conviction "are to run consecutively." While Congress plainly has the authority to mandate imposition of consecutive sentences, it must do so against the backdrop of a default regime under which trial courts are entrusted with substantial discretion in

sentencing, including over the critical determination whether multiple sentences are to run concurrently or consecutively. Only "clear language" can displace a well-established "default rule" such as this. *Babb v. Wilkie*, 140 S. Ct. 1168, 1179-81 (2020) (Thomas, J., dissenting).

As petitioner persuasively explains (Pet'r Br. 11-24), Section 924(j) contains no clear language mandating that sentences under that provision run consecutively to other sentences imposed at the same time. Indeed, Section 924(j) is notably silent in addressing the temporal status of any sentences imposed under that subsection; it says nothing about whether such sentences should run concurrently or consecutively. That should end the matter. As Section 3584 provides, a sentence under Section 924(j) should run concurrently to other sentences, unless a district court, exercising its discretion, orders it to run consecutively.

NACDL leaves to petitioner the details of the statutory interpretation argument, which should be dispositive in compelling reversal of the judgment below. NACDL's brief offers additional context for interpretation of Section 924(j), specifically the centuries-long sentencing principle of trial courts' discretion to select concurrent or consecutive sentences.

ARGUMENT

The Second Circuit's Interpretation of Section 924(j) Undermines District Courts' Longstanding Discretion to Select Concurrent or Consecutive Sentences.

"'Firmly rooted in common law is the principle that the selection of either concurrent or consecutive sentences rests within the discretion of sentencing judges.'" *Oregon v. Ice*, 555 U.S. 160, 168-69 (2009) (quoting A. CAMPBELL, LAW OF SENTENCING § 9:22, at 425 (3d ed. 2004)). "Judges have long been understood to have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose." *Setser v. United States*, 566 U.S. 231, 236 (2012).

In exercising this discretion, trial courts rely on many factors that they are uniquely situated to consider, including "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1); *see also id.* § 3584(b) (requiring district courts to consider the factors in Section 3553(a) when determining whether to impose a concurrent or consecutive sentence). Indeed, in imposing a sentence, district courts "*must* make an individualized assessment based on the facts presented." *Gall v. United States*, 552 U.S. 38, 50 (2007) (emphasis added). And, as this Court frequently has noted, they are best placed to make those determinations: "The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes

credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." *Id.* at 51 (citation omitted); *see also Rita v. United States*, 551 U.S. 338, 357-58 (2007); *Koon v. United States*, 518 U.S. 81, 98 (1996) ("District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do.").

This Court has emphasized the importance of district court discretion to impose an appropriate sentence under Section 3553 even when a portion of that sentence is mandated by statute, including Section 924(c) itself. For example, in *Dean v. United States*, 137 S. Ct. 1170 (2017), the Court rejected the Government's contention that, because Section 924(c) imposes mandatory minimum sentences that must run consecutively to predicate sentences, a sentencing court could not take into account the mandatory minimum "when calculating an appropriate sentence for the predicate offense." *Id.* at 1178. Instead, the Court reaffirmed that, barring express legislative direction otherwise, district courts enjoy broad "discretion in the sort of information they may consider when setting an appropriate sentence." *Id.* at 1175.

As with other default regimes of longstanding vintage, the rule conferring broad discretion on trial judges to impose either concurrent or consecutive sentences can be overridden by statutory mandate, but only where such displacement is clear and express. *See*, *e.g.*, *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873,

877 (2019) (express statutory authority required to overcome default rule). As this Court has explained in rejecting a reading of a sentencing statute that would limit a sentencing court's discretion: "We will not assume Congress to have intended such a departure from well-established doctrine without a clear expression to disavow it." *Dorszynski v. United States*, 418 U.S. 424, 441 (1974). This salutary rule is particularly apt in the present context. "When a defendant is convicted of multiple crimes, the most important decision courts face is whether to run prison terms consecutively to one another or whether to make them concurrent." Jacqueline E. Ross, *Damned Under Many Headings: The Problem of Multiple Punishment*, 29 AM. J. CRIM. L. 245, 250 (2002).

To be clear, the issue here is not whether petitioner or any other defendant convicted of violating Section 924(j) *should* be given a sentence that is consecutive to any other sentence imposed at the same time; the issue is whether district courts retain their traditional discretion to determine, upon consideration of the factors in 18 U.S.C. § 3553, *whether* a defendant should be given a consecutive sentence. Petitioner's textually faithful reading of Section 924(j) does not prevent a district court from imposing consecutive sentences; it simply honors Congress's decision to leave that determination where it traditionally has been placed, in the hands of district court judges who sentence defendants on a regular basis. *See*, *e.g.*, *United States v. Julian*, 633 F.3d 1250, 1256 (11th Cir. 2011) ("Our interpretation of section 924(j) does not prevent a district court from

imposing a sentence under section 924(c) that must run consecutive to a separate sentence imposed under section 924(j)."); *cf. United States v. Brown*, 333 U.S. 18, 26 (1948) (rejecting interpretation of federal statute that would *require* concurrent sentence in some instances; "The [contrary] holding of the Circuit Court of Appeals thus places it beyond the power of the judge to superimpose additional imprisonment for escape in those instances where such punishment is most glaringly needed as a deterrent.").

The Second Circuit's interpretation of Section 924(j) extinguishes district courts' discretion to impose a concurrent sentence where such a sentence is warranted, thereby increasing a defendant's total sentence by many years or even decades. That interpretation is not only unsupported by the plain language of the statute but is inconsistent with district courts' longstanding discretion to impose concurrent sentences.

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

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