No. 12-7099

IN THE
Supreme Court of the United States

BRYAN BURWELL,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

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

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

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

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

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long held that criminal statutes must be interpreted against the background common law commitment to *mens rea* as the touchstone of criminally blameworthy conduct. Accordingly, this Court presumes Congress intends to require a culpable mental state where a statute is silent with respect to the required *mens rea*. The D.C. Circuit's sharply divided *en banc* decision below threatens to narrow this historic presumption beyond recognition and warrants this Court's review. The decision holds that the foundational presumption of *mens rea* applies only to the minimum number of offense elements necessary to avoid criminalizing potentially innocent conduct. Thus, for the en banc majority, there was no need for the government to prove that the defendant *knowingly* possessed a machinegun, as opposed to some other type of gun, because possessing any sort of gun in the commission of the underlying offense was itself illegal.

That holding conflicts with controlling authority in two important ways. *First*, it ignores this Court's reasoning in *United States v. O'Brien*, 130 S. Ct. 2169 (2010). There this Court concluded that Congress intended that the very element in question in this case—a defendant's possession, use, or carrying of a machinegun, rather than some other kind of firearm—be an element of a separate aggravated offense in part because Congress recognized "the moral depravity *in choosing* [such a] weapon." 130 S. Ct. at 2178 (emphasis added). Accordingly, Congress chose to punish those who

"chos[e]" to engage in such conduct with a *minimum* of thirty years in prison. But the "deprav[ed] … choice" that *O'Brien* found crucial is irrelevant on the D.C. Circuit's account; it subjects a defendant to the thirty-year mandatory minimum whether he chose to use a machine gun or genuinely and reasonably thought he was using a less dangerous weapon. *Id.*

Second, the decision below conflicts with this Court's long-standing recognition that federal criminal statutes are enacted against the backdrop of the common law requirement of the "concurrence of an evil-meaning mind with an evil-doing hand." *Morissette v. United States*, 342 U.S. 246, 251 (1952). While the en banc majority below pays lip service to this foundational commitment, its decision dramatically narrows the traditional presumption of *mens rea*, as Judge Kavanaugh explained at length in his dissent. Pet. App. 54a–72a (Kavanaugh, J., dissenting). This Court firmly rejected the majority's narrow interpretation of the *mens rea* presumption in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009).

The *mens rea* presumption is particularly important in cases like this one where Congress has singled out one offense element—here, possession of a machinegun—as independently triggering an extreme increase in the minimum sentence. As the Model Penal Code explains, the *mens rea* presumption reflects the fundamental principle that the severity of criminal punishment should reflect the defendant's moral culpability. Thus, even if this Court's characterization in *O'Brien* of the moral depravity in choosing a machinegun is not by itself

controlling, it certainly reflects the background assumption against which Congress legislated: that the severe sentence mandated by the statute for those who possess a machinegun be reserved for those who did so knowingly or recklessly.

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

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts with This Court's Reasoning in *O'Brien*.

The opinion of the en banc majority below is in significant tension with this Court's opinions interpreting § 924(c). Section 924(c) of Title 18 of the United States Code makes it unlawful to use or carry a firearm during or in relation to a crime of violence or drug trafficking crime or to possess a firearm in furtherance of such a crime. The base 924(c) offense is punishable by a mandatory minimum sentence of five years. In *United States v. O'Brien*, 130 S. Ct. 2169 (2010), this Court unanimously held that § 924(c)(1)(B)(ii) creates a separate aggravated offense carrying a thirty-year mandatory minimum when the firearm is a machinegun. In that case, this Court rejected the Government's argument that the machinegun provision was a sentencing factor to be decided by the trial judge rather than an element to be found beyond a reasonable doubt by the jury. This Court held that "[t]he immense danger posed by

machineguns, *the moral depravity in choosing the weapon*, and the substantial increase in the minimum sentence provided by the statute support the conclusion that this prohibition is an element of the crime, not a sentencing factor." 130 S. Ct. at 2178 (emphasis added). The Court thus presupposed a reading of the statute that requires defendants to make culpable choices to trigger the automatic thirty-year sentence, and those presuppositions drove the Court's holding that Congress intended the machinegun provision to be an element of a separate crime.

The en banc opinion on review here, which holds that a defendant should receive the thirty-year mandatory minimum even where he does not know he is using a machinegun (or, for that matter, even where he lacks any awareness of the mere possibility that it is a machinegun), is not consistent with *O'Brien*'s reasoning. If Congress intended the use of a machinegun to be a statutory element because it wanted a jury to pass on whether the defendant engaged in the "moral depravity in choosing" a machinegun, then Congress necessarily intended the element to be satisfied *only* where a defendant made that morally depraved choice—or was at least aware of the risk that he was choosing such a weapon. The strict liability reading of the en banc majority, in contrast, would impose three decades of punishment on a defendant automatically, even when the defendant mistakenly and reasonably believed he was using a different type of firearm.

The very logic of the D.C. Circuit's opinion shows that it did not fully appreciate *O'Brien's* reasoning.

The en banc majority insisted that it was bound by *United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992), a D.C. Circuit opinion that predated both *O'Brien* and *United States v. Castillo*, 530 U.S. 120 (2000), an earlier case interpreting a pre-amendment version of the same provision.[2] *Harris*, however, rested on assumptions about the conduct Congress intended to target that are inconsistent with *O'Brien*'s teachings. The *Harris* court wrongly assumed that the machinegun provision was a sentencing factor, not an element, leading the court to focus on a very different-looking crime. *See id.* at 259 ("[T]he essential elements of the crime [are] the commission of the predicate offense and the use of a firearm in its execution"). The *Harris* court further assumed that, regardless of the "enhanced" term of imprisonment triggered by the machinegun provision, "there does not seem to be a significant difference in *mens rea* between a defendant who commits a drug crime using a pistol and one who commits the same crime using a machine gun; the act is different, but the mental state is equally blameworthy." *Id.* Even though both of these central assumptions had been contradicted by *O'Brien*, the en banc majority below maintained that "we cannot say that the conceptual underpinnings of *Harris* have been weakened at all." Pet. App. 15a.

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[2] The discussion of the machinegun provision in *Castillo* anticipated that in *O'Brien*. *See Castillo*, 530 U.S. at 126 ("[T]he difference between carrying, say, a pistol and carrying a machinegun (or, to mention another factor in the same statutory sentence, a 'destructive device,' i.e., a bomb) is great, both in degree and kind.").

Notably, the fifth and decisive vote making up the majority was provided by Judge Sentelle, who concurred not because he was persuaded by the majority's reasoning but because errors in statutory interpretation "are reparable by the action of the Supreme Court" and "when the question is a close one—and this one I think is exceedingly close—I will accept the weight of precedent and vote with the majority to leave undisturbed this circuit's controlling interpretation." Pet. App. 31a (Sentelle, J., concurring).

And as Judge Kavanaugh recognized in dissent, the fact that the machinegun provision constitutes an element of a separate crime rather than a sentencing factor is a critical factor in deciding whether a *mens rea* term attaches. That is because offense elements trigger a presumption of *mens rea* while sentencing factors do not. Pet. App. 54a–55a (Kavanaugh, J. dissenting).[3] This presumption alone

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[3] It is therefore no coincidence that the circuits that have decided or assumed that a defendant must know that the firearm was "a machinegun" in order to trigger the severe thirty-year minimum sentence also assumed that the weapon type provisions made out elements of separate crimes. *See United States v. Franklin*, 321 F.3d 1231, 1240 (9th Cir. 2003) (holding that the "evidence was sufficient for a rational jury to find that [the defendant] knew the weapon was capable of being fired in an automatic setting"); *United States v. Rodriguez*, 54 F. App'x. 739, 747 (3d Cir. 2002) (assuming without deciding, after *Castillo* had indicated that the machinegun provision was a separate crime, that knowledge of the type of weapon is an element of the offense); *United States v. Dixon*, 273 F.3d 636, 640–41 (5th Cir. 2001) (assuming without deciding that *Castillo* makes defendant's knowledge of the type of weapon an element of the offense). Meanwhile, several Circuits that held the

should have led the en banc majority to reconsider *Harris*; but the majority also neglected *O'Brien*'s reliance on the extraordinary thirty-year mandatory penalty and the depth of subjective "depravity" Congress had implicitly assigned to the offense. *O'Brien*, 130 S. Ct. at 2177–78. The en banc majority's disregard for these important factors puts its opinion at odds with this Court's precedent.

II. The Decision Below Conflicts with This Court's Long-Standing Recognition That Federal Criminal Statutes Are Enacted Against the Backdrop of the Common Law Requirement of *Mens Rea*.

As Judge Kavanaugh explained at length in his dissent below, the opinion of the en banc majority contravenes this Court's long-standing recognition that federal criminal statutes are enacted against the backdrop of the common law requirement of *mens rea*. Pet. App. 53a–72a (Kavanaugh, J., dissenting). *Mens rea* is foundational to our criminal justice system, as this Court has repeated time and

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contrary—that no *mens rea* was required—based their holdings in whole or in part on the belief that the machinegun provision was a sentencing factor and not an element of a separate crime. *See, e.g.*, *United States v. Eads*, 191 F.3d 1206, 1213–14 (10th Cir. 1999); *United States v. Gamboa*, 439 F.3d 796, 812 (8th Cir. 2006) ("Because the facts concerning the type of firearm used in § 924(c)(1) are sentencing factors, and not elements of the offense, we also conclude that the United States was not required to show that Gamboa subjectively knew that the firearm was a machinegun.").

again. "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951). This requirement of the "concurrence of an evil-meaning mind with an evil-doing hand" has deep roots "in American soil." *Morissette*, 342 U.S. at 251–52. Judge Kavanaugh correctly emphasized that "[t]he presumption of mens rea is no mere technicality, but rather implicates 'fundamental and far-reaching issues'[.]" Pet. App. 53a (Kavanaugh, J., dissenting) (citing *Morissette*, 342 U.S. at 247).

Judge Kavanaugh's comprehensive survey of the history of *mens rea* in this Court's jurisprudence reveals that the presumption applied by courts rests firmly on the "bedrock historical foundation" of the common law. Pet. App. 61a (Kavanaugh, J., dissenting). *See Staples v. United States*, 511 U.S. 600, 619 (1994) (applying the "background rule of the common law favoring *mens rea*"); John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2466 (2003) ("[I]n the absence of clear congressional direction to the contrary, textualists read mens rea requirements into otherwise unqualified criminal statutes because established judicial practice calls for interpreting such statutes in light of common law mental state requirements.").

This Court applies the presumption of *mens rea* regardless of whether the statute explicitly indicates that *mens rea* is required for the offense. "[T]he failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not

signal a departure from this background assumption of our criminal law." *Liparota v. United States*, 471 U.S. 419, 426 (1985). The fact that a federal crime is an invention of Congress rather than a direct inheritance from the common law bears little weight in the analysis. *See Staples*, 511 U.S. at 620 n.1 (Ginsberg, J., concurring in the judgment) ("Contrary to the dissent's suggestion, we have not confined the presumption of *mens rea* to statutes codifying traditional common-law offenses, but have also applied the presumption to offenses that are 'entirely a creature of statute' . . . .").

Importantly, as Judge Kavanaugh recognized, the question of *mens rea* must be analyzed separately for each element of the offense. Pet. App. 57a (Kavanaugh, J., dissenting); *United States v. Bailey*, 444 U.S. 394, 406 (1980) ("[C]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime.") (quoting Model Penal Code Commentaries) (alteration in original).

A. As Judge Kavanaugh's Dissent Explained, This Court Has Firmly Rejected the Reasoning of the Decision Below that the *Mens Rea* Presumption Applies Only to the Minimum Number of Offense Elements Necessary to Avoid Criminalizing Potentially Innocent Conduct.

In reaching his conclusion that the presumption of *mens rea* applied to the criminal statute at issue here, Judge Kavanaugh drew on the reasoning of *Flores-Figueroa v. United States*, 556 U.S. 646 (2009). In *Flores-Figueroa*, this Court examined a federal statute concerning aggravated identify theft that imposed a mandatory, consecutive two-year prison term on any person who, in the course of committing a set of particular predicate crimes, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. § 1028A(a)(1). The government argued that the *mens rea* "knowingly" referred only to the knowing transfer, possession, or use of "something" without lawful authority. *Flores-Figueroa*, 556 U.S. at 648. This position exempted the last few words of the provision from the *mens rea* requirement—in the government's view, it did not matter whether the offender knew that the means of identification belonged to another person. *Id.*

This Court rejected the government's parsimonious interpretation of the statute, holding that the statute's *mens rea* requirement extended to all of the elements of the offense. *Id.* at 647. As

Judge Kavanaugh recognized, *Flores-Figueroa* stands for the principle that "the presumption of *mens rea* applies not just when the presumption is necessary to avoid criminalizing apparently innocent conduct, but also when the presumption is necessary to avoid convicting a defendant of a more serious offense for apparently less serious conduct." Pet. App. 85a (Kavanaugh, J., dissenting). Indeed, none of the opinions in *Flores-Figueroa* accepted the government's argument that the *mens rea* implicit in the defendant's conviction of a predicate crime and explicit in the statute's requirement that the defendant act "knowingly" and "without lawful authority" sufficed to dispense with a knowledge requirement as to the fact that the identification belonged to another person. *Id.* at 86a; *Flores-Figueroa*, 556 U.S. at 656.

The long-standing common-law presumption of *mens rea* noted by Judge Kavanaugh is also reflected in the Model Penal Code.[4] As the Comments to the Model Penal Code explain, "unless some element of mental culpability is proved with respect to each material element of the offense, no valid criminal conviction may be obtained." Model Penal Code § 2.02 cmt. 1 (1985). Given this Court's unanimous holding in *O'Brien* that the § 924(c)(1)(B)(ii)

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[4] Led by Herbert Weschler and assisted by distinguished judges, law professors, and lawyers, the drafters of the Model Penal Code distilled principles from the common law into a systematic criminal code that could be enacted by state legislatures. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 New Crim. L. Rev. 319, 322–26 (2007).

machinegun provision constitutes a separate element, 130 S. Ct. at 2180, the guidance of the Model Penal Code is clear: "When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto." Model Penal Code § 2.02(3). *See also* Herbert Weschler, *A Thoughtful Code of Substantive Law*, 45 J. Crim. L., Criminology, & Police Sci. 524, 527–28 (1955) ("Unless the actor realized or should have realized that his behavior threatened such unjustifiable injury; unless he knew or should have known the facts that gave his conduct its offensive quality or tendency, it was an accident. The threat of sanctions cannot act as a deterrent; the conduct does not show the individual to be a larger menace than another man.").

The Model Penal Code has been particularly influential in the area of *mens rea*, and this Court has relied on the Model Penal Code's *mens rea* provisions on numerous occasions when interpreting federal statutes. *See, e.g.*, *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978) (noting and approving the Model Penal Code's position that strict-liability offenses occupy a "generally disfavored status"); *Bailey*, 444 U.S. at 406 (noting that the Model Penal Code "stated" what prior Supreme Court cases had "implied": "[C]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime[.]") (alterations in original); *Holloway v.*

United States, 526 U.S. 1, 10–11 & n.11 (1999) (adopting the "views endorsed by the authors" of the Model Penal Code with respect to an expression of conditional intent); *see also United States v. Jewell*, 532 F.2d 697, 706–07 (9th Cir. 1976) (Kennedy, J., dissenting) (approving of the Model Penal Code's clarification of the common-law doctrine of willful blindness). Indeed, the Model Penal Code's specific expression of the presumption of *mens rea* has been previously cited by Justices of this Court. *See United States v. Freed*, 401 U.S. 601, 613 (1971) (Brennan, J., concurring) ("[f]ollowing the analysis of the Model Penal Code" in recognizing the presumption of mens rea).

The Model Penal Code also notes that the default *mens rea* term accompanying each material element is not necessarily knowledge: "recklessness" will suffice. Model Penal Code § 2.02(3).[5] The recklessness default in the Model Penal Code, in turn, "accepts as the basic norm what usually is regarded as the common law position." *Id.* at § 2.02(3) cmt. 5. *See also* John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1372 (1979) ("[T]he minimum culpability most widely found in the penal law is recklessness."); *Osborne v. Ohio*, 495 U.S. 103, 114 n.9 (1990) ("Ohio law provides that recklessness is the appropriate

[5] The Model Penal Code defines "reckless[ness]" to mean "consciously disregard[ing] a substantial and unjustifiable risk that the material element exists or will result from [the defendant's] conduct." Model Penal Code § 2.02(2)(c).

mens rea where a statute neither specifies culpability nor plainly indicates a purpose to impose strict liability.") (internal quotations omitted). Although this Court has inferred a heightened *mens rea* term, knowledge, in contexts where the associated penalty is severe, *see, e.g.*, *Staples*, 511 U.S. at 616–17 (concerning a ten-year term of imprisonment), a default of recklessness may be appropriate, depending on the context.[6]

To dispense with a *mens rea* term here flies in the face of both this Court's precedent and the deeply rooted traditions of the American legal system.

B. *Mens Rea* Is Particularly Indispensible When Congress Has Singled Out One Offense Element As Requiring an Extreme Increase in the Minimum Sentence.

The *mens rea* presumption plays a particularly important role in statutes like the one at issue here, where Congress has deemed that a notably harsh penalty provision will be triggered by a single critical fact. "Historically, the penalty imposed under a statute has been a significant consideration in

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[6] With respect to the machinegun provision, the penalty is severe and courts have generally assumed that knowledge, as opposed to recklessness, would be the proper *mens rea* term. *See, e.g.*, *Franklin*, 321 F.3d at 1240; *Rodriguez*, 54 F. App'x. at 747; *Dixon*, 273 F.3d at 640–41. The base firearm offense in 924(c) similarly requires general intent or knowledge. *See Smith v. United States*, 508 U.S. 223, 238 (1993) ("[T]the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence.").

determining whether the statute should be construed as dispensing with *mens rea*." *Staples*, 511 U.S. at 616.

The *mens rea* presumption reflects the background principle that the severity of criminal punishment should reflect the defendant's moral culpability. *See Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."). This principle is long-established not only in Supreme Court precedent, but also in the academic literature. The principle of "proportionate culpability . . . states that punishment must be in accord with or in proportion to culpability[.]" Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 Law & Contemp. Problems 109, 110 (2012). This approach has been adopted "overwhelmingly by scholars." *Id.* (citing John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* 213–38 (2007)); *see also* Andrew Von Hirsch & Andrew Ashworth, *The Justification for Punishment's Existence: Censure and Prevention*, *in Proportionate Sentencing* 15, 29 (Andrew Von Hirsch & Andrew Ashworth eds., 2005); H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, *in Punishment and Responsibility* 1, 8–12 (H.L.A. Hart & John Gardner eds., 2d ed. 2008); John Gardner, *Wrongs and Faults, in Appraising Strict Liability* 51, 69–74 (A.P. Simester ed., 2005). In other words, "the guilty and only the guilty should be punished, and . . . they should be punished at the level proportionate to their

crime and culpability: no higher and no lower." John Braithwaite & Phillip Pettit, *Retributivism: An Inferior Theory*, *in Not Just Deserts: A Republican Theory of Criminal Justice* 156, 156 (John Braithwaithe & Phillip Pettit eds., 1992).

The proportionality principle has clear implications for *mens rea*: "Crimes for which Congress has prescribed severe penalties should require correspondingly high levels of mens rea so that offenders will be seriously blameworthy and thus morally deserving of stiff penalties." Stephen F. Smith, *Proportionality and Federalization*, 91 Va. L. Rev. 879, 931 (2005). Whereas the en banc majority was interested only in the distinction between innocent and culpable conduct, the proportionality principle is just as concerned with the distinction between conduct that is less culpable and that which is gravely culpable—such as the decision to employ a machinegun. But if a defendant has no idea that he is using a machinegun, a twenty-five-year sentence increase because he has the bad luck to be wrong is disproportionate to his moral fault.

The proportionality principle also aids in deterrence, because laws that are perceived to be just are more likely to gain compliance. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453, 477–78, 494 n.88 (1997). In contrast, a law that imposes a thirty-year mandatory minimum even when the defendant had no idea he was engaging in the conduct that triggers the penalty can prove damaging to legal norms more generally. *See id.* at 484–85 ("[A] counterintuitive

rule governing offense culpability requirements . . . can generate an objectionable result. . . . . When a criminal law offends the moral intuitions of the governed community, the power of the entire criminal code to gain compliance from the community is risked.").

When a defendant deliberately selects a machinegun over other potential firearms, there is no question that is a culpable choice meriting higher punishment, as this Court has noted. *See O'Brien*, 130 S. Ct. at 2178 (referring to the "[t]he immense danger posed by machineguns [and] the moral depravity in choosing the weapon."). The disparate penalties for § 924(c) convictions demonstrate that Congress has drawn the same conclusion. The minimum sentence "skyrockets" from five years for a § 924(c) conviction with a generic firearm to a staggering thirty years when that firearm is a machinegun. Pet. App. 4a–5a. This twenty-five year gulf reflects Congress's desire to send a clear "message" to people planning to commit crimes—namely, that whatever other poor decisions these individuals might be making, they should leave their firearms—but particularly their machineguns—at home. *See also Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the Judiciary*, 105th Cong. 6 (1997) ("I think as a Nation—State, local and Federal—we need to target criminals who are carrying guns and they need this mandatory punishment. I think if we do it consistently, they will get the message. If they are going to commit their crime, they will do it without a gun and less innocent

people will be killed as a result.") (statement of Sen. Sessions on amendment to 924(c) changing penalties to mandatory minimums). But individuals contemplating crimes cannot heed that message if they do not know that the weapon is capable of firing as a machinegun.

C. Requiring a *Mens Rea* Term Here Avoids Serious Constitutional Questions.

To permit a strict-liability element to trigger such a harsh penalty would implicate constitutional concerns in the areas of both the Eighth and Sixth Amendments.

"Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)) (alteration in original). This Court's Eighth Amendment jurisprudence ensures that the most severe punishments the state can impose are reserved for those who shoulder a proportional amount of blame. *See Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). This principle applies with similar force to the most severe mandatory minimums, especially in cases like

§ 924(c), where the government asserts that they may be triggered by an element lacking any *mens rea* term whatsoever. *See* William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. Contemp. L. Issues 1, 31–34 (1996) (advocating a constitutional *mens rea* requirement to ensure proportionality in criminal punishments).

Requiring a *mens rea* term here would also safeguard the Sixth Amendment interests at stake. *Mens rea* requirements allow the jury to fulfill its traditional role of providing a community assessment of blameworthiness. *See Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (noting that a role of the jury is "to assess meaningfully the defendant's moral culpability and blameworthiness"); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 404–05 (1958) ("What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition."). In doing so, *mens rea* checks prosecutors, who are otherwise answerable only to a partisan executive. *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2567–68 (2004) (explaining that the elimination of *mens rea* requirements transfers power to prosecutors). Commentators have warned that legislatures might circumvent this Court's Sixth Amendment jurisprudence by omitting traditional *mens rea* elements from criminal statutes, preventing both the judge and the jury from assessing culpability. *See* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vand. L. Rev. 1467,

1540 (2001) (arguing that courts should scrutinize efforts by legislatures to avoid dictate of *Apprendi* by imposing strict liability). To make the conservative assumption that Congress did *not* intend to dispense with *mens rea* with respect to the machinegun element polices this threat to *Apprendi* at the same time that it reinforces the long-established responsibility of juries to assign culpability on behalf of their community.

CONCLUSION

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

Respectfully submitted,

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