No. 11-9335

IN THE
Supreme Court of the United States

ALLEN RYAN ALLEYNE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

The Center on the Administration of Criminal Law ("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. The Center's litigation practice aims to use the Center's empirical research and experience to assist courts in important criminal justice cases, and files briefs in support of both the Government and defendants in criminal matters. 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 focus on government practices in criminal cases and on the exercise of prosecutorial power and discretion, its research-based approach, and its diversity of work make it the first and only organization of its kind.

SUMMARY OF ARGUMENT

One of the cornerstones of American law is 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).

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[1] The parties have consented to the submission of this brief, and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office. 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.

And this 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 (2000), this Court affirmed that these basic principles meant 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." *Id.* at 490 (quotation marks omitted). As a majority of the Members of this Court concluded in *Harris v. United States*, 536 U.S. 545 (2002), there is no constitutionally supportable reason for exempting those facts that require the application of a statutory mandatory minimum from this foundational rule.

Nevertheless, *Harris* preserved a Sixth Amendment loophole for facts that increase the mandatory minimum sentence. As Petitioner rightly argues, *Harris* is, and always has been, fundamentally inconsistent with *Apprendi*. But, in light of the express contingencies in Justice Breyer's controlling concurrence, this Court need not overrule *Harris* to recognize that it is no longer good law.

In 2002, when *Harris* was decided, *Apprendi* was still new and its scope, effect on mandatory guidelines regimes, and even its viability remained uncertain. The result was a fractured Court and a controlling concurrence that exempted mandatory

minimums from Sixth Amendment protections contingent on rolling back *Apprendi* and preserving the federal Sentencing Guidelines. Five Members of this Court accordingly recognized that the rules in *Harris* and *Apprendi* could not coexist for long.

In the ten years since *Harris* was decided, the contingent premises on which Justice Breyer's concurrence depended are no longer viable: *Apprendi* has been strengthened and expanded, while Federal and state mandatory sentencing guideline regimes have been struck down and reformed. Meanwhile, the *Harris* plurality's reasoning has been undermined. All that remains is for this Court to make explicit the import of these decisions: that *Harris* is no longer good law.

Making clear that *Harris* is no longer a viable precedent would bring doctrinal consistency to the Court's Sixth Amendment cases and improve federal sentencing. Nearly every court and commentator to have considered the matter has concluded that a regime that mandates the imposition of statutory minimum prison terms based on judicial factfinding under a preponderance standard of proof is neither principled nor wise. Preserving a loophole that allows circumvention of the jury right and the traditional criminal standard of proof to secure a mandatory minimum sentence incentivizes legislatures and prosecutors to rely heavily on mandatory minimums—a result that undermines the goals of proportionality and fairness that modern structured sentencing reforms are meant to achieve.

In this case, the Government claims that it is entitled to an increased mandatory sentence because, under a preponderance standard of proof, it persuaded the sentencing judge of a fact that it did not prove to a jury beyond a reasonable doubt. But the Sixth Amendment gives criminal defendants like Petitioner Alleyne the right to have a jury find any fact that, as a matter of law, is necessary to increase his sentence and to make that finding beyond a reasonable doubt.

ARGUMENT

I. *Apprendi* and its Progeny Require That All Facts That Increase a Defendant's Sentencing Range as a Matter of Law Must Be Found by the Jury or Admitted by the Defendant.

In its landmark decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that the Sixth Amendment requires any facts other than prior convictions that "increase the prescribed range of penalties to which a criminal defendant is exposed" to be assessed by the jury and established by proof beyond a reasonable doubt. 530 U.S. at 490 (internal quotation marks omitted). Over the past dozen years, this Court has steadily built upon *Apprendi*. *See*, *e.g.*, *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012) (applying *Apprendi* to the imposition of criminal fines); *Cunningham v. California*, 549 U.S. 270 (2007) (striking down California's determinate sentencing law); *Ring v. Arizona*, 536 U.S. 584 (2002) (applying *Apprendi* to aggravating factors required to impose the death penalty).

Most significantly, in *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the then-binding United States Sentencing Guidelines unconstitutionally abridged a defendant's Sixth Amendment right to trial by jury because the Guidelines regime denied defendants the right to have the jury find the facts that increased the binding range within which the judge was authorized to sentence. Relying on *Apprendi*, the Court explained that, while a "trial judge [may] exercise[] his discretion to select a specific sentence within a defined range," *Booker*, 543 U.S. at 233, any fact that, as a matter of law, was necessary to increase a defendant's sentence, even if below the statutory maximum, "must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 244; *see also Apprendi*, 530 U.S. at 490; *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004); *Cunningham*, 549 U.S. at 274-75.

Booker's treatment of facts that set *binding* sentencing ranges as constitutionally different from facts that set *advisory* ranges, or facts that are otherwise considered by the judge at his or her discretion in imposing a sentence, vindicates the historically important role of the jury. This Court has stressed the need "to give intelligible content to the right of jury trial" and the Framers' effort to ensure that the jury could and would "function as circuitbreaker in the State's machinery of justice." *Blakely*, 542 U.S. at 305-06. 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.[2]

The danger of legislative overreaching against which the jury is meant to guard is equally present with respect to criminal laws that trigger mandatory minimum sentences as with those laws that set mandatory maximums.[3] 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

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[2] *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*, at 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 innocent, not all the powers of Congress can hurt him.") (quoting Theophilus Parsons in the Massachusetts Convention of 1788); John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. Am. Judicature Soc'y 166, 170 (1929) ("The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case."); Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12, 18 (1910) (praising the jury's power to correct overbroad laws in the name of justice as "the great corrective of law in its actual administration"); *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").

[3] *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 46-84, 106-16 (2003).

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). Indeed, for much of our Nation's history, facts that raised the required minimum also raised the authorized maximum, and courts treated those facts as offense elements without drawing any distinction based on the effect on the minimum or maximum. *See id.* at 522 (Thomas, J., concurring) (surveying cases).

This treatment makes sense, of course, because just like an increase in an authorized maximum, an increase in a "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." *Id.* (alteration in original) (internal quotation marks omitted). That becomes clear from an examination of this case, in which the mandatory minimum to which the Government claims entitlement increased Alleyne's § 924(c) sentence from 60 months to 84 months. This was so even though the jury was not persuaded Mr. Alleyne was guilty of the very same conduct the sentencing court found mandated an increased sentence as a matter of law. This Court's decisions in *Apprendi* and *Booker* make clear that the Constitution does not countenance such an end-run around the jury guarantee.

II. *McMillan* and *Harris* Are No Longer Good Law.

This is not the first case in which this Court has considered whether a defendant's right to trial by

jury attaches to facts that increase a binding minimum sentence. In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Court held that a legislature could entrust to judges the finding of facts necessary to require a mandatory minimum without seriously addressing the defendant's right to a trial by jury. And in *Harris v. United States*, 536 U.S. 545 (2002), the judgment upholding the exemption of mandatory minimums from the rule in *Apprendi* depended on Justice Breyer's contingent concurrence. That concurrence—together with the four-Justice dissent—established that the rule in *Harris* could stand only if *Apprendi* were rolled back and the mandatory federal Sentencing Guidelines were preserved. Of course, the opposite has happened: *Apprendi* has been expanded and the mandatory federal Sentencing Guidelines have been struck down. *See* Tr. of Oral Arg. at 20, *United States v. O'Brien*, 130 S. Ct. 2169 (2010) (No. 08-1569), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1569.pdf ("[A]t some point I guess I have to accept *Apprendi,* because it's the law and has been for some time.") (statement of Justice Breyer). Even the reasoning of the *Harris* plurality has been fatally undermined. By its own terms, *Harris* must now give way to *Apprendi*.

A. *McMillan* Did Not Address the Relationship Between Mandatory Minimums and the Right to Trial by Jury.

McMillan 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. *McMillan* involved Pennsylvania's creation of a mandatory minimum sentencing enhancement that supplemented its existing indeterminate sentencing regime. The Court analyzed Pennsylvania's legislative innovation in light of the rough Due Process calculus that it discerned from *In re Winship*, 397 U.S. 358 (1970), *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977), and "concluded that the Pennsylvania statute did not run afoul of [the Court's] previous admonitions against relieving the State of its burden of proving guilt, or tailoring the mere form of a criminal statute solely to avoid *Winship*'s strictures." *Apprendi*, 530 U.S. at 486 (citing *McMillan*, 477 U.S. at 86-88). *McMillan* explained that the Pennsylvania mandatory minimums "operate[d] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *McMillan*, 477 U.S. at 88. Having determined that Pennsylvania's treatment of the visible possession of a firearm as a sentencing factor did not fall on the wrong side of *Winship*'s Due Process divide, the Court disposed of petitioners' jury trial claim in a single paragraph, finding the claim "merit[ed] little discussion." *Id.* at 93.

The Court's later cases made clear that *McMillan* had not adequately addressed the jury question. In *Jones v. United States*, 526 U.S. 227, 242-44 (1999), this Court refused to treat the *Winship* Due Process analysis as limiting the nature and extent of the jury trial inquiry. The Court explained that, while the potential Due Process problem arose out of "*Mullaney*'s insistence that a State cannot manipulate its way out of *Winship,* and from *Patterson's* recognition of a limit on state authority to reallocate traditional burdens of proof," *Jones*, 526 U.S. at 243, the threat to the right to trial by jury was "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," *id.*

Moreover, the *Jones* Court explained that "the history bearing on the Framers' understanding of the Sixth Amendment principle [did not] demonstrate[] an accepted tolerance for exclusively judicial factfinding to peg penalty limits." *Id.* at 244. That history revealed instead a common understanding that the right of trial by jury was of central importance to the preservation of liberty, *id.* at 246, and that the finding of facts was a "sacred" prerogative of the jury beyond any possible dispute, *id.* at 247. After examining this history, the *Jones* 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." *Id.* at 248.

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's 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 (alteration in original) (internal quotation marks omitted).

Although its decision appeared to conflict with *McMillan*, *see id.* at 533 (O'Connor, J., dissenting), the *Apprendi* Court did not expressly overrule it, 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." *Id.* at 487 n.13.

Justice Thomas's concurrence went further. After examining the common law cases in great detail, he observed that these cases often involved facts that triggered an entirely new sentencing range—at "both the top and bottom"—and noted that courts finding such facts to be elements "did not bother with any distinction between changes in the maximum and the minimum." *Id.* at 522 (Thomas, J., concurring). Thus he concluded that it is "clear that the common law rule would cover the *McMillan* situation." *Id.* at 521.

B. As Five Justices in *Harris* Concluded, *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*. 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. Splitting the difference was Justice Breyer. 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 practical and legal consequences for the operation of

the Sentencing Guidelines. *Id.* at 569-70 (Breyer, J., concurring in part and concurring in the judgment).

In the plurality opinion written by Justice Kennedy, four Members of the Court concluded 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. Central to the *Harris* plurality's effort to harmonize *McMillan* and *Apprendi* was the conclusion that, so long as they do not increase 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. *Id.* at 575 (Thomas, J., dissenting) (quoting *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring)). Because, like visible possession of a weapon in *McMillan*, whether or not the defendant

brandished a firearm in *Harris* altered the legally-prescribed range of penalties, 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 fortiori* 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 United States v. Krieger*, 628 F.3d 857, 867 (7th Cir. 2010) ("[A]t the time the *Harris* case was decided, five Supreme Court justices—a majority—believed that the holding in *McMillan* was inconsistent with *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. By Its Own Terms, *Harris* Must Now Give Way to *Apprendi*.

Justice Breyer's controlling fifth vote in *Harris* was predicated on conditions that no longer hold true. When *Harris* came down, just two years after *Apprendi*, Justice Breyer could not "yet accept [*Apprendi*'s] rule." *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment). Since then, *Apprendi* 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 a dozen 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*, 549 U.S. 270; *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*, 555 U.S. 160 (2009); *Spears v. United States*, 555 U.S. 261 (2009); *United States v. O'Brien*, 130 S. Ct. 2169 (2010); *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012).

As a result, there are no longer any practical or legal "consequences"—adverse or otherwise—the avoidance of which could support exempting mandatory minimums from *Apprendi*'s logic. Perhaps most critically, the mandatory U.S. Sentencing Guidelines have been held unconstitutional. And while, as we explain *infra*, *Apprendi*'s rule is both consistent with the goals of modern sentencing reform and beneficial to criminal defendants, even if *Apprendi* were neither, its effects should not be undone by an arbitrary exception for facts triggering mandatory minimums. Indeed, as this Court recently recognized, for many statutes, including § 924(c), an increased mandatory minimum is significantly more important "in practice" than an increase in the statutory maximum. *See O'Brien*, 130 S. Ct. at 2177-78 (recognizing undisputed evidence that "most courts impose the mandatory minimum of 7 years' imprisonment for brandishing a nonspecific weapon" notwithstanding an assumed statutory maximum of life imprisonment).

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* Tr. of Oral Arg. at 20, *United States v. O'Brien*, 130 S. Ct. 2169 ("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.") (statement of Justice Breyer). Thus, the opinion of five Justices in *Harris* that the logic of *Apprendi* dictates treating facts as elements of an offense if, as

a matter of law, they mandate a particular minimum sentence, is now binding.

D. Even the *Harris* Plurality Has Been Undermined by *Booker*.

That the contingent premises on which Justice Breyer's controlling concurrence was based are no longer viable is, by itself, sufficient to require the conclusion that *Harris* is no longer good law. But, even if that were not the case, principles of *stare decisis* would not bind this Court to the plurality's unsupportable exception to *Apprendi*, as Petitioner argues in greater detail. Pet'r Br. 38-43; *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63-66 (1996). To that discussion, we would add the observation that *Booker* substantially undermined the *Harris* plurality opinion. The Government conceded in *Booker* 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), 2004 WL 1967056.[4]

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[4] The Government explained that under the then-binding Guidelines, the court's finding of brandishing increased both the mandatory minimum sentence and the maximum Guidelines sentence. *Id.* (citing *Harris*, 536 U.S. at 578 & n.4 (Thomas, J., dissenting)). *Booker* and *Blakely*, of course, held that a fact that increased a binding Guidelines maximum had to be found by the jury or admitted by the defendant. And while this Court ultimately adopted a remedy in *Booker* that made the Guidelines advisory, that does not change the fact that the sentence in *Harris*—which increased the mandatory maximum Guideline sentence on the basis of a judicial finding—would not be proper under *Booker*.

By applying *Apprendi* to the Sentencing Guidelines, even though the Guidelines do not exceed the relevant statutory maximum, the *Booker* Court rejected much of the logic underpinning the *Harris* plurality. 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 a mandatory minimum statute 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 requires 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* effect of the factual finding that is decisive, not whether or not the 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.

To be sure, *Booker* did not directly challenge *Harris*'s loophole for judicial factfinding that increases the bottom of a binding sentencing range. *See Booker*, 543 U.S. at 244. But, as five Justices in *Harris* concluded, the principles that underlie the guarantee of trial by jury and that animated this Court's decisions in *Apprendi*, *Blakely*, *Booker*, *Cunningham*, and, just last Term, *Southern Union Company*, render the *Harris* exception invalid. These principles emerged from "the ideals our constitutional tradition assimilated from the common law." *Id.* at 238 (citing *Jones*, 543 U.S. at 244-48). Chief among them was that ordinary citizens should stand between a potentially tyrannical government and its entitlement to the criminal sanction. *See id.* at 237-39. That "common-law ideal of limited state power accomplished by strict division of authority between judge and jury" motivates the jury provisions contained in Article III

and the Sixth Amendment. *Blakely*, 542 U.S. at 313. "[T]he principles that animated the decision in *Apprendi* and the bases for the historical practice upon which *Apprendi* rested" make clear that "there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum." *Harris*, 536 U.S. at 579 (Thomas, J., dissenting).

III. Applying *Apprendi* to Mandatory Minimums Is Consistent with the Goals of 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 and particularly the Sentencing Guidelines. *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)). The Court later made clear in *Blakely* and *Booker* that the rule in *Apprendi* applies to mandatory guidelines, despite Justice Breyer's effort in *Harris* to keep them shielded from *Apprendi*'s reach. More fundamentally, Justice Breyer's concern about the effect of *Apprendi* on sentencing reform was misplaced, as demonstrated by both state and federal sentencing practice since *Apprendi* was decided. In fact, 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.

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); *see also Apprendi*, 530 U.S. at 559 (Breyer, J., dissenting) (arguing that these basic goals of modern sentencing reform are also demanded by the Constitution as a matter of "basic 'fairness'"). But to treat mandatory minimums as an exception to the holding of *Apprendi*, *Blakely*, and *Booker* would, in fact, undermine these goals.

Although the Sentencing Guidelines have been advisory since *Booker*, they continue to achieve strong compliance from the federal judiciary.[5] This is consistent with the experiences of those states that have purely advisory guidelines.[6] The prevailing

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[5] *See United States Sentencing Commission Preliminary Quarterly Data Report* (3d Quarter Release, Preliminary Fiscal Year 2012 Data) tbl. 1 (2012), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2012_3rd_Quarter_Report.pdf (reporting that federal judges sentence below the guideline range without a government motion in only 16.7% of cases).

[6] *See, e.g.,* Virginia Criminal Sentencing Commission, 2011 Annual Report 12 (2011), *available at*

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 dissimilar cases being treated alike, while at the same time maintaining a general sentencing consensus.[7] After *Booker*, a federal sentencing judge is, in the estimation of Judge Nancy Gertner, "enable[d] . . . to exercise his or her discretion in a reasoned and careful way."[8] As another federal judge summarized the state of the law in testimony

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http://www.vcsc.virginia.gov/2011AnnualReport.pdf (reporting that Virginia's advisory guidelines have a compliance rate of approximately 79%); Maryland State Commission on Criminal Sentencing Policy, 2011 Annual Report 30 (2012), *available at* http://www.msccsp.org/Files/Reports/ar2011.pdf (reporting that Maryland's advisory guidelines have a compliance rate of 79.1%, based on data from fiscal year 2011); 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 6-7 (Feb. 11, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090210-11/Wright_statement.pdf (noting that compliance rates for Pennsylvania, North Carolina and Minnesota hovered around 75% despite dramatic differences in their legal force).

[7] Wright, *supra* note 6, at 9-11; Rachel E. Barkow, 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.

[8] The Honorable Nancy Gertner, Statement Before the United States Sentencing Commission Public Hearing, at 4 (July 10, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Gertner_Testimony.pdf.

before the United States Sentencing Commission in contrasting the pre- and post-*Booker* eras: "[T]he Guidelines g[a]ve judges the means to sentence similar defendants similarly, but took away the opportunity to sentence different defendants differently. We now have that opportunity."[9]

Allowing a loophole from the *Apprendi-Blakely-Booker* line of cases for facts that trigger mandatory minimums would significantly undercut the goals that the Guidelines are meant to achieve. Across the political spectrum, countless judges, legislators, academics and policy experts—from Chief Justice Rehnquist and Senator Orrin Hatch, to Professors Bill Stuntz and Stephen Schulhofer, to the Rand Institute, and even the U.S. Sentencing Commission—have warned that mandatory minimums increase disparity and undermine

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[9] Letter from the Honorable Donetta W. Ambrose, to Judith Sheon, Staff Director, U.S. Sentencing Comm'n, at 4 (June 25, 2008), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Ambrose_testimony.pdf; *see also, e.g.*, The Honorable Denny Chin, Statement Before the United States Sentencing Commission Public Hearing, at 3-4 (July 9, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Chin_testimony.pdf; The Honorable Robert J. Conrad, Jr., Statement Before the United States Sentencing Commission Public Hearing, at 3 (Feb. 11, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090210-11/Judge%20Robert%20Conrad%20021109.pdf.

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, in the words of the Sentencing Commission after a long study of how mandatory minimums have worked in practice, "fundamentally inconsistent with Congress'[s] simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines." *Id.* at 570.[11]

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[10] *See* 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); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L. Rev. 185, 194-95 (1993); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 595 (2001) ("[A]bolishing mandatory minima would be a great gain . . . ."); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199 (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); *United States Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011)* [hereinafter *Sentencing Commission Report*], *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

[11] *See also Sentencing Commission Report* 345–48.

Because mandatory sentences focus on a single variable, they often also do a disservice to victims. More than 77% of the cases involving mandatory minimum sentences in the federal system involve drug offenses.[12] Then-Judge Cassell testified on behalf of the Judicial Conference of the United States before the House of Representatives and explained how applying these mandatory minimums sends the wrong message to victims of crime. He noted that "[w]hen the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their real pain and suffering counts for less than some abstract 'war on drugs.'"[13] Moreover, as Professor Stuntz has written, these mandatory sentences—which strike judges, victims and academic observers as perversely misaligned—do not even "accurately capture

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[12] In the federal system, most mandatory minimum sentences apply to drug offenses. In fiscal year 2010, there were 19,896 primary offense counts carrying a mandatory minimum term of imprisonment. Of these, 77.4% were for drug offenses. Firearms offenses made up another 11.9%. *Sentencing Commission Report* D-2.

[13] Judge Paul Cassell, Statement on Behalf of the Judicial Conference of the United States Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (June 2007), *reprinted in* 19 Fed. Sent. R. 344, 344 (2007). One of Judge Cassell's cases demonstrates in vivid detail his point. In *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006), a first-time offender convicted of possessing a gun on three occasions—twice while selling approximately $350 worth of marijuana and once in his home—found himself with a sentence far greater than the sentences for individuals who rape, murder, kidnap, hijack an airplane, or detonate bombs in airplanes. *Id.* at 1244-46.

majoritarian sensibilities" because the sentences are set with the knowledge that many if not most of "those eligible for the minimum will not receive it, either because police fail to arrest or because prosecutors fail to charge the qualifying crime." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 595 (2001).

And although one of the main goals of the sentencing reform movement has been the elimination of racial disparities in sentencing, mandatory minimum sentencing has worked against that effort. Black offenders make up 31.5% of those convicted of offenses carrying mandatory minimum sentences, and Hispanic offenders make up 38.3%.[14] Black offenders comprise a greater percentage of offenders convicted of a statute carrying a mandatory minimum penalty than their already high percentage (23.8%) of the overall offender population.[15] In addition, black offenders are the least likely to receive relief from mandatory minimum sentences either by providing substantial assistance to the Government or through the safety valve provision,[16] and are thus the most likely to remain subject to

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[14] *Sentencing Commission Report* xxviii.

[15] Ricardo H. Hinojosa, Statement Before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security, at 2-3 (June 26, 2007), *reprinted in* 19 Fed. Sent. R., 335, 336 & tbl. 1 (2007).

[16] *See Sentencing Commission Report* xxviii (stating that black offenders receive relief from mandatory minimums in only 34.9% of cases, as compared to 46.5% for white offenders and 55.7% for Hispanic offenders).

mandatory minimum penalties at sentencing.[17] In the context of mandatory minimum sentences for firearms offenses, the racial disparities are even more pronounced. Black offenders make up 55.7% of those subject to a mandatory minimum sentence under § 924(c).[18] Indeed, the U.S. Sentencing Commission analyzed the effects of mandatory sentencing guidelines and mandatory minimum statutes and concluded that together they "have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation."[19] And recent scholarship suggests that the Sentencing Commission data may understate the racial disparities caused by mandatory minimums. According to one recent study, a prosecutor's initial decision to charge an offense carrying a mandatory minimum may account for the entire gap between the sentences for similarly situated black and white offenders. Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in the Criminal Justice Process: Prosecutors, Judges, and the Effects of* United States v. Booker, at 19 (Nov. 1, 2012), *available at* http://ssrn.com/abstract=2170148. Worse, the prosecutors in that study's sample "were nearly *twice*

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[17] *Id.* at xxix (stating that 65.1% of black offenders remained subject to mandatory minimums at sentencing, compared to 53.5% of white offenders and 44.3% of Hispanic offenders).

[18] *Id.* at 363.

[19] *United States Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 135 (2004).

as likely to bring such a charge against black defendants" even controlling for pre-charge case characteristics. *Id.* at 2. In contrast, "nothing in . . . judges' use of their post-*Booker* discretion exacerbated racial disparity" in sentencing. *Id.* at 4; *accord* Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. Empirical Legal Stud. 726 (2012) (finding that judicial discretion does not contribute to, and may mitigate, racial disparities in sentencing).

On top of all these other shortcomings, mandatory minimum sentences are less effective than discretionary sentencing and drug treatment in reducing drug-related crime. One study found, for instance, that conventional enforcement is nearly *twice* as cost-effective as mandatory minimums in reducing cocaine consumption. Treatment for heavy users was about *three* times more cost-effective.[20]

If the Court were to refuse to accept the logical import of the *Apprendi-Blakely-Booker* line of cases as it applies to mandatory minimum sentences, it would create 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

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[20] *See* Caulkins, et al., *supra* note 10, at 49.

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 applying a preponderance standard of proof. If the Court allows a loophole for mandatory minimum sentencing provisions, however, legislatures can simply bypass the jury's constitutional role to achieve the same result. Indeed, the Department of Justice has already recognized the value of a mandatory minimum loophole. After *Booker* was decided, the Justice Department considered a "fix" to the Sentencing Guidelines that would have turned the bottom of every Guideline range into a mandatory minimum, while leaving the Guidelines maximums advisory.[21] Of course, this would be no "fix" at all, but instead a direct circumvention of the jury guarantee.

But 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

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[21] *See* Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 Hous. L. Rev. 341, 356-59 (2006).

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). This view is shared by other experts as well.[22] In other words, mandatory minimum statutes "give prosecutors the ability to define their own sentencing rules." Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. at 595; *see also* Barkow, 152 U. Pa. L. Rev. at 102 (explaining that mandatory minimums permit the government to "dictate criminal punishment without an effective judicial check").

Mandatory minimums are anathema to the goals of the sentencing reform movement. Far from promoting uniformity, they exacerbate disparity, including racial disparity. They unsettle the balance of powers by increasing the power of prosecutors without a corresponding check from the judiciary (either judges or jurors). And they lead to grave injustices.[23] Thus, to exempt mandatory minimums

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[22] *See* 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; Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1963-64 (1992) (explaining that mandatory minimums give prosecutors a "good deal of bargaining power" by permitting them to "threaten a sentence that [otherwise] would have been implausible").

[23] *See, e.g.*, *United States v. Ezell*, 417 F. Supp. 2d 667, 671-73, (E.D. Pa. 2006) (imposing a 132-year mandatory minimum sentence under § 924(c) when the Sentencing Guideline range was 14-17.5 years), *aff'd*, 265 F. App'x 70 (3d Cir. 2008); *United States v. Hungerford*, 465 F.3d 1113, 1114 (9th Cir. 2006)

from the logical reach of *Apprendi* and *Booker* on policy grounds would impede the fundamental goals of sentencing reform, not further them.

B. Contrary to Justice Breyer's Concerns in *Harris*, Defendants Have Not Been Harmed Under *Apprendi.*

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 concerns, empirical analysis shows that *Apprendi*'s recognition of "jury trial rights substantially benefits defendants" by lowering sentences.[24] And this is

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(affirming a 159-year sentence for conspiracy to violate § 924(c), even though the defendant never touched the gun in question and had no prior criminal record) (2007); *see also* Judge Mark W. Bennett, *I'm Tired of Sending Drug Offenders to Prison*, Pittsburgh Post-Gazette, Nov. 8, 2012, at B5 (recalling a defendant addicted to methamphetamines who received a 20-year mandatory minimum sentence because of a prior drug conviction in county court), *available at* http://www.post-gazette.com/stories/opinion/perspectives/im-tired-of-sending-drug-offenders-to-prison-661058/.

[24] *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 (empirical review finding that

true whether one looks at cases that go to trial or at cases where the defendant pleads guilty.[25] 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 greatly when mandatory minimums apply without the check of a jury. In many instances, juries consider the sentences required by mandatory minimums to be unduly harsh and would impose substantially lower sentences if they had any say in the matter. *See, e.g., United States v. Angelos*, 345 F. Supp. 2d 1227, 1242 (D. Utah 2004) (in case where

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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%).

[25] *Id.* at 66-67, tbls. A1, A2. The empirical evidence post-*Booker* is to the same effect. *See United States Sentencing Commission Annual Report Sourcebook*, tbl. 31A (2008). 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).

§ 924(c) resulted in 61.5-year sentence due to the imposition of mandatory minimums, "the jurors recommended a mean sentence of about 18 years and a median sentence of 15 years," and "[n]ot one of the jurors recommended a sentence closely approaching" the mandatory minimum), *aff'd*, 433 F.3d 738 (10th Cir. 2006).[26]

Legislators often draft mandatory minimums with the most culpable offenders in mind, only to see them applied indiscriminately without regard to the defendant's blameworthiness.[27] Because these provisions sweep so broadly, prosecutors can use the threat of mandatory minimums to induce and, in some cases, effectively coerce guilty pleas on lesser charges.[28] Although interposing a jury requirement does not make mandatory minimums wise or

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[26] *See also* Bennett, *supra* note 23 ("[F]or all the times I've asked jurors after a drug conviction what they think a fair sentence would be, never has one given a figure even close to the mandatory minimum. It is always far lower.").

[27] *United States v. Dossie*, 851 F. Supp. 2d 478, 481 (E.D.N.Y. 2012) (Gleeson, J.) ("[T]he overwhelming majority of crack defendants who feel the pain of mandatory prison terms are not the criminals Congress had in mind in creating those penalties."); *see also* Paul H. Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. Crim. L. & Criminology 709, 721-22, 758 (2010) (describing examples from a survey of Pennsylvania residents in which people believed the maximum sentences for specific crimes should be lower than the state's applicable mandatory minimums).

[28] *See* Richard A. Oppel Jr., *Sentencing Shift Gives New Clout to Prosecutors*, N.Y. Times, Sept. 26, 2011, at A1, *available at* http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html?pagewanted=all.

effective, it does place a check on prosecutorial power—just as the Framers intended.

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 any corresponding legal or policy benefit. As a result, because the conditions that led Justice Breyer to resist the logical application of *Apprendi* counsel the opposite result in light of *Booker* and the empirical evidence, the Court should clarify that *Booker* effectively overruled *Harris* and that the holding of *Booker* applies to mandatory minimums as well.

IV. Applying *Apprendi* to Mandatory Minimums Will Reduce Uncertainty and Administrative Burdens on the Courts, Not Increase Them.

In addition to furthering the policy goals of modern sentencing reforms, resolving the conflict between *Apprendi* and *Harris* in favor of *Apprendi* will reduce uncertainty in the criminal justice

system and reduce administrative burdens on the courts by clarifying that all facts (other than a prior conviction) necessary to increase the defendant's minimum sentence are offense elements not sentencing factors. Under *Harris*, the answer to whether a fact must be proved to a jury beyond a reasonable doubt or to a judge by a preponderance is rarely so clear. "Congress . . . seldom directly addresses the distinction between sentencing factors and elements," *O'Brien*, 130 S. Ct. at 2175, leaving courts to divine Congressional intent through an amorphous balancing of often ambiguous factors, *id.* at 2176-78 (balancing five factors set forth in *Castillo v. United States*, 530 U.S. 120 (2000)). By itself, Section 924(c) has required this Court's intervention in three separate cases. *See Castillo v. United States*, 530 U.S. 120, 123 (2000); *Harris*, 536 U.S. at 552; *O'Brien*, 130 S. Ct. at 2173. Other divisions of authority can be expected to develop in the future. And each time Congress adds or revises a mandatory minimum, the statutory provisions must be interpreted anew, leaving prosecutors, defense attorneys, and courts to guess whether defendants have a right to insist on indictment and a trial by jury or not. *See* Judge Nancy Gertner, *What Has* Harris *Wrought*, 15 Fed. Sent. R. 83, 86 (2002) (describing the exercise of fitting the provisions of the substantive criminal law into the separate analytical "boxes" of elements and sentencing factors as "like the proverbial round peg and square hole").

As a result, the Government is wrong to suggest that applying *Apprendi* to facts triggering mandatory minimums will be disruptive or require an extensive

legislative response. BIO at 12-13. *Apprendi* provides a clear, easily enforced rule for prosecutors going forward: if they want to be entitled to a higher sentence based on a particular fact, they must charge the fact in the indictment and be ready to prove it beyond a reasonable doubt to a jury. Prosecutors are obviously well-equipped to meet these requirements. Indeed, as this case and *O'Brien* demonstrate, prosecutors often obtain indictments charging facts that they believe are sentencing factors. *See O'Brien*, 130 S. Ct. at 2173; BIO at 3.[29]

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[29] *See also* Superseding Indictment at 30, *United States v. Smith*, No. S1-4:11CR00246 CDP (FRB) (E.D. Mo. June 21, 2012) (charging that certain defendants "did knowingly use, carry, brandish, and discharge a firearm" in violation of § 924(c)); Indictment at 13-14, 24, *United States v. Najera*, No. 12-10089-01-23-MLB, (D. Kan. April 16, 2012) (charging that certain defendants "did knowingly possess firearms and brandish firearms"); Superseding Indictment at 2, *United States v. Loughner*, No. CR 11-0187-TUC-LAB (D. Ariz. Mar. 3, 2011) (charging that the defendant "did knowingly use, carry, brandish and discharge a firearm"); Dep't of Justice Criminal Resource Manual § 227 (sanctioning the practice of charging alternative means of violating statute), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00227.htm. Under current practice, if prosecutors are unable to prove the fact beyond a reasonable doubt, they drop the charge from the indictment and ask the court to find the fact itself. *See O'Brien*, 130 S. Ct. at 2173-74. Applying *Apprendi* to facts triggering mandatory minimums will prevent prosecutors from getting two successive chances to prove they are entitled to an increased minimum sentence.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to reverse the decision of the court of appeals.

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