No. 08-1569

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MARTIN O'BRIEN AND ARTHUR BURGESS,
Respondents.

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

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

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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. 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 government 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). And the Court has long held that the Constitution protects a defendant "against conviction except upon proof beyond a reasonable doubt of every fact

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[1] The parties have consented to the submission of this brief. 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.

necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

In *United States v. Booker*, 543 U.S. 220 (2005), this Court affirmed that these basic principles required that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 244; *see also Blakely v. Washington*, 542 U.S. 296, 304 (2004) ("When a judge inflicts punishment that the jury's verdict does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." (quotation marks omitted)). Because there is no constitutionally supportable reason for exempting those facts that require the application of a statutory mandatory minimum from this foundational rule, this Court should clarify that it is impermissible for judicial factfinding to set the limits of any legally mandated sentencing range.

As explained herein, the Court's prior decisions concerning mandatory minimums in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and *Harris v. United States*, 536 U.S. 545 (2002), do not compel a different result. Neither decision can survive the constitutional holdings in *Blakely, Booker,* and *Cunningham v. California*, 549 U.S. 270 (2007). Nor should they. Virtually 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 civil 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.

These concerns with proportionality and fairness are clearly implicated here. The government claims that it is entitled to have a judge find facts under a civil standard of proof triggering the application of a mandatory minimum that would more than triple Respondent O'Brien's and more than quadruple Respondent Burgess's sentence. This is contrary not only to Respondents' Sixth Amendment right to have a jury find any fact that, as a matter of law, is necessary to increase their sentences, but also to fundamental guarantees of Due Process. Congress may not convert an element of a crime into a sentencing factor simply for the purpose of streamlining the process of criminal convictions, which is what the government admits occurred here. As this Court has repeatedly held, it will not countenance legislative efforts to evade the requirements of the Fifth and Sixth Amendments. Thus, even if this Court is not prepared to declare a rule requiring that every fact, other than a prior conviction, that mandates a binding sentencing range must be found by the jury or admitted by the defendant, the government's interpretation of the

statute at issue here still fails under the Court's established Due Process principles.

At a minimum, because of the significant constitutional difficulties with the government's interpretation of 18 U.S.C. § 924(c), this Court should invoke the canon of constitutional avoidance to find that Congress did not intend to convert an element of a crime into a sentencing factor.

ARGUMENT

I. *Booker* Dictates that All Facts that, as a Matter of Law, Increase a Defendant's Sentencing Range Must Be Found by the Jury or Admitted by the Defendant.

In its landmark decision 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 its prior decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), 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*, 542 U.S. at 303-04; *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]

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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");

The danger of legislative overreaching that the jury is meant to guard against 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 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).

Valerie P. Hans & Neil Vidmar, JUDGING THE JURY 155 (1986) ("Because lawmakers cannot anticipate every set of circumstances, it is up to the jury to adjust the general rule of law to the justice of the specific case."); *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, 48-84, 106-16 (2003) (describing the Framers' view of the jury's role in a system of 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).

This treatment makes sense, of course, because just like an increase in an authorized maximum, an increased "mandatory minimum entitles 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.* (quotation marks omitted). That becomes clear from an examination of this very case, in which the mandatory minimums to which the government claims entitlement would more than triple O'Brien's § 924(c) sentence (from 102 months to 360 months) and more than quadruple Burgess's § 924(c) sentence (from 84 months to 360 months), without a jury ever passing judgment on the facts that trigger these increases and under a preponderance of the evidence standard. The Court's decision in *Booker* makes clear that the Constitution does not countenance such an end-run around the jury guarantee.

A. The Court's Decisions in *McMillan* and *Harris* Do Not Require a Different Result.

This is not the first case in which this Court has faced the question of whether a defendant's right to trial by jury attaches to facts that increase a binding minimum sentence. But it is the first case in which this Court has considered the question in light of its holdings in *Blakely*, *Booker,* and *Cunningham*. As explained below, the Court's prior decisions regarding the applicability of the jury right to the statutory minimum schemes at issue in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and *Harris v. United States*, 536 U.S. 545 (2002), must therefore be reexamined in light of the pronouncements and

principles set forth in *Blakely*, *Booker,* and *Cunningham*.

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

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. *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), and its progeny, *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 scant 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, 244 (1999), this Court refused to treat the *Winship* Due Process analysis as defining 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 v. New Jersey, 530 U.S. 466 (2000), 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*: "it 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).

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." 530 U.S. at 487 n.13.

Justice Thomas's concurrence, however, 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 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.

2. As Five Justices in *Harris* Concluded, and as *Booker* Makes Clear, *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. 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 practical and legal consequences for the operation of the sentencing guidelines.

Harris involved 18 U.S.C. § 924(c)(1)(A)(ii), which, as relevant, imposed a higher minimum sentence for the possession of a firearm in furtherance of a drug trafficking crime or a crime of violence where the defendant was found by the court to have brandished the firearm. The sentencing court in *Harris* found by a preponderance of the evidence at sentencing that the defendant had brandished a weapon and therefore imposed the seven-year minimum sentence for brandishing, rather than the five-year minimum for possession. *Harris*, 536 U.S. at 551. In a plurality opinion written by Justice Kennedy, four Members of the Court concluded that *McMillan* was distinguishable from *Apprendi* and was entitled to deference under principles of *stare decisis*. The plurality explained that "[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. Thus, 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. *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*

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.

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)).

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 a decade since the rule was announced. Over this decade, *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 ten 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*, 129 S. Ct. 711 (2009); *Spears v. United States*, 129 S. Ct. 840 (2009). Indeed, *Apprendi* is now an established precedent that has been accepted even by those Members of the Court, like Justice Breyer, who believe 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)). 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.

If there were any doubt left on this score, *Booker* itself erases it. By applying *Apprendi* to the Sentencing Guidelines, even though the Guidelines do not exceed the relevant statutory maximum, the Court 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 (Nos. 04-104 and 04-105).

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 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 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).

To be sure, there is language in *Booker* that can be (and has been) read to exclude judicial factfinding that increases the bottom of a binding sentencing range. *See Booker*, 543 U.S. at 244. But this reading ignores not only the logic of *Apprendi*, as five Justices in *Harris* concluded, but, more fundamentally, the principles that underlie the guarantee of trial by jury and that animated this Court's decisions in *Apprendi, Blakely*, *Booker,* and *Cunningham*. 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 the unanimous concurrence of 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" animates 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).

In this case, these principles are clearly implicated. Prosecutors conceded that they could not prove to a jury beyond a reasonable doubt the fact that Respondents not only possessed a firearm in furtherance of a crime of violence, but that the firearm was a machinegun, one of the "most dangerous and threatening weapons available." Gov't Br. at 31. The judge, using a preponderance of the evidence standard, and constrained by appellate review, was, prosecutors thought, more likely to give them the factual finding and thirty-year sentence that they desired. Although the government argues that giving Respondents the right to demand that the government put its proof before a jury would serve "no great policy interest," *id.* at 33, *Booker* held otherwise. *See* 543 U.S. at 244 ("[T]he interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and this is now enshrined in the Sixth Amendment—has always outweighed the

interest in concluding trials swiftly."). Accordingly, the Court should recognize that the government's interpretation of § 924(c)(1)(B)(ii), along with *Harris* and *McMillan*, is inconsistent with *Booker*.

II. Applying *Apprendi* to Mandatory Minimums Is Consistent with the Sentencing Guidelines and Modern Sentencing Reform.

Justice Breyer resisted taking *Apprendi* to its logical conclusion in *Harris* because of his concern than 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)). 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. In any event, Justice Breyer's concern about the effect of *Apprendi* on sentencing reform was misplaced, as demonstrated by state and federal sentencing experiences. 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 United States Sentencing Guidelines have been advisory since the Court's decision in *Booker*, they continue to achieve strong compliance from the federal judiciary.[4] This is consistent with the experiences of those states that have purely advisory guidelines.[5] The prevailing

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[4] *See* UNITED STATES SENTENCING COMMISSION PRELIMINARY QUARTERLY DATA REPORT (2nd Quarter Release, Preliminary Fiscal Year 2009 Data) tbl. 1 (2009) *available at* http://www.ussc.gov/sc_cases/USSC_2009_Quarter_Report_2nd.pdf (reporting that federal judges sentence outside the guideline range without a government motion in only 17% of cases).

[5] *See, e.g.,* Virginia Sentencing Commission, 2008 Annual Report 16 (2008), *available at* http://leg2.state.va.us/

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.[6] As one federal judge

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dls/h&sdocs.nsf/By+Year/RD4152008/$file/RD415.pdf (reporting that Virginia's advisory guidelines have a compliance rate of 79.8%); National Association of Sentencing Commissions, THE SENTENCING GUIDELINE 7 (Feb. 2009), *available at* http://www.ussc.gov/STATES/NASC_2009_02.pdf (reporting that Maryland's advisory guidelines have a compliance rate of approximately 80%, based on data from fiscal year 2008); 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/AGENDAS/20090210/Wright_statement.pdf (noting that compliance rates for Pennsylvania, North Carolina and Minnesota hovered around 75% despite dramatic differences in their legal force).

[6] Wright, *supra* note 5, at 9-11 (pointing out that compliance with advisory guidelines is strong and that the Commission best serves the goals of the Sentencing Reform Act by providing judges with data on what other judges are doing instead of seeking to mandate particular sentences); 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/AGENDAS/20090709/Barkow_testimony.pdf (citing compliance data and explaining that the current scheme better achieves proportionality); Robert Weisberg, Edwin E. Huddleson, Jr., Professor of Law and Director, Stanford Criminal Justice Center, Stanford University, Statement Before the United States Sentencing Commission,

summarized for 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."[7]

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

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Regional Hearing, at 2 (May 28, 2009) (stating that "[t]he current situation is a reasonably healthy, if accidental, equilibrium"), *available at* http://www.ussc.gov/AGENDAS/20090527/Weisberg_testimony%20.pdf.

[7] Letter from the Honorable Donetta W. Ambrose, Chief Judge, Western District of Pennsylvania, to Judith Sheon, Staff Director, U.S. Sentencing Comm'n, at 4 (June 25, 2008), *available at* http://www.ussc.gov/AGENDAS/20090709/Ambrose_testimony.pdf; *see also, e.g.*, The Honorable Denny Chin, United States District Judge, Southern District of New York, Statement Before the United States Sentencing Commission Public Hearing, at 3-4 (July 9, 2009), *available at* http://www.ussc.gov/AGENDAS/20090709/Chin_testimony.pdf; The Honorable Nancy Gertner, United States District Judge, District of Massachusetts, Statement Before the United States Sentencing Commission Public Hearing, at 1-4 (July 10, 2009), *available at* http://www.ussc.gov/AGENDAS/20090709/Gertner_Testimony.pdf; The Honorable Robert J. Conrad, Jr., Chief District Judge, Western District of North Carolina, Statement Before the United States Sentencing Commission Public Hearing, at 3 (Feb. 11, 2009), *available at* http://www.ussc.gov/AGENDAS/20090210/Judge%20Robert%20Conrad%20021109.pdf.

increase disparity and undermine proportionality.[8] By elevating a single variable over any other consideration, mandatory minimums "rarely reflect an effort to achieve sentencing proportionality." *Harris*, 536 U.S. at 571 (Breyer, J., concurring in part and concurring in the judgment). They are "fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines." *Id.* at 570.[9]

Because mandatory sentences focus on a single variable, they often also do a disservice to victims. Nearly 83% of the cases involving mandatory minimum sentences in the federal system involve drug offenses.[10] Judge Cassell recently testified on

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[8] *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); Stephen 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).

[9] *See also* 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 (1993).

[10] In the federal system, most mandatory minimum sentences apply to drug offenses. In fiscal year 2006, there were 33,636 counts of conviction carrying a mandatory minimum term of

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.'"[11]

And although one of the main goals of the sentencing reform movement has been the elimination of racial disparities in sentencing, the existence of mandatory minimum sentencing has worked against that effort. Black offenders make up 32.9% of those convicted of a mandatory minimum

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imprisonment, affecting 20,737 offenders—roughly 10 percent of the federal prison population. Most of these counts of conviction—82.9%—were for drug offenses. Firearms offenses made up another 11.4%. Ricardo H. Hinojosa, Statement Before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security, at 2 (June 26, 2007), *reprinted in* 19 FED. SENT. REP. 335 (2007).

[11] 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. REP. 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 twice selling approximately $350 worth of marijuana while armed 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.

sentence, and Hispanic offenders make up 38.2%.[12] 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.[13] In addition, excluding immigration offenses, both Hispanic and black offenders comprise a greater percentage of non-immigration offenders convicted of a statute carrying a mandatory minimum penalty than their percentage in the overall fiscal year 2006 offender population.[14] 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."[15] On top of all these other shortcomings, mandatory minimum sentences are less effective than discretionary sentencing and drug treatment in reducing drug-related crime.[16]

If the Court were to refuse to accept the rule of law in 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

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[12] Hinojosa, *supra* note 10, 19 FED. SENT. REP. at 336 & tbl. 1.

[13] *Id.* at 336.

[14] *Id.*

[15] 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).

[16] *See generally* Caulkins, et al., *supra* note 8.

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, 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.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html. 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 Guidelines' range into a mandatory minimum, while leaving the Guidelines maximums advisory.[17]

This would have been no "fix" at all. As virtually every expert to have considered the issue has concluded, mandatory minimums are anathema to the goals of the sentencing reform movement. Thus, to exempt mandatory minimums from the logical reach of *Apprendi* and *Booker* on policy grounds would set back all the fundamental goals of sentencing reform, not advance 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.

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

But contrary to Justice Breyer's predictions, empirical analysis shows that *Apprendi*'s recognition of "jury trial rights substantially benefits defendants" by lowering sentences.[18] And this is true whether one looks at cases that go to trial or at cases where the defendant pleads guilty.[19] 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

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[18] *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%).

[19] *Id.* at 66-67, tbls. 1, 2. The empirical evidence post-*Booker* is to the same effect. *See* UNITED STATES SENTENCING COMMISSION ANNUAL REPORT SOURCEBOOK, tbl. 31A (2008) (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).

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 overly 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 § 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).

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.

III. Even Apart from the Sixth Amendment Issues, Treating the Nature of the Weapon Used in this Case as a Sentencing Factor Would Exceed *McMillan*'s Due Process Limits on Legislative Discretion To Establish Sentencing Factors.

Even apart from *Apprendi* and *Booker*, this Court has long recognized that the Constitution places limits on a legislature's power to define the elements of criminal offenses. *See Patterson*, 432 U.S. at 210; *McMillan*, 477 U.S. at 85; *Monge v. California*, 524 U.S. 721, 724 (1998); *Apprendi*, 530 U.S. at 552-53 (O'Connor, J., dissenting); *Harris*, 536 U.S. at 550; *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting); *Booker*, 543 U.S. at 330-31 (Breyer, J., dissenting in part). These Due Process limits derive from the principle that legislatures may not be permitted to "evade the indictment, jury, and proof requirements by labeling almost every relevant fact a sentencing factor." *Harris*, 536 U.S. at 550.

Here, even if the Court declines to recognize as a *per se* rule that every fact, other than a prior conviction, that mandates a binding sentencing range as a matter of law must be found by the jury or admitted by the defendant, the legislative choice to treat as a sentencing factor a fact that increases a

binding minimum sentence is still subject to constitutional scrutiny under the Due Process test adopted by *McMillan*, interpreted by *Almendarez-Torres v. United States,* 523 U.S. 226, 239-47 (1998), and reaffirmed as it applies to mandatory minimums by *Harris*, 536 U.S. at 568. Applying that test here, if Congress did intend to convert a traditional element of an established crime into a sentencing factor triggering at least a twenty-year increase in the mandatory minimum sentence, and if it did so for the purpose of avoiding the inconvenience and unpredictability of jury factfinding, then it clearly overstepped its constitutional authority.

The government has argued that this is exactly what happened. Gov't Br. at 32-33. According to the government, Congress thought that keeping the question of firearm-type from the jury would "simplif[y] and streamline[] guilt-stage proceedings," *id.* at 33, even though the government admits, as it must, that, "such evidence is usually clear-cut and can be grasped by a jury." *Id.* (citing *Castillo v. United States*, 530 U.S. 120, 127 (2000)).[20] Moreover, in the government's view, Congress converted firearm-type from an element into a sentencing factor because "judicial fact-finding and

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[20] As Justice Breyer explained for the Court in *Castillo*, "to ask a jury, rather than a judge, to decide whether a defendant used or carried a machinegun would rarely complicate a trial or risk unfairness" because the type of weapon allegedly used or carried will normally be part of the government's case and the "evidence is unlikely to enable a defendant to respond *both* (1) 'I did not use or carry *any* firearm,' and (2) 'even if I did, it was a pistol, not a machinegun.'" *Castillo v. United States*, 530 U.S. 120, 127-28 (2000).

appellate review ensure consistent application of the firearm-type enhancement," which is, the government tells us, "no small concern where such an important crime-control interest is at stake." *Id.* These benefits, though "modest," are entirely justified, the government opines, since "no great policy interest would be served by treating firearm type as an offense element because a jury determination is unlikely to improve the accuracy of fact-finding on such an issue." *Id.*

It is difficult to imagine a clearer admission of a legislative purpose to "evade the requirements of the Fifth and Sixth Amendments." *Harris*, 536 U.S. at 568. Congress, the government argues, decided that its interest in controlling the possession of certain types of weapons was so important that whether a defendant was guilty of possessing one of these weapons, as opposed to a less dangerous firearm, should be decided by a judge by a preponderance of the evidence, and subject to government appeal, rather than by a jury beyond a reasonable doubt, and in the case of an acquittal, subject to no further judicial review. This naked—and admitted—purpose to evade the constitutional protections that attach to offense elements, stands in sharp contrast to the legislative purposes animating the statutory provisions at issue in *Harris*, *McMillan* and *Almendarez-Torres*.[21]

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[21] In *Harris* and *McMillan*, the legislative purpose was to specify the weight that judges should give to a fact that they had previously used to inform their discretion. *Harris*, 536 U.S. at 568; *McMillan*, 477 U.S. at 89-90. In *Almendarez-Torres*, Congress merely provided that the government need not prove

Thus, to the extent that § 924(c)(1)(B)(ii) is interpreted as the government wishes to set forth sentencing factors rather than elements, it plainly violates the Due Process test applied in *McMillan*, *Almendarez-Torres* and *Harris*.

IV. The Canon of Constitutional Avoidance Counsels in Favor of Respondent's Interpretation of the Statute.

At the very least, the Court should invoke the canon of constitutional avoidance to construe the machinegun provision as an offense element in order to avoid the grave constitutional difficulties, detailed above, that would follow if it were deemed a sentencing factor. The Court has repeatedly stated that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This approach "reflects the prudential concern that constitutional issues not be needlessly confronted," while also recognizing that Congress does not typically "intend[] to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.* Given the severity of the potential Sixth Amendment and Due Process

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that a defendant previously convicted of a crime, was in fact convicted of that crime. Similarly, in *Patterson*, 432 U.S. at 207, and *Ice*, 129 S. Ct. at 719, this Court emphasized that the States should be given substantial leeway in determining the elements of criminal offenses when their purpose and effect is to "temper the harshness of … historical practice." *Ice*, 129 S. Ct. at 718.

problems, the canon of constitutional avoidance is particularly probative here.

CONCLUSION

For the reasons stated above, *amicus* urges this Court to affirm the decision of the Court of Appeals for the First Circuit.

Respectfully submitted,

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