No. 08-5274

In the Supreme Court of the United States

CHRISTOPHER MICHAEL DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 924(c)(1)(A) of Title 18 of the United States Code criminalizes using or carrying a firearm during and in relation to a crime of violence or a drug trafficking crime, or possessing a firearm in furtherance of any such crime. The sentencing provision in Section 924(c)(1)(A)(iii) provides for a ten-year mandatory minimum sentence for a conviction of that offense "if the firearm is discharged." The question presented is whether the sentencing enhancement in Section 924(c)(1)(A)(iii) requires proof that the firearm was discharged intentionally or knowingly, rather than accidentally or involuntarily.

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OPINION BELOW

The opinion of the court of appeals (J.A. 133-147) is reported at 517 F.3d 1224.

JURISDICTION

The judgment of the court of appeals (J.A. 148) was entered on February 20, 2008. A petition for rehearing was denied on April 15, 2008 (J.A. 149). The petition for a writ of certiorari was filed on July 11, 2008, and was granted on November 14, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c) of Title 18 is reprinted in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiring to interfere with interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a), and using a firearm during and in relation to that robbery, a violent felony, in violation of 18 U.S.C. 924(c)(1)(A) and 2. Petitioner was sentenced to 220 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. J.A. 133-147.

1. Section 924(c)(1)(A) of Title 18 of the United States Code provides in relevant part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime * * * for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. 924(c)(1)(A).

Section 924(c)(4) defines "brandish" for purposes of this subsection to mean "to display all or part of the firearm, or otherwise make the presence of the firearm

known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person." 18 U.S.C. 924(c)(4). Section 924(c) does not define the term "discharged."

2. On November 10, 2004, a masked man carrying a pistol entered the Rome, Georgia, branch of the AmSouth Bank, waved the gun, and ordered everyone in the bank to the ground. The robber entered the tellers' area. There, he began removing cash from the drawers with one hand, while continuing to hold the pistol in his other hand. At one point, the robber reached over a teller, who was on her knees below her teller station, to remove cash from a teller drawer. J.A. 15-18. While he was removing the cash, he "pulled the trigger," discharging the firearm. J.A. 79. The robber cursed when the gun fired. J.A. 19.

The teller under the desk testified that, when the gun fired, it was close to her face. J.A. 29. The bank manager testified that, when the gun went off, "it shook us all because we couldn't see [the teller's] head," as she was below the teller station. One of the bank employees "in the lobby popped up and said, 'oh, my God, has he shot [her]?,'" and the manager told her to "just get down because, again, it was a loud pop, and we couldn't see [the teller]." J.A. 22. The bullet struck a partition between two tellers' work stations, leaving a hole. The robber took the cash and fled the bank and entered a vehicle waiting outside for his escape. J.A. 15-29, 47-48, 54-55, 79.

A short while later, the police located the get-away vehicle in the parking lot of an apartment complex. The police also observed petitioner approach the vehicle and look into the driver's window. The police questioned petitioner and arrested him. J.A. 31-35, 57-60.

Petitioner gave the officers his address in an adjacent apartment complex. An officer went to the apartment and saw Ricardo Curtis Lopez inside. The officer also observed a pile of money on top of a television, some of which was still wrapped in a bank band. Officers entered the apartment and arrested Lopez, whom they found hiding in a bedroom. A search of the apartment uncovered the pistol that had been used in the robbery, a spent shell casing, cash, and keys and other materials from the car dealership from which the get-away vehicle had been stolen. J.A. 35-46, 53-54.

Before trial, petitioner and Lopez each confessed to the robbery. Each, however, claimed sole responsibility for the robbery and denied any involvement by the other. J.A. 62-63, 75-76.

3. A federal grand jury returned a two-count indictment charging petitioner and Lopez with conspiring to interfere with interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a) (Count 1), and using a firearm in the commission of that robbery, in violation of 18 U.S.C. 924(c)(1)(A) and 2 (Count 2). The indictment alleged that the firearm was discharged during the commission of the offense charged in Count 2. J.A. 11-12.

At trial, petitioner admitted to robbing the bank and stated that he did so alone. Petitioner testified that when he was removing money from the teller station, he "pulled the trigger" on the pistol he was carrying while trying to transfer the gun from one hand to the other. He then cursed and left the bank. J.A. 77-81. The jury found petitioner guilty on both counts. J.A. 82.

At sentencing, the probation office recommended that the court find that petitioner was subject to a ten-year mandatory minimum sentence on Count 2 under 18

U.S.C. 924(c)(1)(A)(iii), because the firearm was discharged during the robbery. J.A. 164. Petitioner objected, claiming that the evidence showed that the gun had discharged accidentally and that Section 924(c)(1)(A)(iii) does not apply to accidental discharges. See, *e.g.*, J.A. 94-95, 97, 122.

The district court overruled petitioner's objection, holding that Section 924(c)(1)(A)(iii) applies when a firearm is discharged accidentally. J.A. 103. Consistent with that ruling, the court sentenced petitioner to a 100-month sentence on Count 1 and a consecutive ten-year mandatory minimum sentence on Count 2, for a total sentence of 220 months of imprisonment. J.A. 118-119, 126.

4. The court of appeals affirmed. J.A. 133-147. The court first stated that the "[t]estimony at trial supports [petitioner's] assertion that the discharge of the firearm inside the bank was a surprise even to [petitioner] and, thus, was likely accidental." J.A. 139. The court held, however, that Section 924(c)(1)(A)(iii) does not require proof that petitioner intended to discharge the firearm. J.A. 139-142. The court of appeals reasoned that the text of Section 924(c)(1)(A)(iii) does not impose an intent requirement and that, because Clause (iii) defines a sentencing enhancement rather than a criminal offense, the general presumption in favor of *mens rea* does not apply. J.A. 139-141.

The court disagreed with the D.C. Circuit's analysis in *United States* v. *Brown*, 449 F.3d 154 (2006). J.A. 141-142. The court explained that, contrary to the reasoning of the D.C. Circuit, the increased mandatory minimum sentences in Section 924(c)(1)(A) do not reflect solely a defendant's increasingly culpable intent, but also reflect the fact that "discharging a firearm, regard-

less of intent, presents a greater risk of harm than simply brandishing a weapon without discharging it." J.A. 142. The court also rejected the D.C. Circuit's reliance on the "general presumption against strict liability in criminal statutes," in light of the "distinction between elements of an offense and sentencing enhancements." *Ibid.*[1]

SUMMARY OF ARGUMENT

A. 1. Section 924(c)(1)(A) of Title 18 prohibits using or carrying a firearm during and in relation to any crime of violence or drug trafficking crime and possessing a firearm in furtherance of any such crime. The maximum sentence for any violation of Section 924(c)(1)(A) is life imprisonment. In three clauses in separate paragraphs, the statute sets the applicable mandatory minimum sentences, depending on the manner in which the Section 924(c)(1)(A) crime was committed—five years for any violation; seven years if the firearm was brandished; and ten years if the firearm was discharged. 18 U.S.C. 924(c)(1)(A)(i)-(iii). This Court has held that the opening paragraph of Section 924(c)(1)(A) "list[s] the elements of a complete crime," while Clauses (i), (ii), and (iii) set out "paradigmatic sentencing factors," rather than separate offenses. *Harris* v. *United States*, 536 U.S. 545, 553 (2002).

The government need not prove that a defendant knowingly or intentionally discharged the firearm in

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[1] In addition, the court affirmed Lopez's conviction on both counts, as well as his sentence of 198 months of imprisonment, which included a 78-month sentence on Count 1 and a consecutive ten-year sentence on Count 2. Lopez filed a petition for a writ of certiorari (No. 08-298) presenting the question at issue here, and that petition for a writ of certiorari remains pending.

order to trigger the ten-year mandatory minimum under Section 924(c)(1)(A)(iii). The plain text of the statute imposes no requirement that the firearm be discharged knowingly or intentionally. Rather, Clause (iii) calls for a ten-year mandatory minimum if a "certain fact[] [is] present," *Harris*, 536 U.S. at 553, namely, if "the firearm is discharged," 18 U.S.C. 924(c)(1)(A)(iii). Congress spoke in the passive voice and did not specify who or what must cause the discharge.

The phrase "in relation to" in the principal paragraph of Section 924(c)(1)(A) does not modify the separate sentencing factors. Those factors are not part of the *actus reus* of the offense, are structurally separated into different subsections, and are separated from that adverbial phrase by an independent clause with its own adverbial phrase.

2. The structure of the tiered mandatory minimum sentences of Section 924(c)(1)(A) supports the conclusion that Clause (iii) does not include a separate *mens rea* requirement. None of the clauses themselves contains an express *mens rea* requirement. Congress did provide for an intent requirement with respect to the brandishing enhancement, but it did so in a separate provision defining that term. Thus, where Congress wanted to impose a *mens rea* requirement, it did so explicitly, and its decision not to do the same as to Clause (iii) must be given effect.

3. The purpose of the "discharge" sentencing enhancement further supports the lack of an intent requirement. Sentencing routinely takes into account not only an offender's relative moral culpability but also the risk of harm. The sentencing enhancements in Section 924(c)(1)(A)(ii) and (iii) reflect those dual considerations. The enhancement when the firearm is discharged, for

instance, reflects a judgment by Congress not only of heightened moral culpability, but also the greatly increased risks that are inevitably associated with discharge of a gun in a violent or drug trafficking crime: that death or injury will result, that violence will be used to respond to the offender, and that victims will be terrorized to an even greater extent. Those foreseeable harms result whether or not the discharge is intentional.

4. The legislative history of Section 924(c)(1)(A) demonstrates that Congress purposely omitted a *mens rea* requirement from the discharge sentencing enhancement. Congress did not adopt proposals in the House of Representatives that would have expressly qualified the discharge sentencing factor by "in relation to," or that would have contained active language and a structure indicating that "discharge" was part of the *actus reus* of the offense. The enacted text instead reflects the different language of the Senate bill, setting the "discharge" factor out as a separate sentencing enhancement and using the passive "is discharged" language.

5. It is not necessary to read the words "in relation to" in the offense-creating paragraph as modifying "is discharged" in the sentencing provision in order to avoid the assertedly "absurd results" posited by petitioner. Because sentencing enhancements are applied only to the complete crime of conviction, and reflect the manner in which that crime was committed, the discharge enhancement applies only to that subset of Section 924(c)(1)(A) violations involving a discharge. And it is entirely reasonable for Congress to subject to an enhanced sentence an offender who is careless enough with a loaded firearm he uses during and in relation to a

crime of violence or drug trafficking crime that the firearm "is discharged," even accidentally.

B. 1. The common law presumption of *mens rea* in criminal statutes does not justify reading a *mens rea* requirement into the Section 924(c)(1)(A) sentencing factors. That presumption does not extend to sentencing factors. Congress is presumed to incorporate into crimes the background rule of the common law requiring some *mens rea* for an offense. But the common law has never required separate *mens rea* for facts on which a judge relies to increase the sentence within the statutory maximum.

2. The overriding purpose of the common law presumption in favor of *mens rea* is the need to separate wrongful conduct from otherwise innocent conduct. But there is no such need here: the discharge enhancement applies only when an offender uses a firearm during the commission of a crime of violence or a drug trafficking crime. In that circumstance, the commission of both the underlying violent or drug offense and the firearm offense in Section 924(c)(1)(A) establishes the offender's requisite vicious will. Moreover, no potential "innocent conduct" is associated with using a firearm to commit such a violent felony or drug trafficking crime.

3. In any event, even assuming the presumption of *mens rea* applies to the sentencing factors at issue here, the presumption is easily rebutted by the indications that Congress purposely omitted a *mens rea* requirement. Specifically, Congress omitted a *mens rea* requirement in the "discharge" provision while including one in the "brandish" provision; spoke in the passive voice; and rejected a House amendment to the statute that would have been more amenable to the reading that "discharge" was part of the *actus reus* of the offense.

C. The rule of lenity has no application here because Section 924(c)(1)(A)(iii) is unambiguous. By its terms, it imposes no requirement that the firearm was discharged knowingly or intentionally, and that interpretation is supported by the statute's structure, purpose, and legislative history. Nor can the presumption of *mens rea* in criminal statutes—even assuming it applies to sentencing factors—be used to create an ambiguity in the statute when none otherwise exists.

ARGUMENT

SECTION 924(c)(1)(A)(iii) PROVIDES FOR A SENTENCING ENHANCEMENT WITHOUT REGARD TO WHETHER THE FIREARM WAS DISCHARGED KNOWINGLY OR INTENTIONALLY

The court of appeals correctly held that no separate *mens rea* must be shown to support an enhanced minimum sentence under Section 924(c)(1)(A)(iii) for "discharge[]" of a firearm. When a firearm is discharged in an offense under Section 924(c)(1)(A), the statutory enhancement applies. No presumption of a *mens rea* requirement applies to "paradigmatic sentencing factors," *Harris* v. *United States*, 536 U.S. 545, 553 (2002), such as the one at issue here. And clear indications from the text, structure, purpose, and history of the statute demonstrate that courts should not override the statutory language and insert an intent requirement that Congress did not provide.

A. The Text, Structure, Purpose, And Legislative History Of Section 924(c)(1)(A)(iii) Establish That The Provision Imposes No Intent Requirement

1. The text of Section 924(c)(1)(A) demonstrates that the "is discharged" sentencing factor contains no mens rea *requirement*

a. Whether Section 924(c)(1)(A)(iii) includes a separate *mens rea* requirement "is a question of statutory construction." *Staples* v. *United States*, 511 U.S. 600, 604 (1994). As such, the starting point for interpreting the provision—and the ending point if the language is clear—is its plain language. See *United States* v. *Gonzales*, 520 U.S. 1, 4-6 (1997) (applying this principle to a prior version of Section 924(c)). Here, the language is clear, and it imposes no requirement that the firearm be discharged knowingly or intentionally.

As this Court has held, the "principal paragraph" of Section 924(c)(1)(A) "list[s] the elements of a complete crime." *Harris*, 536 U.S. at 552. That paragraph provides that "any person who, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm," has committed a criminal offense. 18 U.S.C. 924(c)(1)(A). After setting forth the elements of that "single offense," *Harris*, 536 U.S. at 556, the statute contains three clauses that govern how defendants are to be sentenced. As this Court has explained, Clause (i) "sets a catchall minimum" sentence of five years, up to the statutory maximum of life imprisonment, for any commission of the offense. *Id.* at 552-553. Clauses (ii) and (iii), "in turn, increase the minimum penalty if certain facts are present," *id.* at 553, namely, if the firearm "is brandished" or "is discharged,"

18 U.S.C. 924(c)(1)(A)(ii) and (iii). Those clauses do not define separate offenses, but instead set out "paradigmatic sentencing factors." *Harris,* 536 U.S. at 552. As such, those factors "need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt." *Id.* at 568.

The text of Clause (iii), the "discharge" sentencing factor, contains no separate *mens rea* requirement. 18 U.S.C. 924(c)(1)(A)(iii). It provides simply that anyone who violates Section 924(c)(1)(A) shall, "*if the firearm is discharged*, be sentenced to a term of imprisonment of not less than 10 years." *Ibid.* (emphasis added). Congress included no words of qualification or limitation. For example, Congress could have, but did not, make the ten-year mandatory minimum sentence applicable only if the defendant discharged the firearm knowingly, intentionally, or with an intent to injure, assault, or intimidate. Accordingly, "[t]here is no basis in the text for limiting [Section] 924(c)" to certain types of discharges. *Gonzales*, 520 U.S. at 3, 5 (finding that a sentence under Section 924(c) must run consecutively to any other sentence, including state sentences, and vacating the court of appeals' approach, which had rejected a "literal reading" of Section 924(c)).

Congress's use of the passive voice—"if the firearm is discharged"—further supports that conclusion. It reflects an "agnosticism" on the part of Clause (iii) as to who (or what) discharged the firearm or why. See *Watson* v. *United States*, 128 S. Ct. 579, 584 (2007). That formulation contrasts with Congress's use of the active voice in the principal paragraph setting forth the offense, which signifies that the "perpetrator must be clearly identifiable in advance." See *ibid.*

Petitioner observes (Br. 14 n.6) that "discharge" is used in its transitive form, such that it "require[s] a subject to act upon an object." But that is true regardless of whether the transitive verb is used in the active or passive voice, see *American Heritage Book of English Usage* 45-47 (1996), and it does not follow that the act must be intentional. For example, the verbs in the sentences "I lost my wallet" or "The drink was spilled by Joe" are transitive, but they nevertheless connote accidental conduct. Petitioner suggests (Br. 15 n.6) that Congress could have required an enhancement when the "firearm discharges" if it had wanted to cover accidental discharges. But the distinction between petitioner's hypothetical language and the statutory language is not one of accidental versus intentional, but simply that the statutory language "is discharged" requires someone (or something) to cause the discharge, whether accidentally or otherwise.

b. Petitioner does not contend that Clause (iii) by its terms contains a *mens rea* requirement. Instead he contends, for the first time in this Court, that the phrase "in relation to" in the principal paragraph of Section 924(c)(1)(A) embodies a *mens rea* requirement and modifies the verb "discharge[]" in Clause (iii). See Pet. Br. 7-15; cf. Pet. C.A. Br. 12-16. Even assuming that the "in relation to" phrase embodies some type of *mens rea* requirement, see note 9, *infra*, that phrase does not travel down to modify "is discharged" in the sentencing-enhancement provision, and no court has held that it does.

In *Smith* v. *United States*, 508 U.S. 223 (1993), this Court concluded that, to satisfy the "in relation to" element in the offense of using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime, the firearm "must have some purpose or effect

with respect to the drug trafficking [or violent] crime; its presence or involvement cannot be the result of accident or coincidence." *Id.* at 238. Petitioner seeks to apply that qualification to the "is discharged" sentencing factor in Clause (iii). He bases that argument on the premise that, because "in relation to" is an "adverbial phrase * * * appear[ing] before a series of verbs that constitute the *actus reus* of the provisions, including 'use,' 'carry,' 'possess,' 'brandish,' and 'discharge,'" the phrase "must therefore be construed to apply to all of these acts." Pet. Br. 10. That is incorrect.

As an initial matter, that argument cannot be reconciled with this Court's threshold statutory holding in *Harris* that the opening paragraph of Section 924(c)(1)(A) "list[s] the elements of a complete crime," *Harris*, 536 U.S. at 552, while Clauses (i), (ii), and (iii) are "sentencing factors to be found by the judge, not offense elements to be found by the jury," *id.* at 556. Under that decision, if a defendant uses or carries a firearm during a drug trafficking or violent crime, and the use or carrying of the firearm has "some purpose or effect with respect to" that underlying crime and is not "the result of accident or coincidence," *Smith*, 508 U.S. at 238, the offense is complete. The language in Clause (iii) does not describe an element of the offense and it is not the *actus reus* of the offense. Because petitioner's textual argument (Br. 10) hinges on the premise that the verb "discharge[]" "*constitute[s]* the *actus reus*," *ibid.* (emphasis added), that argument fails.[2]

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[2] The only mention in petitioner's brief of *Harris*'s statutory holding is in a footnote in which he describes the Court as having "classified the 'brandish' and 'discharge' provisions of [Section] 924(c)(1)(A) as 'sentencing factors' for purposes of the Fifth and Sixth Amendments." Pet. Br. 30 n.12. To the extent petitioner suggests that the Court's holding

The same textual and structural aspects of the statute that informed the Court's holding in *Harris* confirm that the phrase "in relation to" does not modify the sentencing factor of "discharge." The "in relation to" phrase is part of the "lengthy principal paragraph," while the clause containing the discharge sentencing factor is contained in a "separate subsection[]." *Harris*, 536 U.S. at 552 (citing *Castillo* v. *United States*, 530 U.S. 120, 124 (2000)). The most natural grammatical reading of the statute is that the adverbial phrase "in relation to" modifies only the two verbs—"uses or carries"—that are placed together immediately following the adverbial phrase. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994) ("The most natural grammatical reading * * * suggests that the term 'knowingly' modifies only the surrounding verbs."); *The Chicago Manual of Style* para. 5.167, at 188 (15th ed. 2003) ("A prepositional phrase with an adverbial or adjectival function should be as close as possible to the word it modifies to avoid awkwardness, ambiguity, or unintended meanings.").

That conclusion is reinforced by several additional textual and structural clues. The phrase "in relation to" is not "antecedent to a series of verbs" in the manner that petitioner suggests. See Pet. Br. 10 (listing "'use,' 'carry,' 'possess,' 'brandish,' and 'discharge'"). The statute does not contain a list of verbs, or even a series of similar verbs; rather, the verbs are in different voices. In the principal paragraph, the verbs are in the active

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in that regard can somehow be cabined as a constitutional holding, that is not correct. As the Court explained, before reaching the constitutional question, it "answer[ed] a threshold question of statutory construction: Did Congress make brandishing an element or a sentencing factor in [Section] 924(c)(1)(A)?" *Harris*, 536 U.S. at 552.

voice—"uses or carries" and "possesses"; in the sentencing clauses, the statute shifts to the passive voice—"is brandished" and "is discharged." Cf. *X-Citement Video*, 513 U.S. at 68 (involving a statute containing a series of verbs that were all in the active voice: "transports, ships, receives, distributes, or reproduces"). Moreover, the verb "possesses" is contained in a separate clause, which is set off by commas and introduced by its own relative pronoun: ", or who, in furtherance of any such crime, possesses a firearm,". 18 U.S.C. 924(c)(1)(A). That intervening clause sets forth an alternative means —other than the use or carrying of a firearm "during and in relation to" an underlying crime—by which a defendant can violate Section 924(c)(1)(A). The fact that "possesses" is modified by its own, different adverbial phrase—"in furtherance of"—provides additional support for the conclusion that "in relation to" does not travel past "uses or carries," much less modify the verbs that are set forth in the separate sentencing clauses in Sections 924(c)(1)(A)(ii) and (iii).[3]

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[3] See *United States* v. *Arreola*, 467 F.3d 1153, 1155 (9th Cir. 2006) (holding that the "possesses" and "uses or carries" phrases in Section 924(c)(1)(A) define "two means of committing a single offense"), cert. denied, 127 S. Ct. 3002 (2007). As petitioner notes (Br. 11), the Sixth Circuit has construed Section 924(c)(1)'s "uses or carries" and "possesses" prongs as creating two separate crimes. See *United States* v. *Combs*, 369 F.3d 925, 930-933 (2004). The Sixth Circuit reasoned that those prongs are contained in separate clauses and that the two prongs establish different substantive standards. *Ibid.* Whatever may be the ultimate resolution of that debate, the significant point for present purposes is that under either court's reading, the "in relation to" phrase does not modify the verb "possesses." See *Arreola*, 467 F.3d at 1157 ("As a matter of grammatical construction, the use of the disjunctive indicates that Congress was addressing two separate acts."); *Combs*, 369 F.3d at 931 ("The two prongs of the statute are separated by the dis-

Contrary to petitioner's suggestion (Br. 10 & n.3), the effect of the "interrupt[ion]" caused by that "separate modifying clause" cannot be explained as an accident of statutory history. As petitioner acknowledges elsewhere (Br. 19), the "possession" prong was added by the same amendment that added the "discharge" sentencing factor. See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469 (P.L. 386). If Congress had intended petitioner's meaning, it would have amended the statute to make "in relation to" expressly modify the verb "discharge," as some of the rejected legislative proposals might have done. See pp. 25-28, *infra*.

Equally significant, the sentencing factors in Clauses (ii) and (iii) apply to defendants who violate Section 924(c)(1)(A) by using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime, *as well as* to those who violate it by possessing a firearm in furtherance of any such crime. It thus would make little sense to read the "in relation to" phrase in the principal paragraph as modifying the "is brandished" or "is discharged" verbs in those generally applicable sentencing factors.

Petitioner offers two possible responses to this anomaly, neither of which warrants departing from the most grammatical reading of the text. First, petitioner suggests that it "makes sense" to apply "in relation to" to the sentencing factors because "'brandish' and 'discharge' represent ways in which a firearm is 'used,' beyond mere possession." Pet. Br. 11. But the possession prong requires more than "mere possession," and a defendant who violates that prong by possessing a firearm

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junctive 'or,' which, according to the precepts of statutory construction, suggests the separate prongs must have different meanings.").

in furtherance of a crime of violence or drug trafficking crime could brandish or discharge in so possessing it. In the alternative, petitioner suggests that "in furtherance of," "instead of 'in relation to,'" could be "deemed to modify 'brandish' and discharge.'" *Id.* at 11 n.4. That makes no more sense than deeming them modified by "in relation to"—either way, the Court would be choosing one adverbial phrase over another, when the most grammatical reading of the statute is that neither of those offense elements modifies the verbs in the sentencing factors.[4]

2. The structure of Section 924(c)(1) indicates that the "discharge" sentencing factor contains no intent requirement

The structure of Section 924(c)(1) further supports the conclusion that the "discharge" sentencing factor contains no *mens rea* requirement. The brandishing enhancement in Clause (ii) is phrased similarly to the discharging enhancement in Clause (iii). Compare 18 U.S.C. 924(c)(1)(A)(ii) ("if the firearm is brandished"), with 18 U.S.C. 924(c)(1)(A)(iii) ("if the firearm is discharged"). By their terms, neither clause includes a

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[4] Although petitioner contends that "in relation to" and "in furtherance of" "carry substantially the same meaning," Pet. Br. 11 n.4, courts of appeals have differentiated them. See, *e.g.*, *United States* v. *Avery*, 295 F.3d 1158, 1174 (10th Cir. 2002) ("the terms 'in furtherance of' and 'in relation to' are not entirely interchangeable"), cert. denied, 537 U.S. 1024 (2002); *United States* v. *Mackey*, 265 F.3d 457, 461 (6th Cir. 2001) (observing that "Congress intended the 'in furtherance of' limitation to be a higher standard than 'during and in relation to,' which continues to modify the use and carry prongs of the statute"), cert. denied, 534 U.S. 1024 (2002); see also H.R. Rep. No. 344, 105th Cong., 1st Sess. 11 (1997) ("[T]he Committee believes that 'in furtherance of' is a slightly higher standard.").

mens rea requirement. Rather, with respect to brandishing, Congress expressly included a *mens rea* requirement in a *separate* provision. Section 924(c)(4) provides that "brandish" means "to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, *in order to intimidate* that person, regardless of whether the firearm is directly visible to that person." 18 U.S.C. 924(c)(4) (emphasis added). Although Congress enacted Clauses (ii) and (iii) as part of the same legislation, Congress provided no similar purpose-based definition of "discharge." See P.L. 386, § 1(a)(1), 112 Stat. at 3469-3470.

That silence is "significant." See *Gonzales*, 520 U.S. at 5 (finding it corroborative of the plain meaning of Section 924(c) that Congress expressly limited or restricted the meaning of one phrase in Section 924(c) but included no such limitation or restriction of another phrase in the same statute). When Congress wanted to impose a *mens rea* requirement, it did so explicitly, and its decision not to do so with respect to Clause (iii) must be given effect. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets in original); see also *United States* v. *Ressam*, 128 S. Ct. 1858, 1862 (2008) ("Even if the similarity of the original texts of the two statutes might have supported an inference that both included an implicit relationship requirement, their current difference virtually commands the opposite inference.").

Petitioner endorses (Br. 13 n.5) the D.C. Circuit's suggestion that that principle does not apply here because, "[h]aving embarked on a definition [of 'brandish']

the drafter thought it proper to specify the required intent." *United States* v. *Brown*, 449 F.3d 154, 157 (2006). Particularly given that the definition and Clauses (ii) and (iii) were all enacted in the same legislation, see P.L. 386, § 1(a)(1), 112 Stat. at 3469-3470, that reasoning does not explain why Congress specified no intent for "discharge." Petitioner contends that "the fact that Congress defined the *particular* intent necessary to constitute 'brandishing,' without even mentioning the requisite *general* intent, strongly implies that Congress understood that a general intent element had already been incorporated into subparagraphs (ii) and (iii)." Pet. Br. 14 n.5. But that assumes the answer to the question at issue: whether sentencing factors should be presumed to have a general-intent requirement despite the absence of one in the text.[5]

Nor can petitioner draw support from Clause (i), which provides the mandatory minimum for any violation of Section 924(c)(1)(A). Petitioner contends that because the mandatory minimum sentences in Clauses (i) and (ii) apply "only if the proscribed conduct was performed knowingly," Pet. Br. 12, it follows that Clause (iii) must also contain such a requirement. But Clause (i) merely "sets a catchall minimum" for the crime. *Harris*, 536 U.S. at 552-553. By its terms, it requires no *mens rea* (or even any fact) beyond the commission of the offense. And, as explained, Clause (ii)'s *mens rea* re-

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[5] Indeed, even with respect to "brandish," the sentencing enhancement—which is phrased in the passive voice—does not require that the intent to intimidate be the *defendant's* intent; it simply requires that the firearm that is the subject of the defendant's conviction have been brandished, as defined, by someone. Of course, *Pinkerton* principles would also subject a defendant to the enhanced sentence for a confederate's brandishing. See *Pinkerton* v. *United States*, 238 U.S. 640 (1946).

quirement comes from a separate provision. 18 U.S.C. 924(c)(4). There is thus no basis to conclude that Congress followed a consistent course of imposing a *mens rea* requirement for the conduct specified in each of the sentencing factors in Clauses (i), (ii), and (iii).

3. The purpose of imposing a higher mandatory minimum when a firearm "is discharged" counsels against reading Section 924(c)(1)(A)(iii) as imposing a* mens rea *requirement

a. The purpose of the sentencing enhancement in Section 924(c)(1)(A)(iii) supports the conclusion that no separate *mens rea* must be shown to enhance a sentence based on the discharge of the firearm. Sentencing considerations routinely reflect not only an offender's relative moral culpability but also the resulting harm or risk of harm from the manner in which the crime was carried out. *Harris*, 536 U.S. at 553.

Here, the language Congress chose for Clause (iii) suggests concern about the risk of harm caused by the discharge, not simply the culpability of the person who caused the discharge of the firearm. That conclusion follows from Congress's use of the passive voice to describe when the enhancement applies. As discussed, the language used—"the firearm is discharged"—shows that Congress was indifferent as to the mental state (or even the identity) of the discharger. See *Watson*, 128 S. Ct. at 584. What Congress made pivotal was whether "certain facts [we]re present" in the "manner in which [the] basic crime was carried out." *Harris*, 536 U.S. at 553 (quoting *Castillo*, 530 U.S. at 126).

That is a quintessentially legislative judgment, and it is a reasonable one. The discharge of a firearm creates increased risks that injury or death will result, that

violence will be used in response, and that victims will be terrorized to an even greater extent than when the firearm is brandished. The risk of those harms arises even if the firearm is discharged accidentally. And a person who brings a loaded firearm, ready to fire, to a violent or drug trafficking crime creates the risk that it will be intentionally *or* inadvertently discharged. As then-Senator Biden explained with respect to the need for the possession prong in the same amendment that added the discharge sentencing enhancement: "the underlying public policy relates to whether or not someone is going to, in the act of committing a particular crime, carry with him or her a weapon that either enhances the prospect that they might *accidentally* use it—if there is no gun, they can't use it—or that they take it along with the express purpose of using it." *Violent and Drug Trafficking Crimes: The* Bailey *Decision's Effect on Prosecutions Under 924(c): Hearings Before the Comm. on the Judiciary United States Senate*, 104th Cong., 2d Sess. 14 (1996) (emphasis added); *id.* at 10 ("[T]here are hundreds of cases * * * where the person never intended to use the gun, but panicked. But the result is the same. Somebody is injured, somebody is dead, somebody is in trouble."). The same legislative judgment is reflected in the discharge sentencing enhancement. If an offender wishes to avoid the possibility of that enhancement for an unintended discharge, he can leave the firearm unloaded or, at the least, engage its safety lock.

Moreover, as discussed more fully below, see pp. 38-40, *infra*, defendants are routinely punished based on unintended consequences or unknown aspects of their own actions, or the foreseeable if unintended actions of their confederates, see *Pinkerton* v. *United States*, 238

U.S. 640 (1946), when those unintended or unknown consequences or aspects are part of the natural chain of events triggered by their illegal conduct. One obvious example is the felony-murder rule: if a defendant commits an unintended homicide while he is engaged in the commission or attempted commission of some other felony, the defendant can be convicted of, and punished for, murder. See, *e.g.*, *United States* v. *Matos-Quinones*, 456 F.3d 14, 18 n.2 (1st Cir.) ("under the federal felony-murder rule, a defendant can be convicted of first-degree murder even though he never intended (even conditionally) to inflict physical harm on the victim"), cert. denied, 549 U.S. 1088 (2006).

b. Citing the D.C. Circuit's decision in *Brown*, 449 F.3d at 156, petitioner contends (Br. 13-15) that the purpose of the tiered mandatory minimums in Clauses (i), (ii), and (iii) is to punish more severely conduct that is "increasingly blameworthy," rather than increasingly likely to cause harm. *Id.* at 13.[6] But, as the D.C. Circuit recognized, those clauses address "increasingly culpable *or harmful conduct*," and "discharges of a firearm are more likely to cause severe injury or even death than mere brandishing." *Brown*, 449 F.3d at 156, 157 (emphasis added). The D.C. Circuit, in nevertheless reading an additional *mens rea* requirement into the discharge sentencing enhancement, essentially substituted its own policy judgment for that of Congress: "as between an intentional brandishing and a purely accidental dis-

[6] Petitioner claims (Br. 13-14) that the brandishing of a firearm "does not, in and of itself, increase the risk of harm to others." But when an individual brandishes a firearm, as opposed to simply carrying it without displaying it, he increases the risk that someone will respond with a weapon and that victims will panic. The risk of those harms is even greater when the firearm is discharged.

charge, the increment in risk, given the less reprehensible intent, seems inadequate to explain a congressional intent to add three years." *Id.* at 157. The D.C. Circuit's speculation as to how much additional risk of harm or injury Congress thought was sufficient to warrant increasing the mandatory minimum, however, cannot overcome the plain language of the provision, which imposes no intent requirement. See *Gonzales*, 520 U.S. at 10 ("Given this clear legislative directive, it is not for the courts to carve out statutory exceptions based on judicial perceptions of good sentencing policy.").

A defendant who does intentionally discharge the firearm or one who causes injury from a discharge (whether accidental or not) can be punished still more severely. If a sentencing court concludes that a defendant who has intentionally discharged a firearm is more culpable and should receive a higher sentence, the language and structure of Section 924(c)(1)(A) permit that result. Clause (iii) provides only that the minimum sentence when a firearm "is discharged" must be at least ten years; the statute permits up to life imprisonment. See *Harris*, 536 U.S. at 554 ("Since the subsections alter only the minimum, the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished the firearm."). Thus, the graduation of culpability that the D.C. Circuit attributed to Congress can be fully addressed under the scheme as written, without importing an extra-textual intent requirement.

4. Congress's rejection of proposals that would have been more amenable to petitioner's construction indicates that it did not require an intent to discharge the firearm

Because the text of Section 924(c)(1)(A)(iii) provides a clear answer to the question in this case, the Court need not consult the provision's legislative history. If that history is consulted, however, it supports the conclusion that the discharge sentencing factor contains no *mens rea* requirement.

In 1998, Congress added the discharge sentencing factor as Section 924(c)(A)(1)(iii) and, when it did so, it added it in its present form. P.L. 386, § 1(a)(1), 112 Stat. 3469. In contrast to the version ultimately enacted, earlier attempts to amend Section 924(c) had language that might have made "discharging" an element of the crime; indeed, some proposals contained an explicit *mens rea* requirement. In 1990, Senator Gramm proposed a bill that would have added a 20-year mandatory sentence for "[w]hoever * * * discharges a firearm with intent to injure another person." See 136 Cong. Rec. 16,225 (1990). In 1991, a bill passed the Senate that would have replaced "uses or carries" with "discharges, uses, carries or otherwise possesses." See S. 1241, 102d Cong., 1st Sess. § 1212, at 137 (1991). And in 1995, Representative Barr proposed a bill that would have provided for a 20-year sentence if a person "discharged a firearm with the intent to injure another person." See H.R. 1488, 104th Cong., 1st Sess. § 3, at 6 (1995), 141 Cong. Rec. 11,085 (1995). Those legislative efforts all failed.

Instead, in 1998, Congress amended Section 924(c) to add, *inter alia*, new penalties, including the sentencing factor at issue here. See P.L. 386, § 1(a)(1), 112 Stat.

3469.[7] The final language and structure of the new sentencing factors resulted from a compromise between the House and Senate. As originally introduced in the House, the bill would have amended the statute to apply "if the firearm is discharged *during and in relation to the crime*." H.R. 424, 105th Cong., 1st Sess. 2 (introduced Jan. 9, 1997) (emphasis added). Petitioner seeks to read the quite different enacted language as containing such an "in relation to" qualifier. But the House's ultimate version, much less the enacted version, did not contain that "during and in relation to" language in the "discharge" sentencing enhancement. See H.R. 424, 105th Cong., 2d Sess. (1998) (passed by House).

The House's final version employed the active verb "discharges" and would have structured Section 924(c)(1) such that each of the verbs—"possesses," "brandishes," and "discharges"—would start a new subsection flowing from a revised principal paragraph. H.R. Rep. No. 344, 105th Cong., 1st Sess. 2-3, 11-12 (1997).[8] That proposal would have been somewhat more

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[7] In response to this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), which had interpreted "uses" in the statute to require "active employment" of the firearm during and in relation to the predicate crime, *id.* at 150, the 1998 amendment also expanded the scope of the criminal offense by adding that anyone "who, in furtherance of any [crime of violence or drug trafficking] crime, possesses a firearm," commits an offense under Section 924(c)(1)(A). See P.L. 386, § 1(a)(1), 112 Stat. 3469.

[8] The version as passed by the House, in relevant part, would have amended Section 924(c) to replace paragraph (1) with the following:

> "(1) A person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United

amenable to treating "discharge" as part of the *actus reus* of the offense. Cf. *United States* v. *Williams*, 128 S. Ct. 1830, 1839 (2008) (reading the word "knowingly," when it was set off by a dash from and "introduce[d]" two distinct subsections, as modifying the two subsections in their entirety, rather than just the verbs that introduced each subsection). But Congress did not enact the House version; instead it enacted a provision similar to the Senate version. That bill included the "discharge" factor as a separate sentencing enhancement and used the passive "is discharged" language. S. 191, 105th Cong., 2d Sess. § 1 (as reported Nov. 6, 1997).

Petitioner contends (Br. 21) that this legislative choice can be explained because, "[d]espite the different (and rather awkward) structure [in the Senate bill], there is no indication that legislators understood this language to differ in meaning from that in the House bill." But the best indication that legislators understood the language to differ is the fact that they chose the Senate's language over the House's language. See *INS* v.

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(A) possesses a firearm in furtherance of the crime, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 10 years;

(B) brandishes a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 15 years; or

(C) discharges a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 20 years;

except that if the firearm is a machinegun or destructive device or is equipped with a firearm silencer or firearm muffler, such additional sentence shall be imprisonment for 30 years.

H.R. Rep. No. 344, *supra*, at 2.

Cardoza-Fonseca, 480 U.S. 421, 442-443 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (internal quotation marks omitted); see also 144 Cong. Rec. 25,036 (1998) (statement of Rep. McCollum) (stating that the final language "represents a compromise between the House and the Senate"). Although petitioner points to (Br. 23 & n.9) the House Report for the proposition that the Committee understood that "during and in relation to" modifies "brandishes" and "discharges," that Report analyzed the *House* version, which (as discussed above) differed significantly from the version ultimately enacted. See H.R. Rep. No. 344, *supra*, at 2.

Petitioner's discussion of the legislative history of Section 924(c)(1)(A) (Br. 15-25) is notable for its focus on the principal paragraph of the section, which sets forth the complete crime, rather than on the sentencing factors. See, *e.g.*, *id.* at 15 ("The statute has always included some form of intent requirement."). But the question here is not what *mens rea* must be shown for the offense of conviction—the use or carrying of a firearm during and in relation to a crime of violence or the possession in furtherance of any such crime. Rather, the question is what must be shown to invoke the separately delineated sentencing factors. As the drafting history confirms, nothing is required beyond the requirements stated in the text.

5. Petitioner's construction is not necessary to avoid absurd results

Petitioner contends (Br. 11) that "in relation to" must modify the sentencing factors to prevent "absurd results," such as subjecting a defendant to the discharge enhancement "if the gun used during the crime had been discharged at some point long before or after the offense," *id.* at 12. That argument overlooks the nature of sentencing factors.

This Court explained in *Harris* and *Castillo* that "[t]raditional sentencing factors often involve . . . special features of the manner in which a basic crime was carried out." *Harris*, 536 U.S. at 553 (quoting *Castillo*, 530 U.S. at 553). For such sentencing factors to apply, they must bear some connection to the offense of conviction, but there need not be a *mens rea* requirement. Rather, the inquiry is whether "certain facts are present" in "the manner in which [the] basic crime was carried out." *Ibid.*

Applying that test to petitioner's hypotheticals does not produce "absurd results." The sentencing factors in Section 924(c)(1)(A) describe a subset of Section 924(c)(1)(A) offenses. The conduct or action (brandishing or discharging) thus must occur in the course of the offense of conviction and involve "the firearm" that forms the basis for the conviction. If, for example, the firearm is discharged "at some point long before or after the offense," Pet. Br. 12, that discharge would not be part of the manner in which the Section 924(c)(1)(A) crime was committed. But if the firearm is "appropriated and discharged" by someone other than the defendant, such as "a law enforcement officer or bank teller," that event is a foreseeable harm that flows from the manner of commission of the offense. A closer case is if

the "defendant's weapon accidentally discharged when he dropped it to comply with a police request to do so." *Ibid.* (quoting *Brown*, 449 F.3d at 157). The answer to that question would turn on whether the Section 924(c) offense was still ongoing at the moment of compliance. But however that question is resolved, it would not justify straining grammar and the statutory text by applying the "in relation to" element to the "is discharged" sentencing factor. The firearm that is discharged already must have the requisite relationship to the underlying crime. And there is nothing absurd about Congress concluding that an offender should be subject to greater punishment if, while using or carrying a loaded firearm during and in relation to a crime of violence or drug trafficking crime, or possessing it in furtherance of such a crime, he is careless enough with the firearm that it accidentally discharges.

Here, of course, petitioner displayed his weapon and threatened bank employees, and then reached over a teller, who was on her knees below her teller station, to remove cash from a teller drawer while holding the pistol in one hand. He then "pulled the trigger," J.A. 79, apparently accidentally, while the firearm was close to the teller's head, J.A. 29. The "accident" horrified the teller's colleagues, who feared she had been shot. J.A. 22. Such reckless disregard of human life with the effect of terrorizing the victims certainly falls within Congress's intended ambit for the ten-year mandatory minimum sentence in Clause (iii).

B. No Presumption Requires Reading A Separate *Mens Rea* Requirement Into The Sentencing Factor At Issue Here And, In Any Event, Any Such Presumption Would Be Rebutted

Petitioner contends (Br. 25-26) that, if the statutory language does not by its terms supply a *mens rea* requirement for the "discharge" sentencing factor, this Court should nonetheless rely on background interpretive principle to supply one. He bases that argument on the presumption that "a criminal statute will be construed to require proof of at least general intent 'absent a clear statement from Congress that *mens rea* is not required.'" *Ibid.* (quoting *Staples*, 511 U.S. at 618). He further contends that the presumption should apply here, on the theory that a *mens rea* requirement should be presumed for the "particular *conduct* that gives rise to liability under subparagraph (iii)," namely, the discharge. *Id.* at 34. No such presumption applies here.

1. Petitioner's argument is inconsistent with Harris

As an initial matter, petitioner's argument once again conflicts with the Court's statutory holding in *Harris*. Petitioner suggests that the "discharge" of the firearm is the relevant *actus reus* "that gives rise to *liability* under subparagraph (iii)." Pet. Br. 34 (emphasis added). But it is a misnomer to speak of liability under a sentencing factor. "Liability" results from committing the offense defined in the principal paragraph in Section 924(c)(1)(A). See *Harris*, 536 U.S. at 556. The discharge of the firearm, *Harris* makes clear, does not result in liability for a new criminal offense. Rather, it is a "special feature[] of the manner in which [the] basic crime was carried out" and subjects a defendant to the

higher mandatory minimum sentence set forth in Clause (iii). *Harris*, 536 U.S. at 553.

Nor can petitioner draw support by analogizing (Pet. Br. 28-29) the sentencing enhancements in Clauses (ii) and (iii) to the common-law crime of assault. As an initial matter, he relies on the definition of "brandish"—displaying a firearm "in order to intimidate"—to claim a "close[] match[] [with] the common law offense of criminal assault." *Id.* at 29. That definition, however, expressly provides a *mens rea* requirement, so it cuts against, rather than supports, the notion that one must be implied. See pp. 18-20, *supra*. "Discharge," by contrast, does not bear a resemblance to common law criminal assault—especially when used in the passive voice. It is a distinct aspect of the manner in which the crime was committed that manifests a significant increased risk of physical injury and trauma. But even assuming that "discharge" did bear a resemblance to common-law assault, "[t]he canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law," *Carter* v. *United States*, 530 U.S. 255, 264 (2000), and no such term was borrowed here. As this Court explained in *Harris*, "there is no * * * federal tradition of treating brandishing and discharging as offense elements." 536 U.S. at 553.

2. The bases for the common-law presumption in favor of* mens rea *are not present here

Petitioner nevertheless suggests that interpreting the sentencing factor in Clause (iii) as "dispensing with an intent element would criminalize 'innocent conduct,'" namely, certain accidental discharges of the firearm. Pet. Br. 34. But the bases for the presumption of a *mens*

rea requirement—reflection of a background principle against which Congress enacts criminal provisions and protection against criminalizing innocent conduct—are lacking here.

a. The presumption that Congress generally intends a *mens rea* requirement when defining a crime is based on an "inference of the intent of Congress." *United States* v. *Balint*, 258 U.S. 250, 253 (1922); accord, *e.g.*, *Staples*, 511 U.S. at 604-605. That inference is derived from the principle that when Congress legislates "in light of the background rules of common law in which the requirement of some *mens rea* for a crime is firmly embedded," it is presumed to know and incorporate those rules. *Id.* at 605 (internal citation omitted); see *Morissette* v. *United States*, 342 U.S. 246, 252 (1952) ("courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation"); *id.* at 263.[9]

[9] Some lower courts have applied that presumption to the offense-defining portion of Section 924(c)(1)(A). See, *e.g.*, *United States* v. *Santeramo*, 45 F.3d 622, 623-624 (2d Cir. 1995) ("Although [S]ection 924(c)(1) does not explicitly describe the mental state required for a violation, knowledge of the facts constituting the offense ordinarily is implicit in a criminal statute that does not expressly provide a mental element.") (citing *X-Citement Video*, 513 U.S. at 70-71); *United States* v. *Nava-Sotelo*, 354 F.3d 1202, 1205 (10th Cir. 2003), cert. denied, 541 U.S. 1035 (2004). But it is doubtful whether that background rule applies to the principal offense, for two reasons. First, because every Section 924(c)(1)(A) violation involves an underlying crime that has its own *mens rea* requirement, there is no risk that Section 924(c)(1)(A) would criminalize "otherwise innocent conduct." *Carter*, 530 U.S. at 269. Second, it may be that the "in relation to" and "in furtherance of" elements of the offense require at least knowledge of the firearm's connection to the offense. See *Santeramo*, 45 F.3d at 624; *United States* v. *Dahlman*, 13 F.3d 1391, 1400 (10th Cir. 1993), cert. denied, 511

In contrast to the common law's requirement of *mens rea* for most criminal offenses, petitioner has cited no corresponding "universal and persistent," *Morissette*, 342 U.S. at 250, practice under the common law of requiring a separate *mens rea* for any facts on which a judge relies to increase the sentence within the statutory maximum. Indeed, this Court's cases suggest only a background presumption limited to offense elements. See, *e.g.*, *Carter*, 530 U.S. at 268 ("the presumption in favor of scienter demands only that we read subsection (a) as requiring proof of *general intent*—that is, that the defendant possessed knowledge *with respect to the actus reus of the crime*") (second emphasis added); *X-Citement Video*, 513 U.S. at 72 ("the standard presumption in favor of a scienter requirement should apply to each of the *statutory elements* that criminalize otherwise innocent conduct") (emphasis added); *Balint*, 258 U.S. at 251-252 ("[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it.").[10] In contrast, the Court has recognized in another context that the very sentencing

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U.S. 1045 (1994); *United States* v. *Guiterrez*, 978 F.2d 1463, 1467 (11th Cir. 1992). In any event, the question is not presented here, as Count 2 of the indictment charges that petitioner acted "knowingly," J.A. 12, and the district court instructed the jury that the government had to prove that he "knowingly" carried or possessed the firearm. 5/3/2006. Tr. 155.

[10] Petitioner quotes *Morissette*'s statement about the deep understanding of the need for "[a] relation between some mental element and *punishment* for a harmful act." Pet. Br. 30 (quoting *Morissette*, 342 U.S. at 250-251). *Morissette*, however, was referring to "punishment" as shorthand for criminalizing conduct, not for a rule concerning the particular sentence to be imposed for that crime.

facts at issue here, "though stigmatizing and punitive," do not implicate the rights that obtain with respect to elements of the crime. *Harris*, 536 U.S. at 560; see *ibid.* ("These facts, though stigmatizing and punitive, have been the traditional domain of judges; they have not been alleged in the indictment or proved beyond a reasonable doubt."). And the courts of appeals have generally recognized that, unlike criminal offenses, *mens rea* is not inherent in defining sentencing enhancements.[11]

In the absence of an established common-law tradition that Congress presumably adopted, courts have no basis for presuming that Congress, by remaining silent, intended to include a *mens rea* requirement in a "paradigmatic sentencing factor," *Harris*, 536 U.S. at 553, such as the discharge of a firearm. Courts have no authority to read *mens rea* requirements into sentencing provisions when Congress has not provided them, for it is the function of the legislature, within constitutional limits, not the judiciary, to prescribe the prerequisites for a sentencing scheme.[12]

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[11] See *United States* v. *Lavender*, 224 F.3d 939, 941 (9th Cir. 2000) ("Sentencing factors, however, are not separate criminal offenses and as such are not normally required to carry their own mens rea requirement."), cert. denied, 531 U.S. 1098 (2001); accord, *e.g.*, *United States* v. *Saavedra*, 523 F.3d 1287, 1289-1290 (10th Cir. 2008); *United States* v. *Gamboa*, 439 F.3d 796, 812 (8th Cir.), cert. denied, 549 U.S. 1042 (2006); *United States* v. *King*, 345 F.3d 149, 152-153 (2d Cir. 2003), cert. denied, 540 U.S. 1167 (2004); *United States* v. *Thornton*, 306 F.3d 1355, 1359 (3d Cir. 2002); *United States* v. *Fry*, 51 F.3d 543, 546 (5th Cir. 1995).

[12] Petitioner further contends (Br. 27-28) that the sentencing enhancements in Section 924(c)(1)(A) cannot be likened to "public welfare" or "regulatory" offenses. The government does not rely on any such analogy. In the case of public welfare statutes, the presumption that criminal offenses include *mens rea applies* because the statute

Thus, it is not, as petitioner suggests (Br. 30), the fact that "[t]his Court has never intimated that the presumption of *mens rea* does not apply to 'sentencing enhancements'" that is significant; it is instead the *absence* of decisions from this Court applying the presumption to sentencing enhancements. That judicial silence means that Congress would have had no warning that sentencing factors would be deemed to contain implied, non-textual *mens rea* elements. Nor is it clear how Congress could have negated such implications had it wished to do so. Because Congress did not legislate against a legal background requiring sentencing facts or enhancements to contain a separate *mens rea* requirement, and because Congress is entrusted with defining federal statutory crimes and punishments, see *Staples*, 511 U.S. at 604, it would be unwarranted for this Court to infer a *mens rea* requirement into Clause (iii).

b. Not only have courts *not* presumed that sentencing factors implicitly require distinct *mens rea*, the reasons for such a presumption for offense elements do not apply in this context. Significantly, the concern about "criminaliz[ing] a broad range of apparently innocent conduct," *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), that underlies the common law's inclusion of scienter in criminal offenses is not implicated here. The

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defines a crime, but it is *overcome* by statutory evidence based on the subject matter and penalties, that Congress intended to override it. See generally *Staples*, 511 U.S. at 605-619 (discussing the public welfare statutes and rejecting the government's argument that the offense at issue was such a statute). Here, in contrast, the presumption is *inapplicable* because there is no background universal and long-standing practice against which Congress legislated of requiring *mens rea* for any fact a judge relies on to increase a sentence within a statutory maximum.

sentencing enhancement in Clause (iii) applies only after an offender has been convicted of using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a crime of violence or drug trafficking crime. In that circumstance, the commission of not only the underlying violent or drug offense, but also the separate firearm offense in Section 924(c)(1)(A), establishes the offender's requisite "vicious will." *Morissette*, 342 U.S. at 251. Moreover, there is no potentially "innocent conduct" associated with using a firearm to commit a violent felony or drug trafficking crime. Once offenders use a gun to commit a violent or drug offense, they "understand the wrongful nature of their act," and the purpose of the intent requirement to distinguish them "from those who do not" has been accomplished; the law "does not [further] require knowledge of the precise consequences that may flow from that act once aware that the action is wrongful." *X-Citement Video*, 513 U.S. at 73 n.3; see *Carter*, 530 U.S. at 269-270 ("once this mental state and *actus reus* are shown, the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking—even by a defendant who takes under a good-faith claim of right—falls outside the realm of the 'otherwise innocent'"); *United States* v. *Feola*, 420 U.S. 671, 685 (1975) (noting, in rejecting scienter requirement regarding assault victim's status as a federal officer, that "[t]he situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected").[13]

[13] Thus, the Court's concern in *Staples* that criminalizing possession of a machine gun, absent proof of knowledge of the characteristics that make it a machine gun, would risk criminalizing innocent conduct given the "long tradition of widespread lawful gun ownership by private individuals," is not implicated. 511 U.S. at 610; see *id.* at 614-615.

Petitioner asserts (Br. 33) that this Court has never held that the presumption of *mens rea* applies only when *mens rea* is necessary to separate wrongful conduct from innocent conduct. But as this Court stated in *Carter*, "*only* that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct'" must be read into a statute. 530 U.S. at 256-257 (emphasis added) (quoting *X-Citement Video*, 513 U.S. at 72). If no such *mens rea* is necessary because the defendant already has committed wrongful conduct and there is no possible innocent conduct, it follows that the presumption does not apply. See *X-Citement Video*, 513 U.S. at 72 ("the presumption in favor of a scienter requirement should apply to each of the statutory elements *that criminalize otherwise innocent conduct*") (emphasis added); *Staples*, 511 U.S. at 619 ("the usual presumption that a defendant must know *the facts that make his conduct illegal* should apply") (emphasis added).[14]

Petitioner further argues (Br. 34) that "[a]n intent to do wrong cannot be extrapolated from one criminal act to all of the person's conduct without distending '*mens rea*' beyond any recognizable contours." See *id.* at 33 ("It is of no moment whether the particular defendant may be guilty of *other offenses*.") (emphasis added). But the discharge enhancement is not a separate offense. See *Harris*, 536 U.S. at 552. Nor is the enhancement based solely on the underlying "violent or drug trafficking crime." See Pet. Br. 35. Rather, the enhancement results because the underlying criminal act (violation of

[14] Although petitioner posits the possibility of assertedly "innocent" discharges, it is noteworthy that the examples he hypothesizes (Pet. Br. 34) do not include his own conduct. And the proper answer to those hypotheticals does not demand importation of a novel intent requirement. See pp. 29-30, *supra*.

the separate firearm offense in Section 924(c)(1)(A)) has produced an additional harm, even if unintended. As Blackstone put it:

> [I]f any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused from all guilt: but if a man be doing any thing *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour.

4 William Blackstone, *Commentaries* *26-*27.

Consistent with that principle, it is routine for criminal defendants who have the same culpable mental state to be subject to different levels of punishment based on the often unplanned and unintended consequences of their actions. The felony-murder rule rests on just such a premise. See pp. 22-23, *supra*. Other examples abound. For example, attempts are generally punished less severely than completed crimes, see 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.5(c), at 251 (2d ed. 2003) (*LaFave*), even though both groups of wrongdoers meant to commit precisely the same wrongful act. A defendant who sought only to wound his victim may find himself charged with manslaughter or even murder if the victim dies. See *id.* §§ 14.3, 14.4, 15.4(d), at 434, 436-437, 528. And, a person who knowingly chooses to commit one offense (for example, operating a car after using drugs) may find himself charged with a far greater one if his conduct results in harm to another person. 1 *LaFave* § 6.4(a), at 465; 2 *LaFave* § 15.5(a), at 531.

These examples underscore that criminal law often refrains from requiring a culpable mental state with respect to a fact that triggers increased punishment for a defendant who has already been determined to have committed a crime.

c. Petitioner's amici contend that the presumption of *mens rea* should apply to any statute that "requires additional punishment based on conduct beyond that required for conviction of the offense." NACDL Amicus Br. 7. The adoption of that broad presumption would not only be unprecedented. It would also risk disruption of a great deal of well-settled authority with respect to the construction of other federal criminal statutes.[15]

The most notable potential consequences would relate to the federal drug statutes. Any "knowing[] or intentional[]" manufacture, distribution, or possession with intent to distribute of "a controlled substance" is a federal crime unless the defendant has a valid permit. 21 U.S.C. 841(a). In addition, Congress has enacted a number of other provisions that prescribe enhanced punishment for those who engage in drug trafficking in a particular way or in a particular place. For example, a defendant "who violates section 841(a)(1)," and whose violation occurs "in or on, or within one thousand feet of" a school, is subject to "twice the maximum punishment" that would otherwise be authorized. 21 U.S.C. 860(a). The courts of appeals that have considered the question have uniformly held that 21 U.S.C. 841(a)(1)'s

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[15] Petitioner, for his part, eschews a claim that the presumption of a *mens rea* requirement applies to "every sentencing enhancement," Pet. Br. 35 n.15, but does not explain how his theory would not logically lead to that result.

"knowingly" requirement does not require the defendant have been aware of his proximity to the school.[16]

The same is true with respect to determinations of drug quantity. The amount of drugs involved in a Section 841(a) offense can result in a substantial increase in the defendant's maximum sentence. Compare 21 U.S.C. 841(b)(1)(A), with 21 U.S.C. 841(b)(1)(C). As a result, this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), requires the government to prove drug quantity to the jury in order to obtain such an enhanced maximum sentence. See *United States* v. *Cotton*, 535 U.S. 625, 632 (2002). Notwithstanding that fact, however, the courts of appeals have uniformly held that the government need *not* prove that the defendant had knowledge of the quantity of the drugs involved. See, *e.g.*, *United States* v. *King*, 345 F.3d 149, 153 (2d Cir. 2003) (citing cases), cert. denied, 540 U.S. 1167 (2004).

3. Any such presumption would be rebutted here

In any event, even assuming a presumption of *mens rea* applies to sentencing enhancements, it would be, like any presumption, subject to rebuttal. Any such presumption would be rebutted here by the indications that Congress's omission of a *mens rea* "was not a slip of the legislative pen, nor the result of inartful draftsmanship, but was a conscious and not irrational legislative choice."

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[16] See *United States* v. *Falu*, 776 F.2d 46, 50 (2d Cir. 1985); see also *United States* v. *Jackson*, 443 F.3d 293, 299 (3d Cir. 2006); *United States* v. *Cross*, 900 F.2d 66, 69 (6th Cir. 1990); *United States* v. *Dimas*, 3 F.3d 1015, 1022 (7th Cir. 1993); *United States* v. *Lewin*, 900 F.2d 145, 148 (8th Cir. 1990); *United States* v. *Pitts*, 908 F.2d 458, 461 (9th Cir. 1990); *United States* v. *DeLuna*, 10 F.3d 1529, 1534 (10th Cir. 1993) (aiding and abetting a 21 U.S.C. 860 violation); *United States* v. *Holland*, 810 F.2d 1215, 1222-1224 (D.C. Cir.), cert. denied, 481 U.S. 1057 (1987).

Bifulco v. *United States*, 447 U.S. 381, 400 (1980). Specifically, Congress omitted a *mens rea* requirement in the "discharge" provision while including one in the "brandish" provision; spoke in the passive voice; and did not pass the House versions which would have expressly qualified "discharges" with "during and in relation to" or have been amenable to the reading that "discharges" was part of the *actus reus* of the offense. See pp. 25-28, *supra*.

C. There Is No Reason To Resort To The Rule Of Lenity

Petitioner asserts (Br. 36-38) that the rule of lenity requires that Section 924(c)(1)(A)(iii) be construed to require proof that the firearm was discharged intentionally or knowingly. There is no warrant for resorting to that rule here.

Notwithstanding the clear lack of any requirement that the firearm be discharged intentionally or knowingly, petitioner contends (Br. 37) that Section 924(c)(1)(A)(iii) is ambiguous because the principal paragraph of the statute contains the phrase "in relation to." "The mere possibility of articulating a narrower construction, however, does not by itself make the rule of lenity applicable." *Smith*, 508 U.S. at 239. Rather, the rule is "reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute." *Ibid.* (brackets in original) (internal quotation marks omitted); see *Callanan* v. *United States*, 364 U.S. 587, 596 (1961) ("The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.").

There is no "grievous ambiguity or uncertainty in the statute" such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks omitted). The plain language of Section 924(c)(1)(A)(iii) imposes no requirement that the firearm was discharged knowingly or intentionally, and there is no reason—aside from an effort to *create* an ambiguity where none exists—to assume that the phrase "in relation to" in the opening paragraph of the statute—the paragraph that "list[s] the elements of a complete crime," *Harris*, 536 U.S. at 552—modifies the subsequent "paradigmatic sentencing factor[s]," *id.* at 553. See *Callanan*, 364 U.S. at 596 (rule of lenity "serves as an aid for resolving an ambiguity; it is not to be used to beget one").

Petitioner also argues (Br. 37) that the presumption of *mens rea* in criminal statutes renders Section 924(c)(1)(A)(iii) ambiguous. But as discussed above, there is no common law presumption of a separate *mens rea* for facts on which a judge relies to increase the sentence within the statutory maximum. In any event, the presumption cannot create ambiguity in an otherwise clear statute. See *Bifulco*, 447 U.S. at 387 ("Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2009

APPENDIX

1. 18 U.S.C. 924(c) provides:

Penalties

* * * * *

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

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

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

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

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

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

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

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

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

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

(D) Notwithstanding any other provision of law—

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

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

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

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

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

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

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

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

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

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

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

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