No. 08-1569

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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The petition for a writ of certiorari asks the Court to resolve a 6-2 circuit conflict over whether the types of firearms listed in 18 U.S.C. 924(c)(1)(B)(ii) are offense elements that must be charged in the indictment and proved to the jury beyond a reasonable doubt, or sentencing factors to be found by the district judge by a preponderance of the evidence. Respondents make no plausible arguments to dispute the conflict, but claim that it affects too few cases to warrant this Court's attention. Yet the question presented is recurring and important, and it arises in cases that are particularly significant to the government's efforts to combat violent crime and drug trafficking. These cases involve the most dangerous types of firearms, capable of causing the most harm and fear, such as machineguns, sawed-off shotguns, and bombs.

Respondents also err in suggesting that the decision below is correct or that this case is an inappropriate vehicle for resolving the question presented. Section 924(c)(1)(B)'s text and structure establish that it states sentencing factors, not elements. The government preserved this claim repeatedly in the district court, and if the government prevails in this Court, that decision will afford the government a fair opportunity to secure the enhanced sentence that the lower courts' rulings precluded.

A. The Circuits Are Divided On The Question Presented

As the First Circuit acknowledged, Pet. App. 4a-5a, its decision accord with the decision in *United States* v. *Harris*, 397 F.3d 404 (6th Cir. 2005), but conflicts with the decisions of six other circuits. See Pet. 11-12.

Respondent Burgess concedes the split. Br. in Opp. 6. Respondent O'Brien attempts to deny it by classifying each case according to its factual and procedural history, rather than by the court of appeal's stated holding. Br. in Opp. 18-23. In some of the cases the indictment or a special verdict form may have addressed the firearm type—certainly the safest course in a case of first impression in a circuit. But in each case the court of appeals held that Section 924(c)(1)(B) states sentencing factors, and in none of the cases was the factfinder required to find the type of firearm beyond a reasonable doubt. See, *e.g.*, *United States* v. *Cassell*, 530 F.3d 1009, 1011-1012 (D.C. Cir. 2008) (court of appeals approved jury instructions referring merely to "firearm"), cert. denied, 129 S. Ct. 1038 (2009); *United States* v. *Ciszkowski*, 492 F.3d 1264, 1268 (11th Cir. 2007) (although jury rendered special verdict that firearm was equipped with a silencer, court of appeals held that "the firearm char-

acteristics in [Section] 924(c) are sentencing factors intended to be determined by the judge").

B. The Conflict Merits This Court's Attention

The question presented is important and recurring, and the conflict will not be resolved without this Court's intervention.

1. Burgess contends that review should be denied because the conflict is not "new." Br. in Opp. 6. But the split only arose in 2005, when the Sixth Circuit diverged from three other circuits and concluded that Section 924(c)(1)(B) stated elements of separate offenses. *Harris*, 397 F.3d at 413-414. When the Sixth Circuit stood alone in its view, there was a reasonable chance that it would reconsider, perhaps in light of the three additional circuits that later came to disagree with it. Now, though, the First Circuit has joined the Sixth Circuit and denied rehearing en banc with a full view of the split; the chance that the First and Sixth Circuits will both realign their views is remote.

2. Burgess argues that the question presented is unimportant because it affects only a "small[] sub-subset of an already tiny percentage" of cases. Br. in Opp. 12; see *id.* at 6-13. Burgess reasons that because Section 924(c)(1)(B)(ii) always results in a prison sentence of 30 years or longer, and statistics show such sentences are a small percentage of all sentences imposed for violations of Section 924(c)(1), the question of how to interpret Section 924(c)(1)(B)(ii) is unworthy of this Court's review. He maintains that even his sentencing statistics overstate the number of cases affected by the question presented because those statistics also count (1) lengthy Section 924(c) sentences that are not imposed under Section 924(c)(1)(B)(ii), and (2) cases the government

could successfully prosecute irrespective of whether Section 924(c)(1)(B)(ii) is an element of the offense or a sentencing factor, see pp. 5-6, *infra*. And he further infers that the "numbers or percentages" of 30-year and life sentences within the Sixth Circuit were not "significantly different from those in the district courts of the other circuits," and did not change following the Sixth Circuit's decision in *Harris*. Br. in Opp. 12.

Even apart from overlooking the legal significance of the circuit split—which has generated eight published appellate decisions in as many years—Burgess's statistical approach is flawed in three respects.

First, Burgess is wrong to focus on the percentage of Section 924(c)(1) cases that are subject to Section 924(c)(1)(B), rather than the absolute number of such cases. The absolute numbers here are substantial. By his own count, the specific question presented here could have affected as many as 185 cases over a five-year period. See Burgess Br. in Opp. App. A1-A3. Accumulated over many years, the number of sentences directly affected by the Court's decision would be substantial indeed—and the importance of those cases is magnified because each involves a dangerous firearm capable of inflicting great harm.

Second, Burgess's efforts to make cross-circuit and intertemporal comparisons are not well-supported. Most prominently, the raw statistics cannot reveal the extent to which actual criminal conduct may have varied circuit-to-circuit and over time. The statistics thus cannot show how many cases may have been impeded by the Sixth Circuit's (and now the First Circuit's) approach.

Third, Burgess does not consider the strong likelihood that this Court's interpretation of Clause (B)*(ii)* will also govern the proper interpretation of Clause

(B)(*i*). Clause (B)(i) parallels Clause (B)(ii) in text and structure; every sound guide for interpreting one applies equally to the other. Indeed, in *Harris* v. *United States*, 536 U.S. 545 (2002), the narrowest issue before this Court was whether Section 924(c)(1)(A)(ii) (which prescribes a seven-year mandatory minimum sentence for brandishing a firearm) states a sentencing factor, but the Court made clear that its analysis and holding applied equally to the parallel provision in Clause (A)(iii) (which prescribes a ten-year mandatory minimum sentence for discharging a firearm). See *id*. at 556 ("The statute regards brandishing and discharging as sentencing factors to be found by the judge."). Likewise, this Court's interpretation of Clause (B)(ii) should control the interpretation of Clause (B)(i). Just as in *Castillo* v. *United States*, 530 U.S. 120 (2000), a decision in this case will effectively interpret all "the firearm type-related" provisions of Section 924(c). *Id.* at 131. And that consequence greatly expands the universe of cases that will be affected by the Court's resolution of the circuit split.

3. Burgess also suggests that in only a small number of cases will the government be unable to meet the higher burden of proof required to establish an offense element. Br. in Opp. 11. It is easy for Burgess to suggest that the government will normally prevail (while vowing to challenge the government's proof, see *id.* at 16, and having a co-defendant who boldly asserts that the government will lose, see O'Brien Br. in Opp. 23-25). But the reality is that, even apart from the higher burden of proof, the government will encounter enhanced substantive burdens if, as it assumed below (see Pet. 8, 19), the consequence of treating Section 924(c)(1)(B)(ii) as an offense element is that the government must also prove the defendant's knowledge of the nature of the

firearm. "[V]irtually any semiautomatic weapon may be converted, either by internal modification or, in some cases, simply by wear and tear, into a machinegun," yet "[s]uch a gun may give no externally visible indication that it is fully automatic," *Staples* v. *United States*, 511 U.S. 600, 615 (1994). That in turn makes it difficult or impossible for the government to prove a defendant's knowledge of the nature of the firearm other than by specific witness testimony on that issue, which the government often lacks.

The question presented does not embrace whether the government must prove the defendant's knowledge of firearm type if Section 924(c)(1)(B) states offense elements. See Pet. I, 8 n.2. Nor, contrary to Burgess's claim (Br. in Opp. 16-17), does that limitation undermine the appropriateness of the case for review. The decision whether the type of firearm is an offense element or sentencing factor is logically antecedent to the knowledge question; the government did not contest below that it would have to prove respondents' knowledge of the Cobray's characteristics if firearm type were an offense element (Pet. 19); and the court below only alluded to the issue in passing (Pet. App. 8a). And if this Court resolves this case by holding that firearm type is a sentencing factor, its decision in *Dean* v. *United States*, 129 S. Ct. 1849 (2009) (holding that accidental discharge of a firearm justifies an enhanced minimum sentence under Section 924(c)(1)(A)(iii)), virtually ordains that no knowledge requirement would apply.

C. The Court Of Appeals' Decision Is Incorrect

As discussed in the petition (at 13-18), the text and structure of Section 924(c)(1)(B) require interpreting it as stating sentencing factors. Tellingly, respondents

ignore the statute's express statement that its mandatory minimum sentences apply to "a person *convicted of* a violation of this subsection," 18 U.S.C. 924(c)(1)(B) (emphasis added). As the D.C. Circuit explained, "[t]he use of the phrase 'convicted of a violation' indicates that the provision is to be applied only after a conviction and, hence, only at sentencing." *Cassell*, 530 F.3d at 1017. Moreover, the statute is structured such that this Court "presume[s] that its principal paragraph defines a single crime and its subsections identify sentencing factors." *Harris*, 536 U.S. at 553. Respondents do not counter these arguments or provide any other persuasive support for the First Circuit's reading.

1. Respondents argue that Section 924(c)(1)(B) is structurally similar to the carjacking statute held in *Jones* v. *United States*, 526 U.S. 227 (1999), to state offense elements. Burgess Br. in Opp. 18-19; O'Brien Br. in Opp. 8-9. But the better structural parallels to Section 924(c)(1)(B) are the provisions located closest to it—Section 924(c)(1)(A), which this Court held in *Harris* states sentencing factors, and Sections 924(c)(1)(C) and (D), which similarly are understood to do so, see Pet. 16 & n.5.

Respondents also rely on the "traditional treatment of the fact at issue" and its "impact on sentencing" in support of their interpretation of the statute. Burgess Br. in Opp. 19; see O'Brien Br. in Opp. 10, 14. But assuming it is "traditional" to treat firearm type as an offense element, Congress can (within constitutional limits) write a statute that overcomes that tradition, which is what Congress did here. And while this Court adverted to policy, tradition, and impact to support its conclusions in *Jones*, *Castillo*, and *Harris*, in none of those cases did the Court use these factors to reach a conclu-

sion that contradicted the text of the statute, as respondents advocate here.

2. Respondents also offer three arguments based on legislative history. *First*, respondents argue that the 1998 overhaul of Section 924(c) was intended only to reverse *Bailey* v. *United States*, 516 U.S. 137 (1995), and "nowhere in the Congressional record did Congress state that its intention was to create subsections as sentencing factors." O'Brien Br. in Opp. 15; see Burgess Br. in Opp. 21-22. But "legislative history need not confirm the details of changes in the law effected by statutory language before [this Court] will interpret that language according to its natural meaning." *Morales* v. *TWA*, 504 U.S. 374, 385 n.2 (1992).

Second, O'Brien suggests that if Congress disagreed with *Castillo*, it should have amended the statute. Br. in Opp. 16. But when *Castillo* was decided in June 2000, the statute had already been replaced with a new version. Moreover, this Court's 2002 decision in *Harris* would have given Congress every reason to expect that the Court would interpret Section 924(c)(1)(B) as stating sentencing factors.

Third, O'Brien contends that if Congress had intended Section 924(c)(1)(B) to establish sentencing factors, it could have used more explicit language. Br. in Opp. 16-17. But Section 924(c)(1)(B)'s "convicted of" phrasing *is* explicit, see p. 7, *supra*, and in any event, this Court has never announced the sort of clear statement rule O'Brien seems to suggest.

3. Finally, constitutional avoidance concerns provide no basis for treating firearm type as an offense element. See Burgess Br. in Opp. 22-23. This Court's decision in *Harris* settled that Congress may constitutionally provide for judicial fact-finding that raises a minimum sen-

tence within an otherwise authorized range. This case involves no question of whether the court's finding of firearm type would be a fact necessary to justify the reasonableness of a sentence under *United States* v. *Booker*, 543 U.S. 220 (2005), because Congress has already specified the sentence, and it is not subject to appellate review under *Booker* for reasonableness.

D. This Case Is A Good Vehicle For Resolving The Conflict

Notwithstanding respondents' claims to the contrary, see Burgess Br. in Opp. 13-17; O'Brien Br. in Opp. 23-25, the government rigorously preserved the question presented, and this case is an appropriate vehicle for addressing it.

1. The government preserved its claim by arguing in pretrial filings that firearm type was a sentencing factor, see, *e.g.*, Dkt. 204 at 2-3, and then, after the district court rejected that argument, by arguing in its written objections to the Presentence Report that respondents were subject to a 30-year mandatory minimum sentence pursuant to Section 924(c)(1)(B)(ii) because the Cobray pistol was a machinegun, see Gov't Supp. C.A. App. (Burgess) 84; Gov't Supp. C.A. App. (O'Brien) 37. See also Dkt. 245 at 1 n.1 (government's motion for upward departure preserving argument that Section 924(c)(1)(B) states sentencing factors). The district court even acknowledged at sentencing that the government was "seeking to be especially careful to preserve that issue for appeal." Gov't C.A. App. 192. On appeal, neither respondent contended that the government had failed to preserve its argument that Section 924(c)(1)(B)(ii) states sentencing factors. See O'Brien C.A. Br. 10-41; Burgess C.A. Br. 11-38. The court of appeals likewise gave no indication that the government

had failed to preserve the single issue presented on appeal, and it squarely resolved that issue in a published opinion that establishes circuit precedent and explicitly rejects the holdings of six other circuits. See Pet. App. 1a-10a.

Burgess is mistaken to suggest (Br. in Opp. 14) that the government could preserve its claim only by seeking interlocutory review of the district court's ruling that firearm type is an offense element. An interlocutory appeal under 18 U.S.C. 3731 was not available to the government, because on the government's theory, the dismissal of Count 4 (the only basis for an interlocutory appeal) was correct. The district court's error was failing to impose a 30-year mandatory minimum sentence for Count 3, a decision the government timely appealed under 18 U.S.C. 3742 after sentence was pronounced. See Pet. 7-8 (recounting procedural history in the district court).[1]

2. Respondents contend that if the government prevails in this Court, additional proceedings will be necessary before they would be subject to a 30-year mandatory minimum sentence. Burgess suggests that respondents would be entitled to vacate their guilty pleas, and both respondents say they would contest a finding that the Cobray was a machinegun. See Burgess Br. in Opp. 15-16; O'Brien Br. in Opp. 23-25.

If the government prevails in this Court, respondents will face the possibility of an increased mandatory mini-

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[1] Burgess also seems to suggest that the government's failure to insist on a factual finding that the Cobray was a machinegun is a reason for this Court to decline to review the case. See Br. in Opp. 14-16. But given the district court's prior legal rulings, resolution of that issue was not necessary to respondents' sentences, so the court was under no obligation to resolve it. See Fed. R. Crim. P. 32(i)(3)(B).

mum sentence of which they were not advised before pleading guilty. See Fed. R. Crim. P. 11(b)(1)(I) (requiring court to inform the defendant of any mandatory minimum penalty). The government therefore agrees that if this Court rules that Section 924(c)(1)(B)(ii) establishes a sentencing factor rather than an offense element, further proceedings on the question of guilt may be warranted. And of course respondents would be entitled to be heard at sentencing regarding whether the Cobray is a machinegun—though their briefs offer nothing concrete to contradict the government's lab testing demonstrating that fact.[2] Neither consideration makes this case an inappropriate vehicle for resolving the question presented, however, because neither raises any doubt that this Court's decision will be determinative of future proceedings in this case.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

SEPTEMBER 2009

[2] O'Brien's factual discussion of the Cobray's history (see Br. in Opp. 23-25) refers extensively to documents that are apparently not in the record, and is largely irrelevant given the government's testing of the gun.