No. 10-10392

IN THE
Supreme Court of the United States

JENNIFER LYNN KRIEGER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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The Center on the Administration of Criminal Law ("Center") submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by Jennifer Lynn Krieger.[1]

The Center is dedicated to defining good government and prosecution practices in criminal justice matters through academic research, litigation, and participation in the formulation of public policy. As the Center's name suggests, it is devoted to improving the quality of the administration of criminal justice and advocating the adoption of best practices through its scholarly, litigation, and public policy components. The Center's litigation practice aims to use the Center's empirical research and experience to assist courts in important criminal justice cases. The Center regularly files briefs in support of defendants and the government in courts around the country.

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[1] Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of *amicus curiae*'s intent to file this brief and have consented to the filing of this brief in letters filed simultaneously with this brief with the Clerk's office.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court is presented once more with an intractable circuit split over whether a fact mandating an increase in a criminal defendant's minimum sentence is a sentencing factor or an element of an aggravated offense.

Congress "seldom directly addresses the distinction between sentencing factors and elements." *United States v. O'Brien*, 130 S. Ct. 2169, 2175 (2010). The courts are therefore often left to rely on an amorphous five-factor balancing test to discern Congress's intent.

So too here. Section 841 of Title 21 of the United States Code mandates a sentence of twenty years to life where the distribution of certain controlled substances results in death or serious bodily injury. 21 U.S.C. § 841(b)(1)(C). Otherwise, the statutory sentencing range for simple distribution of the substance at issue in this case is zero to twenty years. The statute does not specify whether the "results" provision is a sentencing factor or an element of an aggravated offense.

The Circuits are predictably divided in their treatment of the "results" provision. Defendants in the First, Second, Sixth and Ninth Circuits have a right to insist that the government indict and prove to a jury beyond a reasonable doubt that death or serious bodily injury resulted from their conduct before becoming subject to a mandatory 20-year sentence. In the Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits, defendants have no such right:

They are subject to a 20-year increase in their mandatory minimum sentence on the basis of judicial fact-finding by a preponderance of the evidence.[2]

The disparity in the interpretation and application of § 841(b)(1)(C) identified by the Petition is of constitutional and practical significance. It is a cornerstone of American government that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511 (1995). And the Court has long held that the Constitution protects a defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that these basic principles mean 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" and that "such facts must be established by proof beyond a reasonable doubt." (quotation marks omitted).

Five Members of this Court recognized in *Harris v. United States*, 536 U.S. 545 (2002), that *Apprendi*'s rule logically applies to any fact that increases the range of penalties to which a defendant is exposed, whether the fact increases the minimum required sentence or the maximum possible

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[2] *See* Pet. 7-12.

sentence. Nevertheless, a fractured majority of the Court affirmed an increased statutory minimum prison term based on facts not found by the jury or admitted by the defendant. A four-Member plurality believed that facts used to increase the mandatory minimum sentence were different from facts used to increase the authorized maximum and were therefore not subject to *Apprendi*. Justice Breyer—while recognizing no logical basis for the distinction drawn by plurality—concurred in the judgment because he was not yet prepared to accept *Apprendi*.

But after more than a decade of sentencing decisions under *Apprendi*, including this Court's landmark opinions in *United States v. Booker*, 543 U.S. 220 (2005) and *Blakely v. Washington*, 542 U.S. 296 (2004), Justice Breyer signaled his willingness to revisit the issue during oral argument last Term in *United States v. O'Brien*: "[I]n *Harris,* I said that I thought *Apprendi* does cover mandatory minimums, but I don't accept *Apprendi*. Well, at some point I guess I have to accept *Apprendi,* because it's the law and has been for some time." Transcript of Oral Argument 20, *United States v. O'Brien*, 130 S. Ct. 2169 (2010) (No. 08-1569) (question of Breyer, J.).

Applying the inescapable logic of *Apprendi* to all facts that increase the minimum lawful sentence is also necessary to safeguard the gains achieved by modern structured sentencing reform. As this case demonstrates, all too often mandatory minimum sentences prevent district courts from "impos[ing] a sentence sufficient, but not greater than necessary" to accomplish the goals of the sentencing statute. *See* 18 U.S.C. § 3553(a). Here, the experienced

district court judge considered all of the statutory sentencing factors and the applicable Guidelines and determined that the mandatory sentence of twenty years imprisonment was "unduly harsh." Pet. App. 42a. Rather than being treated as an offender convicted of distribution of narcotics—the only offense for which the defendant was indicted and to which she pled guilty—the defendant was, the district court admitted, "sentenced for homicide." *Id.* 39a.

The Petition thus presents a question of profound importance for both the character of our constitutional system and the fair, just and effective administration of our sentencing laws. The Petition should be granted.

REASONS FOR GRANTING THE PETITION

I. Whether the Sixth Amendment Gives Criminal Defendants the Right to Insist that a Jury Find Any Fact that, as a Matter of Law, Increases Their Sentencing Range Is a Question of Surpassing Importance.

Just as in *Apprendi*, "at stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. [5], and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6." 530 U.S. at 476-77. In *Apprendi*, the Court held that the use of judicial factfinding to increase the binding sentencing range from between five and ten years to between ten and twenty years was "an unacceptable departure from

the jury tradition that is an indispensable part of our criminal justice system." *Id.* at 497. The defendant in that case received a twelve-year sentence. *Id.* at 474.

Here, the sentencing range for the offense the defendant was actually convicted of was zero to twenty years imprisonment. Based on the judicial finding of a fact that the government could not prove beyond a reasonable doubt, Pet. App. 39a, the statutorily-prescribed sentencing range became twenty years to life. Because sentencing the defendant to more than twenty years would unquestionably violate *Apprendi*, the lower courts interpreted the statute to require a twenty-year sentence.

A Sixth Amendment jurisprudence that would prohibit Apprendi's twelve-year sentence while requiring Krieger's twenty-year sentence makes no sense. As a matter of constitutional logic, "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts," *Gaudin*, 515 U.S. at 513, applies just as strongly to facts that *require* a minimum sentence as it does to those facts that merely *authorize* a maximum sentence, *see Apprendi*, 530 U.S. at 563-64 (Breyer, J., dissenting); *see also O'Brien*, 130 S. Ct. at 2182-83 (Stevens, J., concurring).[3] Just like an increase in an authorized

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[3] *See also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 48-84, 106-16 (2003) (describing the Framers' view of the jury's role in a system of

maximum, an increased "mandatory minimum entitl[es] the government to more than it would otherwise be entitled" in the absence of the law and consequently, "the change in the range available to the judge affects his choice of sentence." *Apprendi*, 530 U.S. at 522 (Thomas, J., concurring) (quotation marks omitted; alteration in original); *see also id.* at 474 (majority opinion) (explaining that the sentencing factor "increased—indeed, it doubled—the maximum range within which the judge could exercise his discretion, converting what otherwise was a maximum 10 year sentence on that count into a minimum sentence").

This case demonstrates the problem with *Harris* in stark terms: Applying *Harris*, the lower courts reluctantly held that *Apprendi* does not apply to judicial factfinding that *required* a twenty-year sentence that the sentencing court thought inappropriate, but *Apprendi* would apply to the same factfinding if it merely *authorized* the court to give a sentence of twenty years and one day.

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separated powers and explaining that it is the *mandatory* nature of both legally binding guidelines and mandatory minimums that places them at odds with the constitutional function of the jury); Josh Bowers, *Mandatory Life and the Death of Equitable Discretion*, *in* LIFE WITHOUT PAROLE: THE NEW DEATH PENALTY (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1792792. (highlighting harshness of modern mandatory punishments particularly given lack of equitable check on prosecutorial power).

A. *McMillan* Failed Adequately to Address the Right to Trial by Jury and Is Inconsistent with *Apprendi*.

McMillan v. Pennsylvania, 477 U.S. 79 (1986), marked the Court's first encounter with what *Booker* later described as a "new trend in the legislative regulation of sentencing": legislative use of so-called sentencing facts that "not only authorized, or even mandated, heavier sentences than would otherwise have been imposed, but increased the range of sentences possible for the underlying crime." 543 U.S. at 236. Pennsylvania had created a mandatory minimum sentencing enhancement that supplemented its existing indeterminate sentencing regime. Applying the rough Due Process calculus that it discerned from *In re Winship*, 397 U.S. 358 (1970), and its progeny, *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977), the Court concluded that Pennsylvania's treatment of the visible possession of a firearm as a sentencing factor was not inconsistent with Due Process. The Court then disposed of petitioners' jury trial claim in a scant paragraph, finding the claim "merit[ed] little discussion." *McMillan*, 477 U.S. at 93.

Later cases made clear that *McMillan* had not adequately addressed the jury question. In *Jones v. United States*, 526 U.S. 227, 248 (1999), this Court concluded that "diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to

raise a genuine Sixth Amendment issue not yet settled."

Apprendi confirmed what *Jones* had suggested: The constitutionality of a sentencing factor that "sets the sentencing range," *Jones*, 526 U.S. at 243, turns not merely on abstract notions of Due Process, but on the concrete protections of trial by jury, the "great bulwark of [our] civil and political liberties," *Apprendi*, 530 U.S. at 477 (quoting 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873)) (alteration in original). At our Nation's founding, the distinction *McMillan* drew between mandatory sentencing factors and elements of a crime was "unknown," *id.* at 478, as criminal laws for felonies generally set a "particular sentence for each offense," *id.* at 479. However, then as now, the jury right was not abridged by the exercise of judicial discretion "*within the range* prescribed by statute." *Id.* at 481. Analyzing the historic right to trial by jury, the Court in *Apprendi* adopted the constitutional rule proposed by Justice Stevens' concurrence in *Jones*: "[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 490 (quotation marks omitted).

The *Apprendi* Court did not expressly overrule *McMillan*, instead preferring to "limit [*McMillan*'s] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict," and "reserv[ing] for another day the question whether

stare decisis considerations preclude reconsideration of its narrower holding." 530 U.S. at 487 n.13.

B. Five Justices in *Harris* Concluded that *Apprendi* Logically Applies to Facts that Trigger Mandatory Minimums.

Harris v. United States, 536 U.S. 545 (2002), presented the Court with the opportunity either to hold that *McMillan* was consistent with *Apprendi*, or to reject *McMillan* in favor of *Apprendi*. *Harris* involved an increased minimum sentence mandated by the sentencing court's determination by a preponderance of the evidence that the defendant had brandished a firearm. Four Members of the Court found *McMillan* logically consistent with *Apprendi* and opined that it should survive. Four Members thought the cases were inconsistent and that *McMillan* should be overruled. The final Member of the Court, Justice Breyer, agreed with the four dissenting Justices that the logical import of *Apprendi* was that *McMillan* was no longer good law. But Justice Breyer voted not to overrule *McMillan* because he was concerned that an extension of *Apprendi*'s principles to mandatory minimum sentences would have adverse consequences for the operation of the Sentencing Guidelines. *Id.* at 569-70 (Breyer, J, concurring).

In the plurality opinion written by Justice Kennedy, four Members of the Court offered that *McMillan* could be reconciled with *Apprendi* because "[t]he factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the

jury," while "[t]he finding in *McMillan* restrained the judge's power, limiting his or her choices within the authorized range." *Id.* at 567 (Kennedy, J., plurality opinion). Central to the *Harris* plurality's effort to harmonize *McMillan* and *Apprendi* was the conclusion that, so long as the sentence remained below the statutory maximum, facts that require an increased minimum sentence, as visible possession of a firearm did in *McMillan*, would not "alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." *Id.* at 563 (quoting *Jones*, 526 U.S. at 253 (Scalia, J., concurring)).

In a dissenting opinion written by Justice Thomas, four Members of the Court found that *McMillan* could not be distinguished from *Apprendi* and should be overruled. The dissenters argued that, on the basis of the original understanding of the elements of a crime, any fact necessary for the prosecution's entitlement to a particular "kind, degree, or range of punishment" was an element of the crime that must be proved to a jury beyond a reasonable doubt. 536 U.S. at 575 (Thomas, J., dissenting) (quoting *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring)). Because whether or not the defendant brandished a firearm in *Harris* altered the legally-prescribed range of penalties—like visible possession of a weapon in *McMillan*—the fact of such brandishing had to be found by a jury or admitted by the defendant. *Id.*

Justice Breyer agreed with the dissent that *Apprendi* could not be distinguished from *Harris* "in terms of logic." *Harris*, 536 U.S. at 569 (Breyer, J.,

concurring in part and concurring in the judgment)); *see also Apprendi*, 530 U.S. at 563 (Breyer, J., dissenting) ("[A]ll the considerations of fairness that might support submission to a jury of a factual matter that increases a statutory maximum apply *a fortiorari* to any matter that would increase a statutory minimum."). Thus, a majority of the Court in *Harris* agreed that the principles announced in *Apprendi* required treating as offense elements those facts that triggered mandatory minimum sentences as a matter of law. *See also* Pet. App. 22a ("[A]t one recent time a majority of the Court believed that the holding of *McMillan* was inconsistent with the holding in *Apprendi*.").

But in *Harris*, Justice Breyer was not yet ready to accept the extension of *Apprendi* to mandatory minimums because he "believe[d] that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal consequences." *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment). Justice Breyer explained that he opposed applying *Apprendi* to mandatory minimums as a policy matter because he predicted that this would, in practice, transfer power from juries to prosecutors and would have the "seriously adverse" legal consequence of diminishing Congress's "constitutional authority to define crimes through the specification of elements, to shape criminal sentences through the specification of sentencing factors, and to limit judicial discretion in applying those factors in particular cases." *Id.* at 571-72 (citing *Apprendi*, 530 U.S. at 555 (Breyer, J. dissenting)).

C. While *Apprendi* and Its Progeny Have Become Entrenched in the Nation's Criminal Justice System, This Court Has Now Squarely Rejected the Constitutional Underpinning on Which *McMillan* and *Harris* Depend.

While Justice Breyer could not "yet accept [*Apprendi*'s] rule," in *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment), a decision that came just two years after *Apprendi* was decided, it has now been more than a decade since the rule was announced. Since then, *Apprendi*'s rule has become firmly entrenched in the Court's jurisprudence and the Nation's criminal justice systems. This Court has now applied or reiterated the rule at least eleven times since the *Harris* decision. *See, e.g., Blakely*, 542 U.S. 296; *Booker*, 543 U.S. 220; *Shepard v. United States*, 544 U.S. 13 (2005); *Washington v. Recuenco*, 548 U.S. 212 (2006); *Cunningham v. California*, 549 U.S. 270 (2007); *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Oregon v. Ice*, 129 S. Ct. 711 (2009); *Spears v. United States*, 129 S. Ct. 840 (2009); *O'Brien*, 130 S. Ct. 2169.

Most significantly, by applying *Apprendi* to the Sentencing Guidelines, even though the Guidelines do not exceed the otherwise specified statutory maximum, the Court in *Booker* made clear that the constitutional underpinning of *Harris* was no longer valid. Indeed, the government conceded as much in *Booker*, warning that to apply *Blakely* to the Sentencing Guidelines would result in the overruling

of *Harris* on its facts. Brief for the United States at 38 n.16, *United States v. Booker*, 543 U.S. 220 (2005) (No. 04-104)).

The plurality opinion in *Harris* and the majority opinion in *McMillan* both depend on a proposition squarely rejected by *Booker*—that only the statutory maximum has Sixth Amendment significance and a sentence can be increased by judicial findings as long as it remains under that maximum. This notion led *McMillan* to hold and the *Harris* plurality to agree that the mandatory minimum statute in *McMillan* was constitutional because it "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." *McMillan*, 477 U.S. at 89-90; *Harris*, 536 U.S. at 559 (Kennedy, J., concurring). The *Harris* plurality argued that while mandatory minimums have a "practical effect" on the sentence, 536 U.S. at 566, mandatory minimums do not "alter the congressionally prescribed range of penalties to which a criminal defendant is exposed," *id.* at 563 (quoting *Jones*, 526 U.S. at 253 (Scalia, J., concurring)); *see also McMillan*, 477 U.S. at 88.

Booker, however, rejected the proposition that whether a fact must be found by a jury turns on whether the existence of that fact allows the sentencing court to impose a sentence within or above the statutory range. Rather, the *Booker* Court held the Sentencing Guidelines unconstitutional even though the sentence Booker himself received was below the statutory maximum for the offense and the increase in the binding Guidelines range was

based on the court's finding of a fact—drug quantity—traditionally considered by courts in setting punishment. *Booker*, 543 U.S. at 235. In doing so, *Booker* made clear that it is the *mandatory* nature of the applicable sentencing range that is decisive, not whether or not the ultimate sentence falls below a statutory maximum. Thus, the Court concluded: "If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Id.* at 233. In other words, *Booker* adopted as a matter of constitutional law the historic distinction identified by Justice Thomas in his concurrence in *Apprendi* between "establishing what punishment is available by law" and "setting a specific punishment within the bounds that the law has prescribed." *Apprendi*, 530 U.S. at 519 (Thomas, J., concurring).[4]

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[4] *Booker* thereby vindicated the historically important role of the jury. *See, e.g.*, *Blakely*, 542 U.S. at 305-07 (jury intended to "function as circuitbreaker in the State's machinery of justice"). This is because the right to a jury trial guarantees a community check not only against the "corrupt or overzealous prosecutor" and "the compliant, biased, or eccentric judge," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), but also against the broad and sometimes unfair rules of even a well-meaning legislature. *See, e.g.,* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, 94 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1891) ("Let [a man] be considered as a criminal by the general government, yet only his fellow-citizens can convict him; they are his jury, and if they pronounce him

Unlike *McMillan* and *Harris*, which have been the subject of unrelenting doubts,[5] *Apprendi* is now an established precedent that has been accepted even by those Members of the Court, like Justice Breyer, who believed it was wrongly decided. *See Oregon v. Ice*, 129 S. Ct. at 717 (opinion of the Court joined by Justice Breyer acknowledging the validity of *Apprendi* and the Court's obligation to honor the "'longstanding common-law practice' in which the rule is rooted" (quoting *Cunningham,* 549 U.S. at 281)).

Consequently, during oral argument in *O'Brien*, Justice Breyer explicitly indicated his willingness to revisit his position in *Harris*: "But in Harris, I said that I thought *Apprendi* does cover mandatory minimums, but I don't accept *Apprendi*. Well, at some point I guess I have to accept *Apprendi*, because it's the law and has been for some time." Tr. of Oral Arg. 20 (question by Breyer, J.). The Court avoided the constitutional question in *O'Brien* by deciding as a matter of statutory interpretation that the fact at issue there was an offense element. Courts around the country thus continue to be vexed in trying to distinguish sentencing factors from elements of aggravated offenses.

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innocent, not all the powers of Congress can hurt him.") (quoting Theophilus Parsons in the Massachusetts Convention of 1788); *see also United States v. Powell*, 469 U.S. 57, 65 (1984) (explaining "the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch").

[5] *See, e.g.*, Pet. 13-14 (collecting criticisms from the courts of appeals).

There is no constitutionally supportable reason for exempting facts that require the application of a statutory mandatory minimum from this foundational requirement, as five Members of this Court recognized in *Harris*. Because, the lower courts are bound by *Harris*'s approval of this exemption until this Court acts,[6] the Court should grant the petition and clarify that it is impermissible for judicial factfinding to set the limits of any legally mandated sentencing range.

II. Allowing Mandatory Minimums to Be Triggered by Judicial Fact-Finding, as the Courts Below Did, Is Anathema to the Sentencing Guidelines and Modern Sentencing Reform.

Justice Breyer resisted taking *Apprendi* to its logical conclusion in *Harris* because of his concern that doing so would undermine sentencing reform, particularly the Sentencing Guidelines and their effort to develop a more rational sentencing system. *Harris*, 536 U.S. at 572 (Breyer, J., concurring in part and concurring in the judgment) (citing *Apprendi*, 530 U.S. at 555 (Breyer, J., dissenting)). But the pragmatic considerations that led Justice Breyer in his *Harris* concurrence to resist the extension of *Apprendi* to mandatory minimums all point in the opposite direction now, requiring the application of *Apprendi* to all facts necessary to set a binding sentencing range.

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[6] *See, e.g.*, Pet App. 24a ("[I]t is difficult to reconcile *McMillan* with *Apprendi*. *McMillan*, however, has not been overruled. And unless and until the Supreme Court explicitly overrules a case, we are bound by it.").

Without this Court's intervention, the use of mandatory minimum statutory provisions can be expected to proliferate and prosecutors will gain ever greater discretionary power over sentencing. At the same time, persistent confusion in the lower courts over the interpretation of these provisions will return criminal defendants to the days when the court in which they are sentenced, is more important than the crime they committed.

A. Taking *Apprendi* and *Booker* to Their Logical Conclusions and Treating Mandatory Minimum Sentencing Provisions as Offense Elements Furthers the Goals of Modern Sentencing Reform.

In *Harris*, Justice Breyer expressed concern that extending *Apprendi* to mandatory minimums would undermine modern sentencing reforms, particularly the Sentencing Guidelines, which seek to promote proportionality and uniformity in sentencing. *Harris*, 536 U.S. at 572 (Breyer, J., concurring in part and concurring in the judgment). But to treat mandatory minimums as an exception to the holding of *Apprendi*, *Blakely*, and *Booker* would, in fact, undermine these goals.

Although the United States Sentencing Guidelines have been advisory since the Court's decision in *Booker*, they continue to achieve strong compliance by the federal judiciary.[7] The prevailing

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[7] *See* UNITED STATES SENTENCING COMMISSION PRELIMINARY QUARTERLY DATA REPORT (1st Quarter Release, Preliminary 4th Quarter Year 2010 Data) tbl. 1 (2011), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_S

view among sentencing experts and judges is that the post-*Booker* Guidelines regime improves upon the pre-Guidelines landscape because it avoids the pitfalls of the old system that often resulted in cases being treated alike though they were, in fact, dissimilar, while at the same time achieving broad consensus among judges on cases that are within the heartland of the Guidelines.[8] As Judge Denny Chin has explained: "I do believe that post-*Booker* is much better than pre-Booker, and I am confident that most, if not all, of my colleagues in the Southern District of New York would agree."[9]

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tatistics/Quarterly_Sentencing_Updates/USSC_2011_1st_Quarter_Report.pdf (reporting that federal judges sentence outside the guideline range without a government motion in only 17.2% of cases).

[8] Ronald F. Wright, Professor of Law and Associate Dean for Academic Affairs, Wake Forest University School of Law, Statement Before the United States Sentencing Commission, Regional Hearing, at 6 (Feb. 11, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090210-11/Wright_statement.pdf (explaining that even post-*Booker*, "sentences within the guidelines remained by far the most common outcome"); Rachel E. Barkow, Professor of Law and Faculty Director, Center on the Administration of Criminal Law, New York University School of Law, Statement Before the United States Sentencing Commission, Regional Hearing, at 6-7 (July 10, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Barkow_testimony.pdf (citing compliance data and explaining that the current scheme better achieves proportionality).

[9] The Honorable Denny Chin, United States District Judge, Southern District of New York, Statement Before the United States Sentencing Commission Public Hearing, at 131 (July 9,

Allowing a loophole from the *Apprendi-Blakely-Booker* line of cases for cases involving mandatory minimums would significantly undercut the goals that the Guidelines are meant to achieve. As countless experts, including the U.S. Sentencing Commission, have noted, mandatory minimums increase disparity and undermine proportionality.[10] By elevating a single variable over any other consideration, mandatory minimums "rarely reflect an effort to achieve sentencing proportionality." *Harris*, 536 U.S. at 570-71 (Breyer, J., concurring in part and concurring in the judgment). They are "fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and

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2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Public_Hearing_Transcript.pdf; *see also, e.g.*, The Honorable Donetta W. Ambrose, Chief Judge, Western District of Pennsylvania, Statement Before the United States Sentencing Commission Public Hearing, at 4 (June 25, 2008), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Ambrose_testimony.pdf (reporting view of judges in the Western District of Pennsylvania).

[10] *See* UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991); *see also* Chief Justice William H. Rehnquist, Luncheon Address at the Inaugural Symposium on Crime and Punishment in the United States (June 18, 1993), *in* UNITED STATES SENTENCING COMMISSION, DRUGS AND VIOLENCE IN AMERICA: PROCEEDINGS OF THE INAUGURAL SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES 284-86 (1993); Jonathan P. Caulkins et al., Drug Policy Research Center, RAND, *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* 12-25, 75-80 (1997).

rational sentencing system through the use of Sentencing Guidelines." *Id.* at 570.

If the Court continues to allow mandatory minimum sentences to be imposed outside the rule of law in the *Apprendi-Blakely-Booker* line of cases, there will be a strong and perverse incentive for legislatures to place greater reliance on mandatory minimums, even though they undermine the goals of modern sentencing reform. *See Apprendi*, 530 U.S. at 564 (Breyer, J., dissenting) ("[B]y leaving mandatory minimum sentences untouched, the majority's rule simply encourages any legislature interested in asserting control over the sentencing process to do so by creating those minimums."); *id.* (noting that an increase in mandatory minimums "would mean significantly less procedural fairness, not more"). After *Booker*, *Blakely*, and *Cunningham*, legislatures can no longer dictate sentencing increases as a matter of law through mandatory sentencing guidelines based merely on judicial factfinding and using a civil standard of proof. If the Court allows a loophole for mandatory minimum sentencing provisions to persist, however, legislatures can simply bypass the jury's constitutional role to achieve the same result.

There is a strong incentive for the Executive Branch to urge Congress to take such an approach because prosecutorial power to control sentencing increases under mandatory minimum regimes. As Justice Breyer has explained, mandatory minimum sentences "transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have

reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate." *Harris*, 536 U.S. at 571 (Breyer, J., concurring in part and concurring in the judgment); *see also Blakely*, 542 U.S. at 331 (Breyer, J., dissenting); Associate Justice Anthony M. Kennedy, Speech at the American Bar Ass'n Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html.

This transfer of power leads to "more and cheaper convictions via plea bargaining," which has led to the "near extinction of acquittals." Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1, 27, 67 (2010).

B. *Apprendi* Has Not Harmed Defendants, But Removing the Jury Check on Mandatory Minimum Sentences Does.

In addition to the concern with sentencing reform in general, Justice Breyer also expressed in *Harris* his concern that defendants would ultimately suffer under *Apprendi*. 536 U.S. at 571 (Breyer, J., concurring in part, concurring in the judgment). This worry prompted Justice Breyer to conclude that *Apprendi* should be limited as much as possible, regardless of whether the logic of its holding would otherwise apply.

But contrary to Justice Breyer's predictions, empirical analysis shows that *Apprendi*'s recognition of "jury trial rights substantially benefits

defendants" by lowering sentences.[11] And this is true whether one looks at cases that go to trial or at cases where the defendant pleads guilty.[12] This is what organizations such as the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders expected when they urged the Court in their *amici* filings in *Apprendi*, *Harris*, *Blakely*, and *Booker* to respect the jury guarantee and require any fact that mandates a particular sentence or sentencing range to be found by a jury beyond a reasonable doubt. These groups, with their experience in the trenches of criminal justice, have every incentive to assess accurately what will best protect defendants' rights. And these groups know all too well that defendants suffer when

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[11] *See, e.g.,* J.J. Prescott, *Measuring the Consequences of Criminal Jury Trial Protections* 3, 24-27, and 53, tbl. 2 (Jan. 2006) (unpublished manuscript), *available at* http://www-personal.umich.edu/~jjpresco/Prescott.Measuring_Jury_Trial_Protections_Jan_2006.pdf (conducting an empirical review of sentences of comparable groups pre- and post-*Apprendi* and finding that *Apprendi*'s recognition of a defendant's jury trial right benefits defendants by reducing the average sentence in all criminal history categories, with some offenders benefitting by more than 5%).

[12] *See* Prescott, *supra* n.11, at 66-67, tbls. A1, A2. The empirical evidence post-*Booker* is to the same effect. UNITED STATES SENTENCING COMMISSION ANNUAL REPORT SOURCEBOOK, tbl. 31A (2010) (showing post-*Booker* increase in downward departures). Prosecutors agree. *See* Mary Patrice Brown & Steven E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1090 (2006) (observing that "on balance, *Booker* clearly takes some negotiating leverage away from the prosecution" in bargaining over the defendant's potential cooperation).

mandatory minimums apply without the check of a jury. This is because the jury right cannot "function as circuitbreaker in the State's machinery of justice" when, as here, that right applies only to the "determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306-07.

It has been true time and again, as it was in this case, that "as a practical matter, a legislated mandatory 'minimum' is far more important to an actual defendant" than the statutory maximum. *Apprendi*, 530 U.S. at 563 (Breyer, J., dissenting). Common law cases recognized as much, treating these mandatory minimums as offense elements to be decided by the jury. *See id.* at 522 (Thomas, J., concurring). Thus, exempting increases in mandatory minimum sentences from the rule in *Apprendi* is neither principled nor wise. Permanently preserving this exemption even in the wake of *Blakely*, *Booker,* and *Cunningham* creates a perverse incentive for reliance on sentencing schemes that are less rational, less consistent, and less transparent, without sufficiently compelling legal or policy benefits.

Just as disturbing, reliably distinguishing sentencing factors from elements of aggravated offenses has proven challenging for the lower courts. This Court has seen fit to address interpretive disputes over this distinction at least five times since 1998. *See, e.g.*, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Jones*, 526 U.S. 227; *Castillo v.*

United States, 530 U.S. 120 (2000); *Harris*, 536 U.S. 545; *O'Brien*, 130 S. Ct. 2169. In addition to the Circuit split identified in this case, additional conflicts have already developed and more can be expected. *Compare, e.g.*, *United States v. Julian*, 633 F.3d 1250, 1254 (11th Cir. 2011) ("Based on the approach of the Court in *Harris* and *Castillo*, we conclude that Congress intended section 924(j) to define a distinct offense, not a sentencing factor."), *with United States v. Battle*, 289 F.3d 661, 667 (10th Cir. 2002) ("Section 924(j) does not set forth a discrete crime."). Without this Court's intervention, the sentence defendants receive will be determined more by their location than their conduct—just as in this case.

The Court should grant *certiorari* and clarify that *Booker* effectively overruled *Harris* and that the holding of *Booker* applies to mandatory minimums as well.

CONCLUSION

For the reasons stated above, the Court should grant the Petition.

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