No. 08-1569

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN O'BRIEN AND ARTHUR BURGESS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENT ARTHUR BURGESS

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QUESTION PRESENTED

In *Castillo* v. *United States*, 530 U.S. 120 (2000), this Court unanimously held that, under a previous version of 18 U.S.C. § 924(c)(1), firearm type was an offense element that had to be proven to a jury beyond a reasonable doubt, when a finding that the firearm was a machinegun increased the mandatory consecutive sentence from five to thirty years. The question presented in this case is whether, under the statute as amended in 1998, firearm type remains an offense element when a finding that the firearm is a machinegun increases the mandatory minimum consecutive sentence from five to thirty years.

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CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . and to be informed of the nature and cause of the accusation.

Section 924(c) of Title 18 of the United States Code is reproduced in an appendix to this brief.

INTRODUCTION

When Congress amended 18 U.S.C. § 924(c) in 1998 to address the effect of *Bailey* v. *United States*, 516 U.S. 137 (1995), on "use and carry offenses," it reorganized the statute but did not reduce firearm type to a sentencing factor. In construing the prior version of the statute in *Castillo* v. *United States,* 530 U.S. 120 (2000), the Court unanimously held that firearm type was an element of the offense set forth in § 924(c), consistent with past practice and with the Court's view of the nature of firearm type. *Id.* at 131. The reasoning of *Castillo* still applies to this case. The Court's decision in *Harris* v. *United States,* 536 U.S. 545 (2001), on its own terms, neither applies to the provisions at issue here nor to the special punishment imposed.

Two features of the amended statute's language and structure make this clear. *First*, the introductory language of subparagraph (B) of § 924(c)(1), concerning a conviction of a violation "of this subsection," refers to § 924(c) as a whole, and not solely subparagraph (A). Thus, the additional elements introduced in subparagraph (B), which are part of the offense described in "this subsection," are just that: elements of an aggravated offense. *Second*, Congress's decision to separate firearm type from brandishing and discharging, placing the latter in clauses (ii) and (iii) of subparagraph (A) and the former in subparagraph (B), strongly supports the conclusion that firearm type is an element. It indicates that Congress differentiated firearm type, which this Court has said goes to the heart of the offense, from other facts that this Court has previously held are sentencing factors.

The amendments made only one substantive change to the sentence where the firearm is a machinegun: the thirty-year mandatory sentence from the prior version became a thirty-year mandatory minimum sentence in the amended one. By any measure, the increase from a mandatory minimum sentence of five years to one of thirty years is significant.

The government's construction of § 924(c) also raises grave and doubtful constitutional questions about the deprivation of jury trial and due process rights. Those concerns are not eliminated by the addition of three words—"not less than"—to prescribe an entirely new level of punishment based upon judge-found facts on a preponderance standard. The government's policy concerns, which were never expressed by Congress in enacting the 1998 amendments, also do not provide an answer.

Streamlining guilt-stage proceedings may solve the claimed problems of proof, but the Constitution does not tolerate a shortcut to judgment at the expense of defendants' rights.

STATEMENT OF THE CASE

The defendants pled guilty to a § 924(c) charge with no admission that any of the firearms involved was a machinegun. J.A. 39-42, 56. They admitted at the Rule 11 colloquy that a firearm was brandished. *Id.* at 43. At sentencing, the government moved for an upward departure pursuant to § 5K2.6 of the United States Sentencing Guidelines, based on the dangerousness of the weapons. J.A. 47; see also Gvt. C.A. App. 209, 231-32. But, despite its advocacy for a thirty-year mandatory minimum sentence based on firearm type, the government chose to recommend a twelve-year sentence on the § 924(c) count. Gvt. C.A. App. 209. Twelve years was five years above the applicable mandatory minimum for brandishing under § 924(c)(1)(A), and eighteen years below the thirty-year sentence the government now seeks to impose post-judgment through statutory interpretation.

Trial Court Proceedings

The defendants were charged in July 2005 with**,** *inter alia***,** Hobbs Act violations, 18 U.S.C. § 1951, and using, carrying, and/or possessing firearms in furtherance of a crime of violence, 18 U.S.C. § 924(c). J.A. 19-21. Prosecutors alleged that Dennis Quirk, Jason Owens, Martin O'Brien, and Arthur Burgess conspired and attempted to rob an armored car as it made a scheduled delivery of cash to a bank in the

North End of Boston, Massachusetts.[1] *Id.* The indictment identified three firearms involved in the offense: an AK-47, a Sig-Sauer, and a Cobray pistol. *Id.*

The case was set for trial on April 2, 2007. Five weeks earlier, prosecutors had obtained a second superseding indictment, adding a second § 924(c) count, Count IV, to allege that the Cobray pistol was a "machinegun" for purposes of § 924(c).[2] J.A. 9, 20-21. The Cobray remained one of the three firearms identified in Count III, in which § 924(c) was originally charged. *Id.* at 19-21.

Defense counsel moved to strike the Cobray from Count III, asserting that firearm type was an element of the § 924(c) offense and therefore properly charged only in a separate count, as it was in Count IV. *Id.* at 10. Prosecutors responded that the government would move to dismiss Count IV, regardless of which way the court ruled. *Id.* at 51-52. They reasoned that, if the District Court agreed with the government that firearm type was not an offense element, then Count IV was unnecessary. *Id.* If,

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[1] Mr. Owens, Mr. Burgess, and Mr. Quirk were also charged with possession of a firearm by a previously convicted felon in violation of 18 U.S.C. § 922(g)(1). J.A. 19-21.

[2] The term "machinegun" is defined for purposes of § 924(c)(1)(B)(ii) as "any weapon which shoots . . . automatically more than one shot, without manual reloading, by a single function of the trigger." 18 U.S.C. § 921(23); 26 U.S.C. § 5845(b). This definition does not include firearms that fire in semiautomatic mode, as they automatically chamber additional rounds, but require additional pulls of the trigger to fire. Pet App. 2a n.1. Notably, the presentence report states: "The Cobray, however, although originally manufactured to fire in semi-automatic mode, in fact fired fully automatically *when test-fired at the FBI Laboratory*." J.A. 45 (emphasis added).

however, the District Court concluded that firearm type was an offense element, they conceded that Count IV was not viable because the government could not prove that the defendants had known that the Cobray pistol was a "machinegun." *Id.*

On the day trial was to begin, the District Court agreed with the defendants and held that firearm type was an element. *Id.* at 39-42, 56. Prosecutors then moved to dismiss Count IV, which the District Court granted. *Id.* The defendants subsequently changed their pleas to guilty to the remaining charges (without plea agreements). *Id.* They acknowledged their understanding that the mandatory minimum sentence on the § 924(c) count was seven years, as a firearm was brandished during the robbery attempt. *Id.* at 43. The defendants made no admission in any form that any of the firearms was a machinegun.[3] *Id.*

Prosecutors made a written objection to the District Court's ruling that firearm type is an offense element. *Id.* at 45-48. But at sentencing they never asked the District Court to sentence the defendants to the thirty-year mandatory minimum term set forth in § 924(c)(1)(B)(ii) for use of a "machinegun." *Id.* Instead, they moved for an upward departure and recommended that Mr. Burgess and Mr. O'Brien each receive a twelve-year sentence on the § 924(c) count,

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[3] Prosecutors described the Cobray at the plea hearing only as a "9 millimeter pistol" and a "real firearm." Gvt. C.A. App. 179-80. At sentencing, prosecutors admitted that "there's nothing on [the Cobray] that says, 'I am a machinegun' or 'I fire in automatic mode,' but the fact of the matter is that it does." J.A. 48.

to run consecutively to the sentences on the other counts.[4] *Id.*; see also Gvt. C.A. App. 209.

The District Court sentenced Mr. Burgess to a consecutive seven-year sentence on the § 924(c) count, for a total sentence of twenty-two years. Gvt. C.A. App. 51-56, 232-48. It likewise sentenced Mr. O'Brien to a consecutive eight-and-one-half-year sentence on that count, for a total sentence of fifteen years. *Id.* The sentencing court made no finding as to whether the Cobray fired in fully automatic mode at the time of the offense, and prosecutors made no request for a finding on that issue.[5] *Id.*; see also J.A. 45-48.

First Circuit Appeal

The First Circuit subsequently affirmed the District Court's judgment. Applying the factors set forth in *Jones* and *Castillo*, and citing *Harris*, it observed that, "[r]ead in a vacuum, the language of [§] 924(c) indicates that the offense is defined as the use, carriage, or possession of a firearm during a drug or violent felony, and that brandishing, discharge, and

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[4] The sentencing judge invited the government to make a recommendation as to a "reasonable" sentence on the § 924(c) charge. Gvt. C.A. App. 207-09. The prosecutor responded: "[T]he government's recommendation, in terms of a concrete number, [is] for an additional 60 months for each defendant on the 924C charge." *Id.* "[I]n this case we're seeking a total of 12 years to run consecutively with respect to Count 3." *Id.*

[5] Because prosecutors never requested—and the sentencing court never made—a finding that the firearm was a "machinegun," there would be no basis to impose the thirty-year mandatory minimum sentence under § 924(c)(1)(B) even if the judgment below is reversed and that provision is deemed to set forth sentencing factors rather than offense elements. For that reason, dismissal of the petition as improvidently granted may be warranted.

the type of firearm are all sentencing factors." Pet. App. 5a. However, the First Circuit refused to read the statute in a vacuum, based on this Court's precedent. See *id.*

The First Circuit looked to *Castillo*. Suggesting that the language and structure of the prior version of the statute were slightly more favorable to the government's interpretation, it viewed the changes as falling short of a clear statement of congressional intent to make firearm type a sentencing factor. *Id.* at 5a-10a. "It would be a different matter," the panel remarked, "if Congress had explained the change as one aimed at *Castillo* itself; but *Castillo* was decided after the new statute had been passed." *Id.* at 10a.

The First Circuit viewed the change to a multi-subpart structure as part of a recent trend in statutory drafting. *Id.* The only substantive change, it noted, was the conversion of fixed sentences to mandatory minimums of the same length. *Id.* It concluded that these changes did not amount to a clear statement of congressional intent to change the status of firearm type.

SUMMARY OF ARGUMENT

In holding the firearm types specified in § 924(c)(1)(B) to be offense elements, the First Circuit followed the language and structure of the statute rather than the flawed interpretations of the opinions of several other courts of appeals which have interpreted the statute. There is no evidence in the statute itself or the legislative history of the 1998 amendments that Congress intended to change firearm type—a traditional offense element—into a mere sentencing factor. The First Circuit rightly refused to infer a substantive change of such

constitutional dimension from the stylistic reorganization of the statute's text. The contrary conclusion reached by other courts is based on a misreading of the statute's structure and a cursory analysis of the amended statute that elevates form over substance and ignores other relevant criteria articulated by this Court.

If Congress intended § 924(c)(1)(B) to define sentencing factors relevant to a predicate conviction under § 924(c)(1)(A), the introductory phrase of subparagraph (B) would specifically refer to the previous subparagraph as a complete, standalone offense, as penalty provisions typically do. Instead, § 924(c)(1)(B) refers more generally to a violation of "this subsection"—meaning § 924(c) as a whole—thus encompassing the firearm characteristics in subparagraph (B) as elements of the offense to which the sentences prescribed in that subparagraph apply. Therefore, contrary to the government's suggestion, the language of subparagraph (B) presumes a finding of guilt not under the previous subparagraph, but rather under subparagraphs (A) and (B) together, supporting the conclusion that subparagraph (B) defines offense elements rather than sentencing factors.

The structure of § 924(c) strengthens, not weakens, this interpretation. The 1998 amendments moved firearm type to an independent subparagraph, separate and apart from the sentencing factors defined in clauses (i) through (iii) of § 924(c)(1)(A). The government suggests, that the location of the firearm-type provisions between sentencing factor subparagraphs means that they too are sentencing factors. This argument rests on the assumption that statutes conform to a formula whereby elements are listed first, followed by sentencing factors. That

assumption is contradicted by the reality, both in § 924(c) and elsewhere in the criminal statutes.

The nature and traditional treatment of firearm type further suggest that subparagraph (B) sets forth offense elements. This Court observed in *Castillo* that firearm type is a traditional offense "element," which lies close to the heart of the crime. 530 U.S. at 126-27. The fact that § 924(c) was amended in no way diminishes the significance of this observation. Nor does it diminish the stark disparity of the six-fold increase from five to thirty years in prison for possession of a machinegun, which *Castillo* emphasized in holding that firearm type is an offense element.

The government's attempt to dismiss this disparity on grounds that a sentencing judge technically has discretion to impose a sentence of thirty years regardless of firearm type ignores the reality of sentencing. The sentencing guidelines, reasonableness review, and common practice ensure that the minimum sentences prescribed by § 924(c) roughly define defendants' actual sentences in most cases. The length and severity of the punishments prescribed by § 924(c)(1)(B) drastically exceed the sort of incremental enhancements which this Court has deemed sentencing factors, to such a degree that firearm type would become the tail wagging the dog of the substantive offense were it construed as a sentencing factor. The foregoing factors cumulatively indicate that firearm type is an element of the offense that must proven to a jury, and to the extent there is any doubt the rule of lenity dictates that this Court err in favor of the defendant.

Even ignoring these considerations, the doctrine of constitutional avoidance precludes the government's proffered interpretation of the statute. It is well

established that Congress cannot circumvent constitutional guarantees simply by relabeling a fact necessary for conviction a sentencing factor. *E.g.*, *Mullaney* v. *Wilbur*, 421 U.S. 684, 698 (1975). Congress cannot, consistent with the Fifth and Sixth Amendments, eviscerate the need for a jury or proof beyond a reasonable doubt on the issue of whether a firearm is a "machinegun" for purposes of § 924(c). *E.g.*, *Jones* v. *United States*, 526 U.S. 227, 239-50 (1999). The government's brief is conspicuously silent on this obvious constitutional issue, which has been acknowledged by this Court in several fractured opinions, including *Harris*. See 536 U.S. at 556-68.

ARGUMENT

I. SECTION 924(c)(1)(B) DEFINES MACHINEGUN POSSESSION AS A SEPARATE CRIME.

In three cases decided between 1999 and 2002, *Jones*, *Castillo*, and *Harris*, this Court established an analytical framework to answer the question presented here: namely, whether a statutory provision describes an offense element or a sentencing factor where the statute does not expressly delegate the factfinding function to either judge or jury. *Harris,* 536 U.S. at 552-56; *Castillo,* 530 U.S. at 123-31; *Jones*, 526 U.S. at 232-39; see also *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). In all three cases, language and structure were starting points for this Court's analysis, but they were never the sole factors determining the outcome. *E.g.*, *Castillo,* 530 U.S. at 123-31. The Court identified other, specific factors as critical to the analysis, most importantly: the nature and traditional treatment of the fact at issue, and the impact on sentencing. *Id.* Other factors were also

considered, including legislative history and the rule of lenity. *Id.* Each of these factors indicates that the firearm-type provisions in § 924(c)(1)(B) remain, as they were before the 1998 amendments, offense elements.

A. The Language And Structure Of The Amended Statute Support The Conclusion That § 924(c)(1)(B) Describes An Offense Element.

1. The Language Of § 924(c) Supports The Conclusion That Congress Intended To Keep Firearm Type As An Offense Element In The 1998 Amendments.

Two words in the introductory phrase of § 924(c)(1)(B) provide a clear signal that the firearm-type provisions contain elements: "[i]f the firearm possessed by a person convicted of a violation of *this subsection* . . . ." 18 U.S.C. § 924(c)(1)(B). The question for this Court is what the words "this subsection" mean in that phrase. As explained below, these words refer to § 924(c) as a whole and not only to § 924(c)(1)(A). It follows that the firearm-type provisions contained in § 924(c)(1)(B) express elements, as they are within "this subsection" which is § 924(c).

Section 924 consistently refers to three major divisions within the statute: "chapter," "section," and "subsection." *E.g.*, *id.* § 924(a)(1)(A). "Chapter" refers to "Chapter 44—Firearms" comprising "sections" 921 through 993, each containing various firearms prohibitions. *E.g.*, *id.* The term "subsection" refers to each of the lower case, lettered divisions of each section. The first sentence of § 924(a)(1), for example, specifies that, "[e]xcept as otherwise

provided *in this subsection, subsection (b), (c), (f), or (p) of this section*." *Id.* § 924(a)(1) (emphasis added).

Both congressional consistency and the use of this phrase elsewhere in the statute indicate that Congress made a conscious choice to use "this subsection" in subparagraph (B) to refer to § 924(c), rather than to § 924(c)(1)(A) alone. Any other reading runs contrary to interpretive doctrine. See *Merrill Lynch* v. *Dabit*, 547 U.S. 71 (2006) (where the same words are used within a statute, they are presumed to have the same meaning).

If the words "this subsection" were read to refer only to § 924(c)(1)(A), the first sentence of § 924(c)(5) would be superfluous. See *Corley* v. *United States*, 129 S. Ct. 1558 (2009). That paragraph provides for sentences of fifteen years and higher, "[e]xcept to the extent that a greater mandatory minimum sentence is otherwise provided under *this subsection* or by any other provision of law." 18 U.S.C. § 924(c)(5). If "this subsection" were to mean § 924(c)(1)(A), the first sentence of paragraph (5) would serve no purpose, because the sentences provided in § 924(c)(1)(A) are all less than fifteen years. See *id.* § 924(c)(1)(A)(i)-(iii).

Other statutory references to violations of a particular provision of law confirm that Congress typically makes express citation to a specific subsection, paragraph, or subparagraph—unless Congress intends to refer to the larger chapter, section, or subsection. See, *e.g.*, 21 U.S.C. § 848(i), (j), (n) (repealed 2006) (referring to "an offense *under subsection (e)* of this section") (emphasis added); 18 U.S.C. § 521(b) ("Penalty—The sentence of a person convicted of an offense described in *subsection (c)* shall be increased by . . . .") (emphasis added); *id.* § 2113(d) ("Whoever, in committing, or in attempting

to commit, any offense defined in *subsections (a) and (b)* of this section, assaults any person. . . .") (emphasis added); cf. *id.* § 2113(e) ("Whoever, in committing any offense defined in this *section*. . . ."); *id.* § 2511(5)(a)(ii)(A) ("if the violation of this chapter is a first offense for the person *under paragraph (a) of subsection (4)*"); 21 U.S.C. § 861(b) ("Penalty for first offense—Any person who violates *subsection (a)* of this section is subject to . . . .") (emphasis added). Congressional references to various statutory provisions are therefore specific and clear. There is thus no reason to infer that Congress meant something narrower than the whole of § 924(c) when it referred in § 924(c)(1)(B) to a person "convicted of a violation of this subsection."

The government's own choice of words in referring to the various parts of this statute is consistent with ordinary practice, and inconsistent with the interpretation of this phrase that it implicitly urges on the Court. It consistently refers to subparagraphs (A), (B), and (C) not as subsections, but as subparagraphs. See Gov. Br. 9, 18; see also *id.* at 14-15 (referring to "Clauses (B)(i) and (B)(ii)").

The government also suggests that the use of the phrase "shall be sentenced" in the firearm type provisions means that they describe sentencing factors. *Id.* But every criminal statute states the length of the sentence. *E.g.*, 18 U.S.C. § 2113(e). The inclusion of the phrase "shall be sentenced" specifies the enhanced sentence to be imposed after conviction of an aggravated offense. See *Jones*, 526 U.S. at 236. Indeed, this feature of clauses (i) and (ii) of § 924(c)(1)(B) distinguishes them from their counterparts in clauses (ii) and (iii) of § 924(c)(1)(A), which contain no "shall" of their own but instead refer back to the one at the end of § 924(c)(1)(A)(i).

That is not to say that the interpretive process is at an end and that the entirety of subsection (c) sets forth offense elements. Section 924(c)(1)(C), for example, refers to recidivist offenders, a factor the Court has found to be traditionally one for the sentencing court alone in light of the due process and jury trial protections already afforded in the course of the earlier conviction. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 241-47 (1998). Similarly, § 924(c)(1)(D) refers only to probation and consecutive sentences—considerations that are unique to the sentencing process itself. Paragraph (5), as noted however, also articulates aggravated versions of the "use or carry" offense—referencing armor-piercing ammunition and death resulting from the use thereof. *Id.* § 924(c)(5).

2. The Structure Of § 924(c)(1)(B) Supports The Conclusion That Congress Intended Firearm Type To Remain An Offense Element In The 1998 Amendments.

Congress's decision to place the firearm type provisions alone in subparagraph (B), apart from the discharging and brandishing provisions contained in clauses (ii) and (iii) of subparagraph (A), further supports the conclusion that firearm type remains an offense element distinct from the sentencing factors listed in subparagraph (A). See *Jones*, 526 U.S. at 232-39. Subparagraph (B) stands alone in the subsection in referring to firearm type: subparagraph (A) refers only to "a firearm" and to how the "firearm" is used. 18 U.S.C. § 924(c)(1). The government's reading would be plausible, though still not definitive, if the substance of clauses (i) and (ii) of § 924(c)(1)(B) appeared instead in § 924(c)(1)(A), as clauses (iv) and (v), after the brandishing and

discharge provisions. But, of course, that is not the statute Congress wrote.

The government makes no mention of the segregation of firearm-type provisions in subparagraph (B). Instead, it resorts to an argument that this Court rejected in *Jones*: namely, that the statute contains a principal paragraph "followed by the word 'shall,' . . . and finally 'separate subsections,'" that specify sentences. Gov. Br. 17. As the *Jones* Court noted, although the word "shall" "frequently separates offense-defining clauses from sentencing provisions, it hardly does so invariably." 526 U.S. at 234 (citing 18 U.S.C. § 2118(a)(3) as but one example). Elements have been located on either side of the word "shall." *Id.*

The government's structural argument has even less weight here, as the word "shall" appears in subparagraph (B), *after* the additional element of firearm type: "[i]f the firearm . . . is a machinegun . . . the person shall be sentenced to a term of imprisonment of not less than thirty years." 18 U.S.C. § 924(c)(1)(B)(ii). Thus, "shall" is not a divider between elements earlier defined and the provisions in subparagraph (B). Even under the government's theory, the use and placement of the word "shall" in subparagraph (B) indicate that the machinegun provision in fact states a separate, aggravated form of the § 924(c) offense.

The Court's decision in *Harris* is limited to the brandishing provision of § 924(c)(1)(A)(ii), see 536 U.S. at 551, and thus offers little support for the government's reading of the subsection as a whole. The Court viewed the structure of § 924(c)(1)(A) as permitting a presumption, though not mandating a conclusion, that Congress intended to make brandishing a sentencing factor. *Id.* at 552-56. Here,

the question arises from the same version of § 924(c)(1), but in a different subparagraph, with its own unique structure. Subparagraph (A) is a run-on sentence with the word "shall" followed by a dash and a series of clauses. 18 U.S.C. § 924(c)(1)(A). The final clause, § 924(c)(1)(A)(iii), ends in a period, bringing § 924(c)(1)(A) to a close. *Id.* Had Congress intended firearm type to be a sentencing factor, like discharging or brandishing, the placement of the firearm type provisions in subparagraph (B)—separated from the sentencing factors in clauses (ii) and (iii) of subparagraph (A)—and the inclusion of the introductory phrase of subparagraph (B) serve no purpose. See *Jones*, 526 U.S. at 232-39.

The First Circuit offered the most cogent explanation for the change from the single-paragraph structure of the prior version of § 924(c) to a series of subparagraphs in the 1998 amendments. Pet App. 8a-10a. It noted that there was no indication that the alteration of the run-on sentence into its present form evidenced "anything more than the current trend—probably for ease of reading—to convert lengthy sentences in criminal statutes into subsections in the fashion of the tax code." *Id.* at 9a. And, as discussed below, the "stated objective of re-writing [§] 924(c)" was *not* to alter the purpose of the statutory language—which was taken from the opening sentence and moved into subparagraphs—but rather "another issue entirely."[6] *Id.*; see also *Finley* v. *United States*, 490 U.S. 545, 549 (1989) ("Under

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[6] As the First Circuit observed, the debates and hearings surrounding the amendment of the statute were focused on Congress's aim to criminalize "mere" possession of firearms after this Court's decision in *Bailey*, which had held that "use" of a firearm required the government to show active employment of the weapon. *See* Pet App. 9a n.5.

established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'") (quoting *Anderson* v. *Pacific Coast S.S. Co.*, 225 U.S. 187 (1912)). Far from supporting the government's argument that § 924(c)(1)(B) describes a sentencing factor, the structure of the provision strongly suggests that Congress still intended for it to describe an element of the crime, just as this Court in *Castillo* found it did in the prior version of the statute.

3. The Placement Of The Firearm-Type Provisions Between Subparagraphs Containing Sentencing Factors Does Not Indicate Congressional Intent To Make Firearm Type A Sentencing Factor.

The government attaches significance to the location of subparagraph (B) between subparagraphs (A) and (C), where the latter two contain sentencing factors. Gov. Br. 20. This would certainly not be the first time that legislative drafting, a process famously compared with sausage production,[7] has resulted in a jumble of widely varying provisions, as even a cursory survey of federal criminal statutes shows.[8] That is

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[7] *See, e.g.*, *In re Ondras,* 846 F.2d 33, 36 (7th Cir. 1988).

[8] *See, e.g.,* 18 U.S.C. § 831(a) (elements); *id.* § 831(b) (penalties); *id.* § 831(c) (elements); *id.* § 831(d) (enforcement); *id.* § 831(e) (enforcement); *id.* § 831(f) (definitions); *id.* § 521(a) (definitions); *id.* § 521(b) (penalty); *id.* § 521(c) (defines offenses by reference to other statutes); *id.* § 521(d) (sentencing factors); *see also* 21 U.S.C. § 848(b)(e), In *United States* v. *Tidwell*, 521 F.3d 236 (3d Cir.), *cert. denied*, 129 S. Ct. 762 (2008), cited by the government, the Third Circuit rejected the defendant's argument that 21 U.S.C. § 848(b) must contain elements

true even when those provisions are "organized" into sections, subsections, subparagraphs, and subparts, with letters and numbers large and small. For example, the Controlled Substances Act, despite its clearly labeled subsections captioned "unlawful acts" and "penalties," contains an element sandwiched between sentencing factors: where "death . . . results" from a controlled substance offense, an aggravated offense with increased maximum penalties exists. See 21 U.S.C. § 841(b). Congress often mixes together elements and sentencing factors without intending to blur the distinction between them.

The government's description of the organization of § 924(c) is, moreover, not entirely accurate. See Gov. Br. 20. The claim that subparagraph (B) is surrounded by sentencing factors glosses over the fact that subparagraph (A) contains elements, see 18 U.S.C. § 924(c)(1)(A), and subparagraph (C) contains the same firearm-type references as subparagraph (B), see *id.* § 924(c)(1)(C)(ii).[9] See also *Dean* v. *United States*, 129 S. Ct. 1849, 1853 (2009).

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because § 848(e) states an offense. 521 F.3d at 248. The *Tidwell* opinion noted: "'[s]everal other subsections of § 848 refer to § 848(e) as a separate offense." *Id.* (quoting *United States* v. *NJB*, 104 F.3d 630, 633 (4th Cir. 1997)).

[9] Most if not all of the cases cited by the government regarding § 924(c)(1)(C), *see* Gov. Br. 19 n.5, pertain exclusively to § 924(c)(1)(C)(i), which is a recidivism provision. But § 924(c)(1)(C)(ii) combines recidivism and firearm type.

4. The Current Majority Courts Of Appeals View That Firearm Type Is A Sentencing Factor Is Rooted In A Clear Misreading Of The Statute's Structure.

The government suggests that the majority of circuits have applied this Court's approach to statutory interpretation and correctly held that firearm type is a sentencing factor. Gov. Br. 13. To the contrary, the circuit court opinions demonstrate a failure to follow this Court's analytical approach and a fundamental misreading of the amended statute's structure.

The error began with *United States* v. *Sandoval*, 241 F.3d 549 (7th Cir. 2001). The opinion, in a passage relied on by other courts, described the statute as follows:

> [T]he first clause of § 924(c)(1), standing alone, defines the offense . . . while subsections (A) and (B) single out subsets of those persons . . . for more severe punishment.

Id. at 551. In fact, there is no "first clause" of § 924(c)(1) independent of subparagraph (A). The misconstruction is critical. Had § 924(c)(1)(A) and § 924(c)(1)(B) both been subparts of one main paragraph, as *Sandoval* suggests, then the argument that they are structurally similar might have made at least some sense. But they are not: § 924(c)(1)(B) has its own introductory text and its own subparts.

The Fourth Circuit's decision in *United States* v. *Harrison*, 272 F.3d 220 (4th Cir. 2001), reflects similar analytical errors. Noting that the 1998 amendments made the fixed penalties of § 924(c) into mandatory minimums, that court observed:

> [A]s a provision marking out a separate offense, § 924(c)(1)(B) would be incomplete; it sets forth no determinate sentence or even any upper limit on sentencing. It makes sense only as a sentencing factor that cabins a judge's discretion when imposing a sentence for the base offense in [§] 924(c), for which the maximum penalty is life imprisonment.

Id. at 225-26. However, if the absence of an expressly stated maximum sentence makes a statutory provision incomplete, then § 924(c)(1)(A) is incomplete as well—because it also lacks an upper limit on sentencing. See 18 U.S.C. § 924(c)(1)(A). Yet, this Court has concluded that subparagraph (A) contains elements. *E.g.*, *Dean*, 129 S. Ct. at 1853.

These errors are significant because other circuits that have construed the amended version of § 924(c)(1)(B)(ii) have cited to *Sandoval* or *Harrison*, or otherwise relied upon the same flawed reading of the statute. See *United States* v. *Avery*, 295 F.3d 1158 (10th Cir. 2002); *United States* v. *Gamboa*, 439 F.3d 796 (8th Cir. 2006). These courts gave no consideration to the critical factors that ultimately determined this Court's holdings in *Jones*, *Castillo*, and *Harris*. This critical error at the root of the formation of the circuit majority undermines the significance of that majority.

B. The Nature And Traditional Treatment Of A Specific Factor And Whether Steeply Higher Penalties Result From The Presence Of That Factor Are Controlling.

1. Nature And Traditional Treatment.

The nature and traditional treatment of the factual issue was "perhaps the most important [guidepost]" in *Jones*. *Harris*, 536 U.S. at 553. In *Jones, Castillo,* and *Harris*, these considerations carried great weight. *Harris,* 536 U.S. at 552-56; *Castillo,* 530 U.S. at 123-31; *Jones*, 526 U.S. at 232-39. Indeed, in each case, the Court's assessment of the traditional treatment of the fact at issue was the same as its conclusion on the ultimate question, whether the provision at issue was an element or a sentencing factor.

In *Jones*, this Court found in federal and state statutes a tradition of treating "serious bodily injury" as an offense element, and held that the Congress had done the same in the carjacking statute. 526 U.S. at 235-236. In *Harris*, this Court held that brandishing, a "paradigmatic sentencing factor," was a question for the sentencing court alone. 536 U.S. at 554. And, in *Castillo*, the Court observed that firearm type has not traditionally been used as a sentencing factor in the context of "use and carry" offenses. 530 U.S. at 126. The Court noted that the difference between various types of firearms, including machineguns and destructive devices, is so great both in degree and kind, that it "concerns the

nature of the element lying closest to the heart of the crime at issue." *Id.* at 126-27.[10]

Congress's treatment of firearm type as an offense element confirms the *Castillo* Court's assessment. Several of the offenses defined in 18 U.S.C. § 922, a section within the same chapter as § 924(c)(1), explicitly make a firearm's characteristics an element.[11] Additionally, the National Firearms Act defines firearm type, including status as a machinegun, as an element with respect to a wide range of violations set forth in 26 U.S.C. § 5861(a) through (j). See 26 U.S.C. § 5845; see also *Staples* v. *United States*, 511 U.S. 600, 602-03 (1994). State legislatures have taken a similar approach.[12] See

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[10] The *Castillo* Court also considered whether unfairness or confusion would result from submitting the issue of firearm type to a jury rather than a judge, and its answer was no. 530 U.S. at 128. As the lower courts in this case noted, special verdict forms could be used to address any potential problems in this regard.

[11] *See* 18 U.S.C. § 922(a)(4) (prohibiting unlicensed individuals from transporting machineguns, destructive devices, and short-barreled rifles or shotguns in interstate or foreign commerce); *id.* § 922(b)(4) (forbidding licensed individuals from selling or delivering machineguns and similar weapons except as authorized by the Attorney General); *id.* § 922(k) (making it a crime to transport or possess any firearm "which has had the importer's or manufacturer's serial number removed, obliterated, or altered"); *id.* § 922(o) (making it unlawful for any person to "transfer or possess a machinegun"); *id.* § 922(p) (prohibiting certain firearms which are not accurately detected by x-ray devices).

[12] *See, e.g.*, D.C. Code Ann. § 22-4514 (prohibiting unauthorized possession of machineguns, sawed-off shotguns, and other similar weapons); Ohio Rev. Code Ann. §§ 2923.11(K), 2923.17(A) (prohibiting any person from acquiring, having, carrying, or using "dangerous ordnance[s]," including "[a]utomatic or sawed-off firearm[s]"); Or. Rev. Stat. § 166.272

Jones, 526 U.S. at 236 ("[s]tate practice bolsters this conclusion"). Because both Congress and states have routinely treated firearm type as an offense element, this Court's precedents support similar treatment when interpreting § 924(c)(1). Cf. *Jones*, 526 U.S. at 235 (employing similar logic to classification of serious bodily injury).

The government suggests that, despite these observations**,** the traditional treatment of firearm type changed between 1988 and 1998, creating a different traditional backdrop for this Court's analysis of the statute as amended in 1998.[13] Gov. Br. 22-23. This argument relies on the treatment of firearm type in the United States Sentencing Guidelines. *Id.*

But the Guidelines are not a source on which this Court has relied to determine traditional treatment of a fact. Serious bodily injury—which this Court noted in *Jones* has traditionally been treated as an offense element, 526 U.S. at 234-37—is a sentence enhancer in the Guidelines as well. See, *e.g.*, U.S.S.G. §§ 2A3.1(b)(4), 2A4.1(b)(2), 2B3.1(b)(3), 5K2.2. The Guidelines permit a sentencing court to consider uncharged conduct, including entire offenses, in sentencing within the range authorized by the jury's verdict. See, *e.g.*, *id.* § 2K2.1(b)(5).

(prohibiting the knowing possession of a "machine gun, short-barreled rifle, short-barreled shotgun or firearms silencer"); Wash. Rev. Code Ann. § 9.41.190 (making it unlawful to "manufacture, own, buy, sell, loan, furnish, transport, or have in possession or under control, any machine gun, short-barreled shotgun, or short-barreled rifle").

[13] The government does not suggest that trends in legislation and in the Guidelines in any way undermine this Court's observations in *Castillo* about the nature of firearm type in the context of "use and carry" provisions.

Those provisions were never meant to identify a dividing line between offense elements and sentencing factors. The government's use of the Guidelines as the source of a new "tradition" to supplant the past practice of treating firearm type as an element should be rejected.[14]

2. The Twenty-Five Year, Six-Fold Increase To The Mandatory Minimum Based On A Finding That The Firearm Is A Machinegun Is Not The Type Of Increase Usually Associated With Sentencing Factors.

In *Jones*, *Castillo*, and *Harris,* the impact of the fact at issue on sentencing was another critical factor that assisted this Court in distinguishing offense elements from sentencing factors. *Castillo*, 530 U.S. at 131; see also *Harris*, 536 U.S. at 554; *Jones*, 526 U.S. at 243-44. In each case, the Court gave careful consideration to the "length and severity" of the sentence. *E.g.*, *Castillo*, 530 U.S. at 131. The six-fold, twenty-five year increase triggered by a machinegun finding under the prior version of § 924(c), addressed in *Castillo*, was the most extreme increase of all those considered in these cases. See *id.* After the 1998 amendments, the same factual finding leads to the same increase, except that now the increase applies to a mandatory minimum sentence.

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[14] *Harris* referred to the "brandishing" and "discharging" provisions of the Guidelines only to highlight the *absence* of a federal tradition of treating those characteristics as offense elements. *See, e.g.*, 536 U.S. at 535-54 ("[T]he Guidelines appear to have been the only antecedents for the statute's brandishing provision. The term 'brandished' does not appear in any [other] federal offense-defining provision.").

The *Harris* majority acknowledged that it might have questioned the inference arising from the statute's structure (that the clauses of § 924(c)(1)(A) identified sentencing factors) "if brandishing or discharging altered the defendant's punishment in a manner not usually associated with sentencing factors." 536 U.S. at 554. But the Court viewed the two-year increase for brandishing as insignificant—or no "higher penalt[y] at all"—based on its view that the seven-year sentence was an available sentencing option even without a finding of brandishing. *Id.*

The same cannot be said of the much steeper increase here. Under § 924(c), there is no Guidelines range; instead, the Guidelines prescribe a sentence fixed at the length of the mandatory minimum set forth in the statute. U.S.S.G. § 2K.2.4. A sentencing court would be hard-pressed to justify an increase of twenty-five years either as an upward departure or as a variance in light of the constraints of 18 U.S.C. § 3553(a). See *Gall* v. *United States*, 552 U.S. 38, 50 (2007) ("We find it uncontroversial that a major departure [from the Guidelines range] should be supported by a more significant justification than a minor one.").

The government observes that two other federal statutes permit similarly severe levels of enhancement based upon purported sentencing considerations. Gov. Br. 26-28 (citing the federal kidnapping statute, 18 U.S.C. § 1201(a) (victim's minor status triggers a twenty-year mandatory minimum sentence), and the criminal enterprise statute, 21 U.S.C. § 848(b) (life sentence for principal status and annual gross receipts of $10 million or more)). These statutes, neither of which has been construed by this Court, do not negate the Court's reliance on the extent of a penalty increase as a

significant factor in determining whether a fact is an element or a sentencing consideration. See *Castillo*, 530 U.S. at 131.

In any event, both of these statutes appear to describe offense elements. As for the kidnapping statute, 18 U.S.C. § 1201(a), a victim's status is both "based on the nature of the offense," *Cunningham* v. *California*, 549 U.S. 270, 295 (2007) (Kennedy, J., dissenting), and a traditional element in other federal provisions, *e.g.*, 18 U.S.C. §§ 2241, 2421, 2423, 2251, 2252, as well as state statutes, *e.g.*, Mass. Gen. Laws ch. 265, § 26A (1933); Ohio Rev. Code Ann. § 2905.01(A)(4) (2009); R.I. Gen. Laws § 11-26-1.4 (1956); Utah Code Ann. § 76-5-301 (1953). The criminal enterprise statute, 21 U.S.C. § 848(b), likewise "inarguably . . . refers to behavior which the legislature intended to prohibit." *McMillan*, 477 U.S. at 95 (Stevens, J., dissenting). "As a consequence, the prohibited conduct had to be established by proof beyond a reasonable doubt." *Id.*

Unlike the brandishing or discharging provisions discussed in *Harris*, use of a machinegun alters the defendant's punishment significantly, in a way not usually associated with sentencing factors. See *Harris*, 536 U.S. at 554. It does not present the type of incremental penalty increases which *Harris* described as those one would expect to find in provisions aimed at identifying sentencing matters for a judge to consider. See *id.* In fact, the same extreme degree of increase exists in this case as existed in *Castillo*. See 530 U.S. at 131. This staggering increase counsels strongly against the single-crime interpretation.

3. The Legislative History Of The 1998 Amendments Supports Reading § 924(c)(1)(B) As Setting Forth Offense Elements.

This Court has recognized that, "[u]nder established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Finley*, 490 U.S. at 549 (quoting *Anderson*, 225 U.S. 187). There is no indication from the legislative history surrounding § 924(c) that Congress intended, in the 1998 amendments, to change the firearm-type provisions from offense elements into mere sentencing factors.

To the contrary, Congress's clear intent in promulgating the 1998 amendments was to reverse the impact of this Court's decision in *Bailey*, and to increase penalties for § 924(c) violators. The amending bill was known as the "*Bailey* Fix Act" in the Senate, and legislators in both houses noted that the legislation was in response to this Court's "invitation" in *Bailey* "to make clear that possession [of a firearm] alone does indeed trigger liability [under § 924(c)]." 143 Cong. Rec. S405 (1997) (Sen. Helms). The committee report noted that the bill "provides for an increased mandatory penalty for any person who possesses brandishes or discharges a firearm during and in relation to the commission of a federal crime of violence or drug trafficking crime." H.R. Rep. No. 105-344, at 2 (1997).[15] Nothing in the

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[15] *See also* 144 Cong. Rec. H10330-01 (1998) (Rep. Myrick) "In the 1995 case of *Bailey* v. *United States* . . . the Supreme Court interpreted the word "carry" in the Federal criminal code to mean that a felon must fire or brandish his weapon. This is

congressional records suggests any intent to change firearm type from an element of an offense to a sentencing factor.

Lower courts have interpreted the changes in structure incorporated in the 1998 amendments in a similar fashion. The division of the statute into subprovisions was not, these courts have recognized, intended to alter the meaning or effect of the statutory language but were necessary to accommodate the addition of the "brandishing" and "discharging" provisions as sentencing factors. *E.g.*, *United States* v. *Alaniz*, 235 F.3d 386, 388 (8th Cir. 2000) ("Because of this increase in sentencing possibilities, Congress divided what was already a lengthy subsection into distinct subdivisions."); see also *United States* v. *Studifin*, 240 F.3d 415 (4th Cir. 2001) (same). The lower courts also agree that the central purpose behind the 1998 amendments was to broaden the reach of the statute in the wake of this Court's decision in *Bailey*. See, *e.g.*, *Alaniz*, 235 F.3d at 386-89; *Studifin*, 240 F.3d at 420.

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clearly contrary to Congress's intent, and it has resulted in the early release of hundreds of dangerous criminals. To put a stop to this mess, S. 191 clarifies that a criminal who possesses a gun while committing a violent crime or a drug crime will face a mandatory sentence. And at the same time, the bill increases the mandatory sentence for such crimes."); 144 Cong. Rec. H10330-01 (1998) (Rep. McCollum) ("This legislation clarifies Congress' intent as to the type of criminal conduct which should trigger the statute's application. The bill strikes the now unworkable 'use or carry' element of the statute, and replaces it with a *structure which allows the penalty enhancement for possessing, brandishing, or discharging* a firearm during and in relation to a Federal Crime of violence or drug trafficking crime.") (emphasis added); 144 Cong. Rec. S12670 (1998) (Sen. DeWine) ("This legislation will provide enhanced mandatory minimum penalties for those criminals who use guns while trafficking in drugs or in commission of violent crimes.").

This Court recognized in *Castillo* that the pre-1998 legislative history of § 924(c) suggests that "Congress believed that the 'machinegun' and 'firearm' provisions would work similarly"—as separate offenses. 530 U.S. at 130. This history is not superseded by anything in the record of the 1998 amendments and therefore supports the conclusion that firearm type was intended to remain an element of a separate offense.

* * *

Mr. Burgess submits that § 924(c)(1)(B)(ii) contains elements of an aggravated offense. Even if the foregoing analysis leaves uncertainty as to the meaning of § 924(c)(1)(B)(ii), ambiguous criminal statutes are to be construed in favor of the accused. *Castillo*, 530 U.S. at 131: see also *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality); *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917). That is particularly true where, as here, a twenty-five year increase to a mandatory minimum sentence is involved, see *Dean*, 129 S. Ct. at 1860 (Breyer, J., dissenting), and where the government's competing construction cannot be squared with constitutional limitations.

II. THE GOVERNMENT'S INTERPRETATION OF § 924(C)(1)(B) IS INCONSISTENT WITH CONSTITUTIONAL REQUIREMENTS.

Any remaining doubt over the meaning of § 924(c) must, in any event, be resolved against the government. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," the Court's duty is to adopt the latter. *Jones*, 526 U.S. at 239 (quoting

United States v. *Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

By urging the Court to adopt an interpretation of § 924(c)(1)(B) that would abrogate much of this Court's reasoning in *Castillo*, the government raises a series of grave and doubtful constitutional questions that were avoided by the statutory ruling in that case. The government's brief nowhere addresses these questions, which are so often a feature of this Court's analysis in similar cases. And, as the government construes the statute, it would be clearly unconstitutional. It would relabel elements as sentencing factors, evading indictment, jury, and proof requirements contrary to prior opinions of this Court.

The government makes the stunning suggestion that the Court should respect what it characterizes as Congress's choice to treat use of a machinegun as a sentencing factor, because doing so would "simplif[y] and streamline[] guilt-stage proceedings without interfering with the accuracy of fact-finding." Gov. Br. 33. This desire on the part of prosecutors to clear the path to guilt and to higher sentences with as little an evidentiary burden as possible is one of the dangers against which the Constitution protects. The Court's "decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Blakely* v. *Washington*, 542 U.S. 296, 313 (2004); see also *Jones*, 526 U.S. at 246 ("[L]et it be again remembered, that . . . little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.") (quoting Blackstone). Instead, "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely,* 542 U.S. at

313 (emphasis in original). The Court should reject the government's construction and thereby avoid the constitutional questions that necessarily arise.[16]

A. Constitutional Limitations Prevent Congress From Relabeling Elements As Sentencing Factors.

Congress cannot relabel "the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Mullaney* v. *Wilbur*, 421 U.S. 684, 698 (1975); *In re Winship,* 397 U.S. 358 (1970). Otherwise, Congress would have unbridled power to deprive defendants of their Fifth and Sixth Amendment rights by redefining crimes, allowing judges to find the facts that constitute the offense by a preponderance of the evidence. *McMillan*, 477 U.S. at 86; *Jones*, 526 U.S. at 242; see also *Harris*, 536 U.S. at 550. "Once a [legislature] defines a criminal offense, the due process clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt." *McMillan*, 477 U.S. at 96 (Stevens, J., dissenting).

1. Firearm type has been an element of a § 924(c) offense from the time it was introduced into the statute, and it is by nature a component of the prohibited transaction, "lying closest to the heart of the crime at issue." *Castillo*, 530 U.S. at 126-27.

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[16] *See also Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001) ("'[I]t is a cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'") (quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)).

"The difference between carrying, say, a pistol and carrying a machinegun . . . is great, both in degree and kind." *Id.* at 126. Thus, a finding that the firearm possessed was a machinegun (or other form of specialized weapon or destructive device) results in a special stigma: the government, for example, characterizes such weapons as "some of the most dangerous and threatening weapons available." Gov. Br. 31. It also results in a special punishment: in the words of the government, "the difference between sentencing a defendant under the machinegun enhancement of § 924(c), or merely under the brandishing enhancement of the statute, is 23 years of mandatory incarceration." J.A. 52. That difference is comparable to the one in *Mullaney*—twenty years for manslaughter and life for murder—which was held to prohibit reclassification of the element as a mere sentencing factor. See 421 U.S. at 698.

The issue here, then, is not purely one of statutory construction. Even if in 1998 Congress had somehow intended to do what the government claims was accomplished—the relabeling of what was formally (and traditionally) an element of the offense into a separate fact for the sentencing court to find—the Court's precedents nonetheless require consideration of whether the practical effect of having done so is consonant with the requirements of the Fifth and Sixth Amendments. *E.g.*, *id.* "[T]he substantiality of the jury claim is evident from the practical implications of assuming Sixth Amendment indifference to treating a fact that sets the sentencing range as a sentencing factor, not an element." *Jones*, 526 U.S. at 243 (footnote omitted).

2. Here, the practical implication of constitutional indifference is untenable. Prosecutors openly conceded that they had to dismiss Count IV because

they could not prove beyond a reasonable doubt that Mr. Burgess or Mr. O'Brien knew that the Cobray was a machine gun. J.A. 51-52. And, in pleading guilty, neither made such an admission. *Id.* at 43. At sentencing, prosecutors recommended a twelve-year sentence for both Mr. Burgess and Mr. O'Brien—even though they would later seek a thirty-year sentence on appeal, where they would use their admitted lack of evidence on *mens rea* to support an argument rather than let it be the reason why they would have lost in the trial court. See *supra* note 4. No more patent demonstration of the practical implications of constitutional indifference can be imagined.

These constitutional concerns do not disappear simply because the twenty-five-year sentence increase is now to a mandatory minimum rather than a fixed sentence. In *McMillan*, this Court acknowledged that Congress cannot circumvent constitutional guarantees of due process, notice, and jury trial by relabeling long-recognized offense elements as sentencing factors. 477 U.S. at 88. One critical question for the Court was whether the judicially determined sentencing factor gave the "impression of having been tailored to permit [it] to be a tail which wags the dog of the substantive offense." *Id.* Here, § 924(c)(1)(B)(ii), if read as a sentencing factor alone, gives precisely that impression. The five-year term of imprisonment resulting from a jury verdict on § 924(c)(1)(A) is dwarfed by the six-fold increase based on a judicial finding that the firearm was a machinegun. See *Castillo,* 530 U.S. at 123-31. Further, the factual question without which 84 percent of the sentence could not be imposed would be answered by a judge on only a preponderance of the evidence. According to the government, there would be no consideration of

whether the defendant knew the nature of the firearm. The jury's role would be reduced to that of a gatekeeper, reaching only a general verdict that then enables the judge to make the finding on firearm type that would, in a much more practical sense, determine the defendant's fate. See *id.* Firearm type thus becomes the tail that wags the dog of the § 924(c) offense.

3. Resort to *McMillan* and the rhetoric of mandatory minimum sentencing simply cannot support the government's reading of § 924(c)(1)(B)(ii). In *McMillan*, the Court rejected a due process challenge to the Pennsylvania Mandatory Minimum Sentencing Act. 477 U.S. at 84-91. The Act set a five-year mandatory minimum sentence for certain enumerated felonies (*e.g.*, murder, robbery, kidnapping, rape) where the defendant visibly possessed a firearm. *Id.* at 83. It did not provide for the imposition of a sentence separate from that imposed for the underlying felony, nor did it remove elements from any of the enumerated offenses. *Id.* Rather, it set a mandatory minimum sentence for those offenses, "which may be more or less than the minimum sentence that might otherwise have been imposed." *Id.* The Court acknowledged that it had not precisely defined the constitutional limits on the power of states to reallocate burdens of proof in criminal cases. *Id.* at 84-91. Without purporting to do so in *McMillan*, the Court held that the Pennsylvania statute did not violate due process. *Id.* That statute, according to the Court, "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given to that factor." *Id.* at 89-90.

The constitutional limitations that were recognized

but not defined in *McMillan* apply here and prohibit the government from obtaining dramatically increased sentences without application of these constitutional principles.

4. The driving force behind the government's argument is its desire to "streamline guilt-stage proceedings" and to avoid the necessity of proving to a jury that a defendant knew the firearm was a machinegun. Gov. Br. 33. But these administrative concerns, as noted earlier, are simply no justification for infringing upon the individual rights of defendant.

In any event, the government offers no evidentiary support for its claims of difficulties in obtaining convictions, and none is apparent in the available data. To the contrary, as summarized in Mr. Burgess's brief in opposition, the data disclose no apparent disparity in sentencing that might correspond to the circuit courts' rulings on whether firearm type is an element. See Burgess BIO apps. A, B.

In addition, the claimed problem of proof would pertain to only a very few factual scenarios that arise under § 924(c)(1)(B)(ii). If the firearm is a destructive device, such as a bomb, it is hard to imagine prosecutors having great difficulty proving a defendant's knowledge. Further, if it is a firearm that was manufactured to function in automatic mode, *mens rea* again should present little or no unusual difficulty. Only in cases like this one, where the firearm was not manufactured to function as a machinegun—and its ability to do so is not obvious—*might* proof of knowledge present a challenge. But this Court should not look to eliminate that challenge at the expense of due process, notice, and jury trial rights, particularly where the consequence to defendants is so staggering.

B. This Court's Decision In *Harris* Is Not To The Contrary.

In *Harris*, a divided Court affirmed imposition of a seven-year mandatory minimum sentence for brandishing a firearm under § 924(c)(1)(A)(ii). 536 U.S. at 568. *Harris* cannot save the government's interpretation of § 924(c)(1)(B) because its conclusion was largely driven by features of the brandishing provision that are not present in the firearm-type provisions.

The Court in *Harris* viewed the seven-year mandatory minimum for brandishing as a sentencing option that was available even without a finding of brandishing. *Id.* at 561. But the thirty-year sentence called for in § 924(c)(1)(B)(ii) could *not* be imposed based solely on the facts to which the respondents pled guilty. A sentence of that length without the machinegun finding would be an unreasonable departure from the Guidelines, which call for a seven-year sentence. See U.S.S.G. § 2K2.4(b) ("the guideline sentence is the minimum term of imprisonment required by statute"). Because upward departures are rare in § 924(c) sentencing, an increase this dramatic would require a compelling justification. See *Gall*, 552 U.S. at 50.

C. To The Extent *McMillan* and *Harris* Would Permit The Government's Interpretation, They Should Be Overturned.

In *Jones* and *Apprendi*, the Court articulated the important Fifth and Sixth Amendment principles that the government says do not apply here because the increase in the sentence affects "only" a mandatory minimum. Gov. Br. 24. If the government can use *McMillan* and *Harris* as a shield

against constitutional protections, then the Fifth and Sixth Amendment principles articulated in *Apprendi* will operate only when the government so desires.

1. Any criminal statute could be amended to substitute mandatory minimums for fixed sentences, inserting life imprisonment as the maximum sentence or failing to provide any maximum sentence at all. By this reasoning, Congress could *Mullaney*- and *Apprendi*-proof any or all criminal statutes by insuring that no element recast as a sentencing factor—indeed, nothing at all—would increase the statutory maximum.

This obviously reflects an overly expansive reading of *McMillan* and *Harris*. In neither of these cases did the Court establish a categorical rule that exempted mandatory minimum sentences from constitutional scrutiny. *McMillan* expressly declined to delineate the limitations on the power of states to redefine criminal offenses. 477 U.S. at 84-91. And the *Harris* plurality suggested that its own conclusion might be questioned when a statute increased the mandatory minimum (but not the maximum) *based on a factor traditionally treated as an element*. 536 U.S. at 560.

Section 924(c)(1)(B) itself provides compelling reasons for distinguishing *McMillan* and *Harris*. *First*, firearm type was previously treated as an element in this very statute, consistent with this Court's observation of its traditional treatment. See *Castillo,* 530 U.S. at 123-31. *Second*, the increase in sentence based on a machinegun finding is categorically different than those considered in *McMillan* or *Harris*. It not only exceeds the sentence authorized by the jury verdict; it completely overshadows it. Cf. *id.*

2. *Harris* carries little, if any, precedential weight on this issue. Only four Justices joined the opinion's constitutional discussion. 536 U.S. at 556-68. The remaining five—four in dissent, and one concurring in the judgment (based on disagreement with *Apprendi* itself)—concluded that the plurality's conclusion was inconsistent with *Apprendi*. See *id.* at 569-72 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 572-83 (Thomas, J., dissenting). The plurality opinion thus cannot be viewed as binding. *CTS Corp.* v. *Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987).

The *Harris* plurality opinion need not and should not be followed. As Justice Thomas explained:

> It is true that *Apprendi* concerned a fact that increased the penalty for a crime beyond the prescribed statutory maximum, but the principles upon which it relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum: When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is "by definition [an] 'elemen[t]' of a separate legal offense." Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.

536 U.S. at 579 (Thomas, J., dissenting); see also *id.* at 577-78 ("As a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards.").

This same concern with the range of penalties to which a defendant may be exposed drove the Court's earlier decisions. For example, in *Jones*, the Court repeatedly referred to sentencing "ranges" rather than statutory maxima alone. *E.g.*, 526 U.S. at 233, 244, 248; see also *id.* at 252 (Stevens, J., concurring) (same); *id.* at 253 (Scalia, J., concurring) (same).

The *Harris* dissent correctly recognized this incongruity between the precedents set by *Jones* and *Apprendi* on the one hand, and *McMillan* on the other. 536 U.S. at 577-79 (Thomas, J., dissenting). That dissent is more in line with the conflicted nature of the cases holding precedential authority, while the *Harris* plurality resolves that conflict only by bracketing the precedent.

3. This Court need not disturb the holdings of either *McMillan* or *Harris* to conclude that the firearm-type provision of § 924(c)(1)(B) contains offense elements. See *supra* Part II.B. It need not do so even to conclude that the government's reading of § 924(c)(1)(B) violates the Fifth and Sixth Amendment rights of the respondents in this particular case. See *infra* Part II.D. But, if this Court interprets these cases as establishing a rule that *any* increase to a mandatory minimum sentence based on a judge-found facts—no matter how great and even if based on a fact that was formerly and traditionally an offense element—is not a "higher penalt[y] at all," *Harris*, 536 U.S. at 554, and thus constitutionally permissible, then those cases must be overturned.

D. Reading § 924(c)(1)(B) To Contain Sentencing Factors Would Violate The Respondents' Fifth And Sixth Amendment Rights In This Case.

The government's interpretation of § 924(c)(1)(B)(ii) raises other serious constitutional concerns that are rooted in the jurisprudence of sentencing after *United States* v. *Booker*, 543 U.S. 220 (2005).

1. After *Booker*, this Court clarified the parameters of substantive reasonableness review. In *Rita* v. *United States*, 551 U.S. 338 (2007), the Court held that properly calculated within-Guidelines sentences enjoyed a presumption of reasonableness. *Id.* at 347. The same year, in *Gall,* the Court explained that, in imposing sentences outside the Guidelines range, "a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or unusually harsh sentence is appropriate in a particular case with sufficient justifications." 552 U.S. at 46. The sentencing court must "ensure that the justification is sufficiently compelling to support the degree of the variance." *Id.* at 50. Rejecting a presumption that sentences outside the Guidelines range are *un*reasonable, *Gall* held that "appellate courts may . . . take the degree of variance into account and consider the extent of a deviation from the Guidelines" in reviewing the reasonableness of a sentence. *Id.* at 47.[17]

Reasonableness review has constitutional implications. As Justice Scalia noted in *Rita*,

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[17] Notably, however, the facts supporting the petitioner's sentence in *Gall* had been admitted, 552 U.S. at 64 (Alito, J., dissenting), so the Court had no call to address the Sixth Amendment implications of its ruling.

"[u]nder such a system, for every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant." 551 U.S. at 372 (Scalia, J., dissenting). "*Every* sentence higher than that is legally authorized only by some judge-found fact, in violation of the Sixth Amendment." *Id.* at 372.

2. These principles, as applied in this case, highlight the difficulty that would arise if § 924(c)(1)(B)(ii) were held to describe a sentencing factor. Mr. Burgess admitted to brandishing a "firearm" during a crime of violence; they did not admit to using a machinegun, or any enhancing fact. That observation has held true with respect to § 924(c) sentences since *Harris*. See U.S. Sent'g Comm'n, *Monitoring of Criminal Sentences, 2008* (2009). Even where sentencing courts have imposed enhanced sentences in cases involving § 924(c) charges, those sentences (like the one imposed here) are comparatively modest, and even the highest such sentence in a combined sentence for the underlying offense and the § 924(c) offense has been only 177 months (just under fifteen years)—or less than half of the thirty-year mandatory minimum that the government seeks to invoke here. *Id.*

Yet, if firearm type in § 924(c)(1)(B) is read as a sentencing factor, which can be found by the judge based on a preponderance of evidence, then (assuming the government could offer such proof) the sentencing judge would be *required* to impose a sentence more than four times greater than that recommended by the Guidelines. See 18 U.S.C. § 924(c)(1)(B)(ii). It is difficult, if not impossible, to imagine how such a sentence could be justified as "reasonable" based solely on the facts admitted by

Mr. Burgess in his plea, as would be required under the Fifth and Sixth Amendments. See *Gall*, 552 U.S. at 50. To the contrary, a thirty-year sentence imposed upon Mr. Burgess in this case would almost certainly be not only unreasonable, but unconstitutional. See *id.*; see also *Rita*, 551 U.S. at 372 (Scalia, J., concurring in part and concurring in the result) (a sentence of seven times the Guidelines range would be unreasonable absent reliance on additional judge-found facts).

The government dismisses this constitutional problem in one sentence: "Congress has already specified the sentence, and it is not subject to appellate review under *Booker* for reasonableness." Pet. Reply 9. This misses the point. In the absence of this statutory provision, a thirty-year sentence for Mr. Burgess based on the plea-admitted facts would not be substantively reasonable. See *Harris*, 536 U.S. at 557; cf. *Cunningham*, 549 U.S. at 270. "[T]he relevant 'statutory maximum,'" this Court has clarified, "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Blakely*, 542 U.S. at 303-304. Here, the plea did not authorize the imposition of a thirty-year sentence.

Thus, interpreted as a sentencing factor, the thirty year mandatory minimum sentence set forth in § 924(c)(1)(B)(ii), if imposed in this case, would be unconstitutional.

3. Treating § 924(c)(1)(B) as a sentencing fact to be found by the judge rather than a separate element to be found by the jury would violate the Fifth and Sixth Amendments as applied in this case. Where, as here, facts are essential to the reasonableness of a defendant's sentence, the Constitution dictates that

those facts must be found by a jury beyond a reasonable doubt.

CONCLUSION

For these reasons, the Court should affirm the decision of the Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX

1. 18 U.S.C. § 924(c) provides:

Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

2. 18 U.S.C. § 924(c) (1988 ed.) provided:

Penalties

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle [or a] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under

the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.