No. 08-1569

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217
SupremeCtBriefs@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, guidelines and rule:

Statutes, guidelines and rule—Continued:

Statutes, guidelines and rule—Continued: Page

In the Supreme Court of the United States

No. 08-1569

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

As the government demonstrated in its opening brief (at 12-34), the primary guides to statutory interpretation—language and structure—compel the conclusion that firearm type is a sentencing factor in 18 U.S.C. 924(c)(1), and secondary considerations like tradition and policy also favor that conclusion. Respondents nevertheless argue that the Court should adhere to its construction of the prior version of Section 924(c)(1) and that it should favor considerations like sentence length and silent legislative history over the text of the statute. Their interpretive methodology is misguided and their conclusions mistaken. Nor is there merit to respondents' suggestion that a sentencing-factor approach raises constitutional concerns. This Court in *Harris* v. *United States*, 536 U.S. 545 (2002), reaffirmed that Congress may constitutionally rely on sentencing factors to increase a mandatory minimum sentence within an autho-

rized range. Firearm type plays just that permissible role in Section 924(c)(1).

A. Section 924(c)(1) Provides That Firearm Type Is A Sentencing Factor Rather Than An Element

1. Castillo *v.* United States *does not control the meaning of the revised version of Section 924(c)(1)*

O'Brien contends (Br. 18-36) that *Castillo* v. *United States*, 530 U.S. 120 (2000), continues to control whether firearm type is a sentencing factor in the amended Section 924(c)(1). But *Castillo* itself acknowledged that the "statutory restructuring" in the current version of Section 924(c)(1) "suggest[s] a contrary interpretation" to the one it reached about the prior version. *Id.* at 125. O'Brien's argument (Br. 18-24) that Congress's substantial 1998 revision of Section 924(c)(1) does not disturb *Castillo*'s holding ignores the profound changes Congress made to the statute. See Gov't Br. 35-39. For example, O'Brien's claim that the 1998 revision "contain[s] no 'clear indication' that Congress intended" to change the statute's meaning, Br. 20, is refuted by his acknowledgment on the very next page that the firearm type provisions were relocated to "a subsection that is separated from other parts of the statute," *id.* at 21: that feature creates a "presumption drawn from * * * structure" that a statute states sentencing factors, *Harris*, 536 U.S. at 554.

To escape the strong implication of the many revisions Congress made to Section 924(c)(1), O'Brien posits that Congress can alter the meaning of a statute once construed by this Court only by enacting a super-clear statement. See Br. 23 (suggesting that copying the language of the sentencing factor in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), "might" be sufficient to over-

come *Castillo*). But the cases O'Brien cites (Br. 18-19) stand for the far more modest propositions that technical amendments and codifications generally do not work substantive changes and that Congress does not radically alter the law through trivial changes in wording—that "Congress * * * does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).[1] Here, the substance of the change is not an "elephant": although the statutory changes are procedurally significant, Congress adhered to the substantive principle that certain especially dangerous weapons warrant enhanced punishment. And the means for making that change is not a "mousehole": the statute was entirely restructured, with new language added that unmistakably designates firearm type as a relevant factor once a defendant has been "convicted of a violation." 18 U.S.C. 924(c)(1)(B). To see this as a sentencing factor, a court need only "interpret [the statute's] language according to its natu-

[1] See *Grogan* v. *Garner*, 498 U.S. 279 (1991) (replacing the narrower term "judgments" with the broader term "liabilities" did not affect the principle that fraud judgments are nondischargeable in bankruptcy); *Director of Revenue* v. *CoBank ACB*, 531 U.S. 316, 323 (2001) (technical and conforming amendment); *Department of Commerce* v. *United States House of Reps.*, 525 U.S. 316, 343 (1998) (opinion of O'Connor, J., for three Justices) (doubting that Congress intended "arguably * * * the single most significant change in the method of conducting the decennial census since its inception * * * by enacting only a subtle change in phraseology"); *Chisom* v. *Roemer*, 501 U.S. 380, 396 (1991) (amendment to Voting Rights Act of 1965, 42 U.S.C. 1973, using the word "representatives" did not repeal Act's coverage of judicial elections); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 317-318 (1985) (minor wording change made during codification of jurisdictional provisions into Title 28); see also Burgess Br. 16-17, 27 (citing *Finley* v. *United States*, 490 U.S. 545 (1989) (minor changes made during codification)).

ral meaning." *Morales* v. *TWA*, 504 U.S. 374, 385 n.2 (1992).[2]

2. Section 924(c)(1)'s language and structure show that firearm type is a sentencing factor

Notwithstanding respondents' attempts to downplay language and structure, those have been the primary and dispositive guides for this Court in interpreting Section 924(c)(1). See *Dean* v. *United States*, 129 S. Ct. 1849, 1853-1854 (2009); *Harris*, 536 U.S. at 552-554; *Castillo*, 530 U.S. at 124-125.[3] Those guides provide clear evidence of Congress's intent to make firearm type a sentencing factor.

Language. The first mention of firearm type in the statute is introduced by the language, "If the firearm possessed by a person *convicted of a violation* of this subsection—." 18 U.S.C. 924(c)(1)(B) (emphasis added). Because firearm type is a relevant consideration in the statute only *after* a defendant has been "convicted of a violation" (*i.e.*, found guilty by a jury of the elements of

---

[2] O'Brien takes out of context the government's suggestion in its brief in *Castillo* that the 1998 amendments intended no substantive change. See O'Brien Br. 22. That position cannot be divorced from the government's argument in *Castillo* that the pre-1998 version of the statute also made firearm type a sentencing factor. In that context, the government's statement reflected the view that the 1998 amendments only strengthened the case for treating firearm type as a sentencing factor. *Castillo* conceded that the 1998 amendments—at issue here—"suggest" a sentencing-factor interpretation, but found those amendments irrelevant to the meaning of the prior statute. 530 U.S. at 125.

[3] See also *Watson* v. *United States*, 552 U.S. 74, 78-79 (2007); *Muscarello* v. *United States*, 524 U.S. 125, 127-132 (1998); *United States* v. *Gonzales*, 520 U.S. 1, 4-11 (1997); *Bailey* v. *United States*, 516 U.S. 137, 144-146 (1995); *Smith* v. *United States*, 508 U.S. 223, 228-229 (1993); *Deal* v. *United States*, 508 U.S. 129, 131-132 (1993).

the offense), firearm type must be a sentencing factor. See Gov't Br. 14.

Respondents' counterarguments miss the point entirely by discussing instead what "violation of this subsection" means. See Burgess Br. 11-13; O'Brien Br. 30. All parties agree that the principal paragraph of Section 924(c)(1)(A) states elements. Wherever else in "this subsection" one might find additional elements "of a violation" (there are no obvious candidates), the use of the past participle "convicted" makes quite clear they are not to be found in Subparagraph (B). And that is a compelling reason why, contrary to O'Brien's argument, Section 924(c)(1)(B) cannot be "read * * * as simply substituting the word 'machinegun' for the initial word 'firearm.'" Br. 29 (quoting *Castillo*, 530 U.S. at 124). As explained (Gov't Br. 14, 36), a defendant does not come within Subparagraph (B) until he has already been "convicted." And he is "convicted" when found guilty of the "complete crime" specified in the subprincipal paragraph of Section 924(c)(1)—"the basic federal offense of using or carrying a gun during and in relation to a violent crime or a drug offense." *Harris*, 536 U.S. at 552 (internal quotation marks and citation omitted).

The introductory language of Section 924(c)(1)(A) independently shows that firearm type is a sentencing factor, because it describes provisions like Section 924(c)(1)(B)(ii) as supplying "a greater minimum sentence," and not as defining a separate crime altogether. See Gov't Br. 15-16. Respondents do not attempt to square Section 924(c)(1)(A)'s reference to "greater minimum sentence[s]" with their fundamental view that the firearm-type provisions are not "greater minimum

sentence[s]" but rather create "greater offense[s]," O'Brien Br. 1.[4]

Structure. As emphasized (Gov't Br. 16-19), *Harris*'s conclusions about the structure of Section 924(c)(1) apply here with equal force; if anything, the structural reasons to presume that Clauses (B)(i) and (ii) state sentencing factors are even stronger than the reasons *Harris* gave for interpreting Clause (A)(ii) to state a sentencing factor.

Respondents, like the court of appeals below, dismiss Congress's structural overhaul of Section 924(c)(1) as being "simply * * * for ease of digestion." O'Brien Br. 34; see *id*. at 31-35; Burgess Br. 16-17; Pet. App. 9a. But ignoring statutory structure is contrary to this Court's precedent in general, and *Castillo*'s particular comment that the "statutory restructuring" here "suggest[s] a [sentencing factor] interpretation," 530 U.S. at 125. Respondents' focus on legislative drafting technique betrays a misunderstanding of why structure matters. Structure is not important "for ease of reading," Pet. App. 9a; it is important because it reinforces Congress's intended meaning. Structural choices reveal how the parts of the statute interact and function in practice.

---

[4] O'Brien suggests that the language here is not clear enough to designate firearm type as a sentencing factor because one can imagine language that, in his view, would be clearer. See Br. 20 & n.4, 23. But "it is always possible to construct through hindsight an alternate structure for a statute with alternative wording that would render it more clear." *Bruesewitz* v. *Wyeth Inc.*, 561 F.3d 233, 246 (3d Cir. 2009), petition for cert. pending, No. 09-152 (filed Aug. 4, 2009). Cf. *United States* v. *Hayes*, 129 S. Ct. 1079, 1085 (2009) (holding that the domestic relationships specified in 18 U.S.C. 921(a)(33)(A) are not required elements of predicate offense, even though "lawmakers might have better conveyed their intent" through structural and punctuation changes).

Here, the "lengthy principal paragraph listing the elements of a complete crime" is in a separate sentence and separate subparagraph from the firearm-type provisions, which "explain how defendants are to 'be sentenced.'" *Harris*, 536 U.S. at 552 (quoting 18 U.S.C. 924(c)(1)(A)). That structural separation informs the reader that the two perform the distinct functions of identifying elements for the jury and identifying sentencing factors for the judge. This in turn results in an overall orderly progression from elements in the principal paragraph of Subparagraph (A), then to sentencing factors in the balance of Subparagraph (A) through Subparagraph (C), and finally to technical considerations about the sentence in Subparagraph (D). That structure is a practical aid to applying the statute because it allows the reader (*e.g.*, a district judge) to use Section 924(c)(1) as step-by-step instructions for charging a jury, then determining the appropriate statutory sentencing range if the defendant is convicted, and finally memorializing the actual sentence.[5]

Respondents offer two other replies. First, they assert that the government's structural argument is one "that this Court rejected in *Jones*: namely, that the statute contains a principal paragraph followed by the word 'shall,' and finally separate subsections" that state sentencing factors. Burgess Br. 15 (alteration and some

[5] Burgess's observation (Br. 17 & n.8) that some federal criminal statutes are not organized in this way is beside the point. Plainly there is no rule that statutes must progress from elements to sentencing factors—especially not when a statute has (as those cited by Burgess do) clear internal headings and cross-references explaining the relationship among its provisions. But when (as here) a statute's language and structure point to such a progression, common sense suggests that was what Congress intended.

internal quotation marks omitted); see O'Brien Br. 34-35. But it would be more germane to say that the government's structural argument here is the one the Court accepted in *Harris* regarding this very statute. Second, respondents assert (with no citation) that the case for treating firearm type as a sentencing factor would be strengthened by moving it *closer* to the elements of the offense (indeed, by relocating it to the same sentence and subparagraph as the offense elements). See Burgess Br. 14-15; O'Brien Br. 35. But the opposite is true: it is Subparagraph (B)'s structural and linguistic separation from the elements in the principal paragraph of Subparagraph (A) that should give the Court confidence that firearm type is not itself an element. See Gov't Br. 17-19.

In the end, rather than glean meaning from Congress's structural choices as *Harris* commands, respondents dismiss Section 924(c)(1) as a "jumble of widely varying provisions" (Burgess Br. 17) that merely reflects the happenstance of how things "ended up" (O'Brien Br. 35). But the current version of the statute is the product of a wholesale structural revision by Congress, in which firearm type was shifted from raising a fixed sentence to increasing the minimum sentence within a much larger authorized range. That significant alteration makes it all the more likely that Congress purposefully selected a structure that would implement a sentencing factor design, as Section 924(c)(1) does.

3. Secondary factors such as tradition and sentence length support treating firearm type in Section 924(c)(1)(B) as a sentencing factor

Respondents overemphasize secondary interpretive guides like the traditional treatment of firearm type and

the length of the sentence at issue. As previously explained (Gov't Br. 21-22), reliance on such considerations is appropriate only when the statute's language and structure "do[] not justify any confident inference," *Jones* v. *United States*, 526 U.S. 227, 234 (1999). Even so, these secondary considerations support treating firearm type as a sentencing factor here.

Tradition. As we explained in our opening brief (at 22-24), the enhanced minimum sentences for particularly dangerous firearms lie at the intersection of two well-established traditions, neither of which was implicated by the version of the statute construed in *Castillo*: the use of sentencing factors to constrain the judge's discretion through mandatory minimum sentencing laws, and the Sentencing Guidelines' treatment of firearm type as a sentencing factor for firearms offenses. Respondents do not dispute the former; indeed, they point to no federal statute (and we are aware of none, see *id*. at 37) that requires a jury finding to raise the minimum permissible sentence within an authorized range.[6]

Nor do respondents offer a sound reason to ignore the Sentencing Guidelines' tradition of treating firearm type as a sentencing consideration. Tradition matters when statutory language and structure are "unclear" because "statutory drafting occurs against a backdrop

---

[6] O'Brien observes (Br. 25) that Section 924(c)(1)(A)(i) provides for a minimum sentence based exclusively on offense elements, but that section simply states (as any penal statute must) the authorized sentencing range for the offense it describes. What places Section 924(c)(1) in the sentencing factor tradition is that each of the *aggravated* ways of committing the offense triggers a higher minimum sentence within that authorized range (rather than an "increase [in that] penalty range," *Jones*, 526 U.S. at 233).

* * * of traditional treatment of certain categories of important facts," and it is therefore a "fair assumption that Congress * * * intend[ed]" to follow traditional practices that prevailed at the time of drafting. *Jones*, 526 U.S. at 234. O'Brien suggests (Br. 26 n.7) that the Guidelines would have been just as relevant in construing the 1986 version of Section 924(c)(1) in *Castillo*. But Congress could not have legislated "against a backdrop" of the Guidelines in 1986 because the Guidelines were not effective until late 1987, see Sentencing Guidelines Ch. 1, Pt. A.2 (1987). By contrast, in 1998 the Guidelines undeniably embodied the dominant federal sentencing tradition.

Burgess (see Br. 23-24) is mistaken to infer anything from the absence of any mention of the Guidelines in *Jones*. Although the government argued in *Jones* that the Guidelines' tradition of treating serious bodily injury as a sentencing consideration supported its reading of the statute at issue (see Gov't Br. at 23-25, *Jones*, *supra*), this Court's "search for comparable examples" turned up better parallels in other statutes, and the Court did not need to address the Guidelines, *Jones*, 526 U.S. at 235-236.

Here, by contrast, the Guidelines provide the better parallel. Many of the statutes Burgess offers as parallels (see Br. 22-23 & nn.11-12) are designed to criminalize certain acts or omissions only when they involve a particular type of firearm; that tailored purpose cannot easily be served without making the particular type of firearm an offense element. By contrast, Section 924(c)(1) criminalizes certain acts involving *any* firearm, and thereby serves Congress's objective of combating the dangerous combination of *all* firearms with drugs or violent crime, see Gov't Br. 32. Further distinctions

among Section 924(c)(1) offenders can sensibly be drawn by the judge at sentencing.

The great majority of offenses under 18 U.S.C. 922, 18 U.S.C. 924, and 26 U.S.C. 5861 are drawn broadly to reach any "firearm" as defined in the respective statutes; none of those broad offenses makes the involvement of a specific type of firearm an aggravated offense.[7] But every one is subject to Sentencing Guidelines § 2K2.1, which directs the judge to consider the particular type of firearm at sentencing. Construing firearm type in Section 924(c)(1)(B) as a sentencing factor is consistent with that tradition.

Length. Only "after considering traditional interpretive factors" and finding itself "genuinely uncertain as to Congress's intent" would this Court "assume a preference for traditional jury determination." *Castillo*, 530 U.S. at 131. As shown above and in our opening brief, no "genuine[] uncertain[ty]" exists about Congress's intent here. The length of the sentence enhancement does not change matters. Congress has authorized comparably large sentence enhancements on the basis of judge-found facts for conduct that is as heinous and dangerous as using a machinegun in connection with violent crime. See Gov't Br. 26-29. Respondents say nothing in response to the vast majority of the enhancements cited in

[7] Burgess asserts that "status as a machinegun" is "an element with respect to * * * violations set forth in 26 U.S.C. 5861(a) through (j)." Br. 22. But all "firearm[s]" covered by 26 U.S.C. 5845(a)—machineguns included—are treated alike; different firearms do not define different aggravated offenses, and what matters here is whether the fact is made an element of an aggravated offense. See, *e.g.*, *Jones*, 526 U.S. at 235 ("[S]erious bodily injury has traditionally been treated * * * as defining an element of the offense of aggravated robbery."); *Harris*, 536 U.S. at 553 ("[B]randishing and discharging affect the sentences for numerous federal crimes.").

our opening brief; Burgess argues that two in particular are actually not sentencing factors, but offers no judicial authority (aside from dissenting opinions) in support of his argument, see Br. 26.

Respondents seem to embrace the proposition that a ten-year minimum sentence—like that provided in Clause (B)(i) for certain types of firearms—is what "one would expect to find in provisions aimed at identifying sentencing matters for a judge to consider." Burgess Br. 26 (citing *Harris*, 536 U.S. at 554). Clauses (B)(i) and (B)(ii) are similarly worded and identically structured, however, and respondents fail to explain what will become of Clause (B)(i) if this Court accepts their invitation to decide the status of Clause (B)(ii) based on the length of sentence it prescribes. Perhaps respondents would argue that the nearly identical provisions mean diametrically opposite things. The more sensible conclusion, though, is that Congress intended Clause (B)(ii)—like every other provision around it—to be a sentencing factor.[8]

B. Treating Firearm Type As A Sentencing Factor Is Consistent With Constitutional Limitations On Mandatory Minimum Sentences

Congress's decision in Section 924(c)(1) to impose an enhanced minimum sentence based on the sentencing

[8] With respect to other considerations, the parties agree (Gov't Br. 29, Burgess Br. 27-28, O'Brien Br. 28-29) that the 1998 legislative history is silent on the question presented. As for policy, we explained in our opening brief why firearm type in particular was a reasonable subject for Congress to commit to the sentencing judge in the context of this statute. Br. 31-34. O'Brien's general endorsement of jury determinations (Br. 26-27) would apply equally to every fact in every criminal case; it says nothing about why firearm type in particular cannot fairly be entrusted to the judge in a Section 924(c)(1) case.

judge's finding of particular firearm type is consistent with the Fifth and Sixth Amendments.

1. Mandatory minimum sentences raise no Sixth Amendment concern

"[M]andatory minimums * * * are not a concern of the Sixth Amendment." *Rita* v. *United States*, 551 U.S. 338, 373 n.2 (2007) (opinion of Scalia, J.) (citing *Harris*, 536 U.S. at 568-569). This Court has never wavered from that clear and firmly established rule, and respondents offer no valid reason to reconsider it.

a. In *McMillan*, *supra*, this Court "rejected" a rule "that the Constitution requires any fact increasing the statutory minimum sentence to be accorded the safeguards assigned to elements." *Harris*, 536 U.S. at 555. No subsequent case has disturbed that holding:

- In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that the Sixth Amendment requires that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. *Apprendi* expressly "d[id] not overrule *McMillan*," recognizing the force of *stare decisis* considerations, *id.* at 487 n.13.
- *Harris* reaffirmed *McMillan* and held that *Apprendi*'s rule does not apply to judicial factfinding that increases a defendant's minimum sentence within an authorized range. See *Harris*, 536 U.S. at 568 (opinion of the Court "reaffirming *McMillan*"); see also *id.* at 565, 567-568 (plurality opinion); *id.* at 569, 572 (Breyer, J., concurring in part and concurring in the judgment). The *Harris*

plurality explained that, unlike the "prevailing historical practice" of submitting to a jury factual matters that would increase a defendant's sentence beyond the otherwise-applicable statutory maximum, there was "no comparable historical practice of submitting facts increasing the mandatory minimum to the jury, so the *Apprendi* rule d[oes] not extend to those facts." *Id.* at 563.

- *Ring* v. *Arizona*, 536 U.S. 584, 604 n.5 (2002), reiterated the Court's conclusion from *Harris* that "the distinction between elements and sentencing factors continues to be meaningful as to facts increasing the minimum sentence."
- *Blakely* v. *Washington*, 542 U.S. 296, 305 (2004), applied *Apprendi* to invalidate an enhancement under a state sentencing guidelines scheme that produced "a sentence greater than what state law authorized on the basis of the verdict alone." *Blakely* expressly distinguished *McMillan* on the ground that it "involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact." *Id.* at 304.
- *United States* v. *Booker*, 543 U.S. 220, 232 (2005), and *Cunningham* v. *California*, 549 U.S. 270, 281-282 (2007), both adhered to the principle that *Apprendi*'s rule applies only to factfinding that affects a defendant's maximum sentence.[9]

---

[9] Amicus Center on the Administration of Criminal Law is quite wrong to claim that *Booker* extends *Apprendi* to any law "establishing what punishment is available by law," Br. 17 (quoting *Apprendi*, 530 U.S. at 519 (Thomas, J., concurring)). Justice Stevens's opinion is clear that the mandatory Sentencing Guidelines violated the Sixth Amendment not because they specified sentencing ranges generally,

McMillan and *Harris*'s rule is correct and forms a deeply rooted part of this Court's Sixth Amendment jurisprudence.

b. Burgess (see Br. 36-39) and his amici nonetheless advocate overruling *McMillan* and *Harris*. Even apart from the correctness of those decisions, *stare decisis* commands adherence to their rule. "*Stare decisis* is not an inexorable command, but the doctrine is of fundamental importance to the rule of law," and this Court "will not overrule a precedent absent a special justification." *Harris*, 536 U.S. at 556-557 (plurality opinion) (internal quotation marks and citations omitted). No such "special justification" exists here. *McMillan* and *Harris* offend no historical practices, and they are entirely consistent with the rule of *Apprendi*. And a rule permitting legislatures to increase minimum sentences within an authorized range based on judge-found facts is clear and workable.

"*Stare decisis* has special force when legislators or citizens have acted in reliance on a previous decision, for in this instance overruling the decision would * * * require an extensive legislative response." *Hubbard* v. *United States*, 514 U.S. 695, 714 (1995) (opinion of Stevens, J.) (internal quotation marks and citation omitted). As this Court is well aware, *McMillan* and *Harris* have engendered considerable reliance at both the federal and the state level.[10] Section 924(c)(1) itself exem-

---

but because "the 'statutory maximum' for *Apprendi* purposes" in a guideline system is "the maximum sentence a judge may impose [within the system] solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Booker*, 543 U.S. at 232 (quoting *Blakely*, 542 U.S. at 303) (emphasis omitted).

[10] See, *e.g.*, *Harris*, 536 U.S. at 567-568 (plurality opinion) (noting that "[l]egislatures and their constituents have relied upon *McMillan* to

plifies that reliance; the 1998 revision took it outside what became *Apprendi*'s rule and placed it inside *McMillan*'s. After *Harris*, Congress has continued to enact mandatory minimum sentencing laws. See, *e.g.*, Prevention of Terrorist Access to Destructive Weapons Act of 2004, Pub. L. No. 108-458, Tit. VI, Subtit. J, §§ 6903-6906, 118 Stat. 3770-3773 (adding or amending 18 U.S.C. 175c, 2332g, 2332h and 42 U.S.C. 2722). Respondents offer no adequate justification to overrule *McMillan* and *Harris*.

2. Treating the firearm-type provisions of Section 924(c)(1)(B) as sentencing factors is consistent with the Due Process Clause

Respondents argue (O'Brien Br. 52-55, Burgess Br. 33-39) that Section 924(c)(1)(B)(ii) cannot be considered a sentencing factor because imposing a 30-year sentence based on judicial factfinding would violate the Due Process Clause by "diluting the prosecution's burden of proof." O'Brien Br. 52. That is incorrect.

a. This Court has never held that the Due Process Clause is violated when a judge makes findings by a preponderance of the evidence that raise a minimum sentence within an authorized range. To the contrary, the Court rejected such claims in *McMillan* and *Harris*. Respondents nonetheless would transform *McMillan*'s observation that the statute there gave "no impression

---

exercise control over sentencing through dozens of statutes like the one the Court approved in that case"); see also *id.* at 570 (Breyer, J., concurring in part and concurring in the judgment) (recognizing that "[d]uring the past two decades, * * * mandatory minimum sentencing statutes have proliferated in number and importance."); *Apprendi*, 530 U.S. at 487 n.13 (noting the Court was "[c]onscious of the likelihood that legislative decisions may have been made in reliance on *McMillan*").

of having been tailored to permit the [sentencing factor] finding to be a tail which wags the dog of the substantive offense," 477 U.S. at 88, into an affirmative arithmetical command that the Due Process Clause is offended whenever a "major portion of a defendant's sentence is attributable to a particular sentencing factor rather than to the offense itself," O'Brien Br. 54.

Harris itself rejects that view of the Fifth Amendment. See 536 U.S. at 565 (plurality opinion) ("[O]nce the jury finds [the elements of the offense], *Apprendi* says that the defendant has been convicted of the crime; the Fifth and Sixth Amendments have been observed."). And a majority of this Court has squarely rejected—in a decision rendered since *McMillan* and *Harris*—the argument that the line between sentencing factor and offense element can be governed by such an amorphous and "subjectiv[e]" standard as whether the sentencing factor appears to be a "tail" that "wags the dog" of the substantive offense. See *Blakely*, 542 U.S. at 307 (quoting *McMillan*, 477 U.S. at 88); *id.* at 311 n.13. Rather, whether the Constitution requires a particular fact to be found by a jury is determined by "*Apprendi*'s bright-line rule." *Id.* at 308. That rule does not apply to the enhanced minimum sentence prescribed by Section 924(c)(1)(B)(ii) because the underlying offense carries a potential life sentence and the presence of a machinegun simply increases the minimum sentence within that range. Where *Apprendi* does not apply, the Constitution commits concerns about such schemes to the "'structural democratic constraints [that] exist to discourage legislatures from' pernicious manipulation of the rules" defining offenses and assigning burdens of proof. *Oregon* v. *Ice*, 129 S. Ct. 711, 719 (2009) (quoting *Apprendi*, 530 U.S. at 490 n.16).

b. Section 924(c)(1)(B)(ii) bears no resemblance to the extreme hypotheticals that this Court has offered to illustrate the concern raised by sentencing factors that overshadow the offense. See, *e.g.*, *Blakely*, 542 U.S. at 306 (hypothesizing a murder prosecution in the guise of a sentencing proceeding for a traffic offense committed while fleeing the death scene). All would agree that the actions described in the principal paragraph of Section 924(c)(1)(A) are wrongful and deserving of serious punishment; indeed, Congress authorized punishment up to life imprisonment. The firearm type provisions of Section 924(c)(1)(B) merely categorize particularly dangerous forms of the offense by looking closely at an element—the firearm—that has already been proved to the jury's satisfaction. In other words, Congress "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor." *Harris*, 536 U.S. at 568 (quoting *McMillan*, 477 U.S. at 89-90).

C. This Court Should Reject Or Not Decide The Other Statutory And Constitutional Claims Respondents Raise

Respondents and their amici press certain statutory and constitutional issues that were not raised or decided by the courts below and that are not within the question presented. This Court should not address those claims, but if it does, it should reject them.

1. This Court cannot and should not decide respondents' putative as-applied Sixth Amendment challenge

Respondents, joined by their amici, contend that basing a sentence under Section 924(c)(1)(B)(ii) on a judge's finding of a machinegun would violate their Fifth and Sixth Amendment rights as interpreted in *Apprendi*, *supra*. See O'Brien Br. 37-52, Burgess Br. 40-43. In

particular, respondents contend that the applicable statutory maximum for *Apprendi* purposes is not Section 924(c)(1)'s statutory maximum of life imprisonment, but instead the maximum hypothetical sentence that could be imposed under 18 U.S.C. 3553(a) in the absence of judicial factfinding and upheld on appeal as reasonable. See generally *Rita*, 551 U.S. at 368-381 (opinion of Scalia, J.). In respondents' view, the 30-year minimum sentence prescribed by Section 924(c)(1)(B)(ii) exceeds that hypothetical level, and, they claim, it therefore cannot be imposed based on the sentencing judge's finding that the Cobray MAC-11 was a machinegun.

The Court should refuse to reach respondents' contention. Doing so would require the Court to adjudicate an as-applied challenge it has never recognized, to a sentence that has not been imposed, based on a set of facts not presently determined, all without the benefit of decisions from the courts below. That said, if the Court were to address respondents' putative as-applied challenge, it should fail on the merits.

a. This Court need not reach the question. It was not pressed or passed upon by the courts below and is not part of the question presented. The Court "ordinarily do[es] not decide in the first instance issues not decided below," *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 168 (2004) (citation omitted), and it would be extraordinary for the Court to take up a case-specific constitutional question the courts below never confronted. If the government prevails in this Court, respondents could raise their challenge on remand. See, *e.g.*, *id.* at 168-171 (remanding for lower courts to consider in the first instance an alternative claim not previously decided, beyond the question presented, and subject to limited briefing in this Court); *FCC* v. *Fox Televi-*

sion Stations, Inc., 129 S. Ct. 1800, 1819 (2009) (remanding for consideration of constitutional claims by lower court in the first instance). And because proceedings on remand will not necessarily result in imposition of the Section 924(c)(1)(B)(ii) sentence—respondents could be acquitted at trial, or the district court might reject the government's proof of the Cobray's characteristics—it is possible that no court will have to reach respondents' constitutional challenge.

b. Respondents' challenge is not ripe at this point in the proceedings. An as-applied challenge asserts that "under the facts of [a] specific case[] * * * applying [a statute] would produce unconstitutional results." *Cutter* v. *Wilkinson*, 544 U.S. 709, 725 (2005) (citation omitted). Any as-applied challenge would require determining what sentence would be the maximum "reasonable" sentence based on "the facts found by the jury or admitted by the defendant." Burgess Br. 41 (quoting *Rita*, 551 U.S. at 372 (opinion of Scalia, J.)). But it is impossible to know now what the "facts found by the jury or admitted by the defendant" would be should respondents challenge some future sentence. While respondents admitted certain facts at their guilty plea hearing, they raise a serious prospect that they might withdraw their guilty pleas on remand. See Burgess Br. in Opp. 15-16; O'Brien Br. in Opp. 23-25; see also Pet. Reply Br. 10-11. Whatever happened next—perhaps a trial, perhaps an open guilty plea, perhaps a plea agreement —would make a new record of admissions or jury findings different from the current record. Thus, a pronouncement from this Court about the constitutionality of a 30-year sentence on this record would be entirely advisory.

c. If this Court reaches the issue, it should conclude that respondents' putative as-applied challenge has no basis in the Sixth Amendment. Respondents' challenge posits a system of reasonableness review in which "appellate courts, in case-by-case fashion," construct maximum reasonable sentences based on the Section 3553(a) sentencing criteria to limit the discretion of the sentencing judge. *Rita*, 551 U.S. at 372 (opinion of Scalia, J.). But reasonableness review does not generate predictable maximum sentences on which an offender can rely when embarking on a crime.

The *Apprendi* rule was based on the idea that a defendant, before he engages in conduct, is entitled to know the "certain pains" to which his actions expose him under the law and to enjoy the "procedural safeguards designed to protect [the defendant] from unwarranted pains." 530 U.S. at 476 (citation omitted). Thus, the Court held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the *prescribed range of penalties* to which a criminal defendant is exposed." *Id.* at 489 (emphasis added; citation omitted; brackets in original). Later cases reiterated the theme that a defendant is entitled to rely on the maximum penalty threatened by the law when committing a crime or pleading guilty.[11]

[11] See *Blakely*, 542 U.S. at 309 ("In a system that says the judge may punish burglary with 10 to 40 years, every burglar *knows* he is risking 40 years in jail.") (emphasis added); *id.* at 311 (describing the pre-*Apprendi* regime as one "in which a defendant, *with no warning in either his indictment or plea*, would routinely see his maximum potential sentence balloon") (emphasis added); *Harris*, 536 U.S. at 566 (plurality opinion) ("The Fifth and Sixth Amendments ensure that the defendant 'will never get *more punishment than he bargained for* when he did the crime.'") (emphasis added) (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

But the hypothetical maximum reasonable sentence available in a system that includes appellate review for substantive reasonableness is not the sort of "certain pains" on which an offender can rely, because the existence of that appellate check creates no ascertainable upper limit on the legally available punishment. The purpose of appellate review certainly is not to create such an entitlement. See *Rita*, 551 U.S. at 354 ("In sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur."). Nor would it be possible for a would-be offender to anticipate the particular combination of facts and policy judgments on which the sentencing court would rely in determining the appropriate sentence—let alone predict the maximum sentence that an appellate court might ultimately conclude is reasonable based on those fact- and policy-based justifications.

In considering extensions of the *Apprendi* rule, this Court has looked to "historical practice" and the degree of intrusion on sovereign prerogatives. *Ice*, 129 S. Ct. at 717. Here, no "historical practice" supports treating a deferential appellate check on unreasonable sentences as if it were a predictable and uniform legal maximum sentence for Sixth Amendment purposes. And extending *Apprendi* to achieve that result would effectively preclude legislatures from relying on appellate review to weed out excessive sentences, and force them instead either to abandon the appellate check or grant jury trials based on appellate rulings—an outcome that would "make scant sense," put unnecessary "straightjacket[s]" on governments, and "be difficult * * * to administer." *Id.* at 719.

If as-applied Sixth Amendment challenges were permissible, no sentencing judge would be able to ascertain the upper limit of her authority; every case would have to be considered on its own facts. Nor could any coherent body of precedent develop to guide sentencing judges. Each hypothetical maximum reasonable sentence would depend on the unique set of facts proved to the jury or admitted by the defendant and the sentencing court's application of its own policy judgment—all filtered through abuse-of-discretion appellate review. The resulting chaos would undermine the remedy the Court fashioned in *Booker*, *supra*, and reaffirmed in *Rita*, *supra*, and *Gall* v. *United States*, 552 U.S. 38 (2007), and it would deprive sentencing courts of their constitutionally permitted latitude "to take account of factual matters not determined by a jury and to increase the sentence in consequence," *Rita*, 551 U.S. at 352.

d. All that aside, such a challenge would fail on the facts here. In brief, the "facts * * * admitted by the defendant[s]" for *Apprendi* purposes are these:

- Respondents planned with their confederates for several months to rob an armored car.
- Respondents gained access to three stolen cars and three firearms (a Sig-Sauer pistol, a Cobray MAC-11, and an AK-47) as part of their plan.
- Following through on their plan, respondents assaulted an armored car and its two guards while brandishing those firearms on a weekday morning in a commercial area of a major city.
- Respondents aborted only because one of the guards escaped their control.

App., *infra*, 1a-5a. In addition, the fact of a prior conviction is not subject to *Apprendi*, see 530 U.S. at 488-490, and each respondent has a fair history of misdemeanor and felony convictions, see C.A. Supp. App. 13-16 (O'Brien), 57-66 (Burgess). Imposing a 30-year sentence on repeat offenders for using multiple firearms in a dangerous, threatening, and premeditated way would be within the sentencing judge's discretion, irrespective of whether one of the firearms was a machinegun.

e. Finally, the Court should reject O'Brien's invitation to invoke "the doctrine of constitutional avoidance," Br. 37, to construe Section 924(c)(1)(B)(ii) to state an element in all cases. For the canon to apply, "the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238 (1998). But as we have explained, when this statute is carefully considered, it is not ambiguous at all.

The avoidance "canon is followed out of respect for Congress, which we assume legislates in light of constitutional limitations." *Almendarez-Torres*, 523 U.S. at 238 (citation omitted). Congress did so in 1998 by respecting *McMillan*'s assurance that elevated mandatory minimum sentences within an authorized range could be imposed on the basis of judicial factfinding. See *Harris*, 536 U.S. at 556 ("The statute at issue in this case was passed when *McMillan* provided the controlling instruction, and Congress would have had no reason to believe it was approaching the constitutional line by following that instruction."). Constitutional law is to the same effect today; the Court is not confronted by a "grave and doubtful" constitutional issue, *id.* at 555 (citation omitted), if it construes Section 924(c)(1)(B)(ii) as Congress wrote it.

2. This Court should reject or refuse to decide O'Brien's claim that the government must prove he knew the Cobray was a machinegun

O'Brien contends that, irrespective of the answer to the question presented, Section 924(c)(1)(B)(ii) requires the government to prove his knowledge that the Cobray was a machinegun—something it concededly cannot do. See O'Brien Br. 13-17. This Court should refuse to reach that issue because it is not properly presented here, but if it does decide the question, it should resolve it against O'Brien.

a. This Court should not reach the knowledge issue because, as O'Brien concedes, it is not part of the question presented (see Pet. I; O'Brien Br. 15), nor was it pressed or passed upon in the courts below. See pp. 19-20, *supra*. O'Brien's suggestions (Br. 13, 17) that the Court avoid answering the question presented or dismiss the writ as improvidently granted are particularly inappropriate given that he did not raise the knowledge issue in his brief in opposition, notwithstanding the government's pointed discussion of the issue in its petition (at 18-19). See S. Ct. Rule 15.2.

O'Brien describes the knowledge issue as "analytically distinct from the question [presented]." Br. 15. But in fact, this Court's decision in *Dean* suggests that resolution of the sentencing factor/element question is a prerequisite to intelligent analysis of the knowledge issue. *Dean* considered whether Section 924(c)(1)(A)(iii)'s enhancement when "the firearm is discharged" required proof of the defendant's mental state. *Dean* held that it did not, partly based on the tradition of imposing criminal punishment for the unintended consequences and unknown circumstances of otherwise unlawful conduct. See 129 S. Ct. at 1855-1856. That analy-

sis is appropriate when a sentencing factor is at issue (because the offense elements establish the otherwise unlawful conduct), but it may carry less force when an element is at issue (because the element may itself define the unlawful conduct). The Court should define the nature of machinegun enhancement before considering whether it requires proof of a mental state.

b. *Dean* also demonstrates why O'Brien's position on the knowledge issue is wrong on the merits. Like Clause (A)(iii) at issue in *Dean*, Clause (B)(ii) contains no express mental state, so it would be inappropriate to imply one. See 129 S. Ct. at 1853. Also like Clause (A)(iii), Clause (B)(ii) is phrased in the passive voice, suggesting the statute is unconcerned with the knowledge or intentions of the criminal actor. See *ibid.* Furthermore, *Dean* found it unnatural to "extend" the mental state of the principal paragraph of Section 924(c)(1)(A) "all the way down" to modify Clause (A)(iii), see *id.* at 1854; it would be even more unnatural to extend it all the way to Clause (B)(ii).

O'Brien's reliance (Br. 14-15) on *Staples* v. *United States*, 511 U.S. 600 (1994), is misplaced, because firearm type plays quite a different role in 26 U.S.C. 5861(d), the firearm-registration statute at issue in *Staples*. There, if the government were not required to prove knowledge of the characteristics that made the object in question a machinegun, committing the offense "would require the defendant to have knowledge only of traditionally lawful conduct," *Staples*, 511 U.S. at 618, effectively "dispens[ing] with *mens rea*," *id.* at 619. The application of that principle here is that the government must prove a defendant's knowledge of the characteristics that made the Cobray a "firearm" under 18 U.S.C. 921(a)(3), not a "machinegun" under 18 U.S.C. 921(a)(23)

and 26 U.S.C. 5845(b). And independent statutory elements assure that a defendant subject to Clause (B)(ii) is culpable—as in *Dean*, he "is already guilty of unlawful conduct twice over: a violent or drug trafficking offense and the use, carrying, or possession of a firearm in the course of that offense." 129 S. Ct. at 1855.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

ELENA KAGAN
Solicitor General

FEBRUARY 2010

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. l:05-cr-10183-MLW

UNITED STATES OF AMERICA

v.

DENNIS QUIRK AND MARTIN O'BRIEN AND
ARTHUR BURGESS

Monday, Apr. 2, 2007

[**Plea Hearing**]

---

* * * * *

[60]

* * * * *

THE COURT: All right. Now, the government is going to provide a factual basis. I'm quite familiar with the factual basis because of the trial memo and the preparation for trial, the other pleas, I take it, but I think it probably would be prudent to have the government summarize what the evidence would have been if we went to trial and then I'll ask each of the defendants if he agrees with the government's summary of what he did.

MR. RICHARDSON: Yes, your Honor.

Had the case gone to trial, the evidence would have shown that around the spring of 2005, Dennis Quirk, Martin O'Brien, Arthur Burgess and Patrick Lacey made plans to rob an armored car. They made arrangements through the defendant Quirk to use Jason Owens's room at 311 Pearl Street in Malden, Massachusetts as a place to rendezvous after the robbery.

In around late April and early May of 2005, they twice set up to rob an armored car as it made a delivery to a Citizen's Bank branch located in Charlestown, but both times circumstances interfered and the robbery did not go forward on either of those occasions .

The evidence would have shown that during the week of June 6, 2005, defendant Quirk spoke with Jason Owens and again arranged to use his room at 311 Pearl Street as a place to rendezvous after an armored car robbery. The evidence would have shown that the defendants Quirk, O'Brien and Burgess, together with Patrick Lacey, then made preparations to rob a Loomis Fargo & Company armored car as it made a delivery to the Citizen's Bank branch located on Hanover Street in the North End of Boston on June 16th, 2005. The evidence would have shown that Loomis Fargo & Company operated throughout the United States and in foreign countries and that Loomis Fargo & Company would have borne at least part of the amount of the loss occasioned by a robbery. The evidence would have shown that as part of the preparation for committing this robbery, the defendants planned to use three stolen vehicles, a blue minivan, a red Buick, and a white van.

The evidence would have shown that on the morning of June 16th, 2005, Patrick Lacey drove a red Buick to the North End of Boston and defendants O'Brien, Quirk

and Burgess, armed with the AK-47 rifle described in the indictment and the Cobray 9 millameter pistol described in the indictment and the Sig Sauer pistol described in the indictment, drove in the blue minivan to the North End of Boston. The evidence would show that they made several loops around the block that included the location of the Citizen's Bank and then when the armored car had arrived, the evidence would show that Lacey drove by in the Buick as the defendants Quirk, O'Brien and Burgess pulled up to the blue minivan with the rear slider door open.

The evidence would show that armed with the firearms, they ordered the two guards that were there to get down on the ground. The evidence would show that one did so, but the other took cover and then ran down the sidewalk. The evidence would show that one did so, but the other took cover and then ran down the sidewalk. The evidence would show that the defendant O'Brien, who was driving the minivan, took off without their having obtained any money or other property.

The evidence would show that he followed Patrick Lacey in the red Buick over to Cooper Street, where they abandoned the blue minivan. The evidence would show that they all got into the Buick. O'Brien drove them to Everett where they abandoned the Buick and got into a white van that they had waiting, and the evidence would show that they all then drove to 311 pearl Street in Malden.

The evidence would show that the defendant O'Brien dropped the defendant Quirk, the defendant Burgess, and Patrick Lacey off and then, went to park the van. The evidence would show that they went inside and that

the defendant O'Brien arrived somewhat later after having parked the van.

The evidence would show that they took off clothing. Defendants Quirk and Burgess, in particular, took off bullet proof vests, and that the vests, some of the clothing, and the three firearms described in the indictment were put into a black Nike bag, which was put into Jason Owens's closet, together with magazines and ammunition for each of the weapons.

The evidence would show that the defendant Quirk was the first to leave 311 Pearl Street, was seen by law enforcement as he left, and ended up being arrested a few minutes later at the nearby T station. The evidence would show that the defendants Burgess, O'Brien, and Patrick Lacey left a short while later, unobserved by law enforcement, and took a cab away from 311 Pearl Street.

The evidence would show that the FBI executed a search warrant at 311 Pearl Street later that day and recovered a black Nike bag with the bullet proof vests, the three firearms described in the indictment, and the ammunition and magazines for those firearms. The evidence would have shown that each of the three firearms described in the indictment is a real firearm and that the ammunition described in the indictment is real ammunition.

The evidence would have shown that each of defendant Quirk and defendant Burgess, prior to June 16th of 2005, had been convicted in a court of a crime punishable by a term of imprisonment exceeding one year and the evidence would have shown that each of the three firearms described in the indictment and all of the ammunition described in the indictment was made outside of Massachusetts.

THE COURT: Do you agree with the government's summary of what you did, what you knew?

MR. BURGESS: Yes.

MR. O'BRIEN: Yes.

MR. QUIRK: Yes.

THE COURT: And how do you now each wish to plead to the charges against you, guilty or not guilty?

MR. BURGESS: Guilty.

MR. O'BRIEN: Guilty.

MR. QUIRK: Guilty.