No. 11-9335

In the Supreme Court of the United States

ALLEN RYAN ALLEYNE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Court should overrule its decision in *Harris* v. *United States*, 536 U.S. 545 (2002).

TABLE OF CONTENTS

Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, guidelines and rule:

Statutes, guidelines and rule—Continued: Page

Statutes, guidelines and rule—Continued: Page

Miscellaneous—Continued: Page

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OPINION BELOW

The opinion of the court of appeals (J.A. 73-78) is not published in the Federal Reporter but is available at 2011 WL 6228319.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2011. The petition for a writ of certiorari was filed on March 14, 2012, and was granted on October 5, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of robbery affecting interstate commerce, in violation of 18 U.S.C. 1951(a) and 2, and using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 2. J.A. 64. He was sentenced to a total of 130 months of imprisonment including a mandatory minimum term of 84 months under Section 924(c)(1)(A)(ii), based on the district court's finding that he was liable for his accomplice's brandishing of a firearm, to be followed by five years of supervised release. J.A. 65-66. The court of appeals affirmed. J.A. 73-78.

1. In August 2009, petitioner's girlfriend, who worked at a convenience store, suggested a plan to rob the store's manager as he drove the daily deposits to a local bank. Presentence Investigation Report (PSR) ¶¶ 5-6. She provided petitioner with extensive information about the store's operations, and petitioner and an accomplice (who was not identified at trial) conducted surveillance on the store. *Ibid.* On September 30, 2009, petitioner and his girlfriend rented a car for use in the robbery. PSR ¶ 7.

The following day, petitioner and the accomplice waited for the manager to leave the store with the day's deposits and then positioned their rental car on the side of the road ahead of him. PSR ¶ 9. As the manager approached, petitioner's accomplice got out of the rental car and made it appear as though he and petitioner were experiencing car trouble. *Ibid.* He then walked towards the manager's minivan and gestured for the manager to roll down his window. *Ibid.* When he reached the minivan, petitioner's accomplice pulled out a gun, pushed it

up against the manager's neck, and demanded the bag containing the bank deposits. *Ibid.* The manager complied, handing over a total of $13,201.99. PSR ¶¶ 9-10. Petitioner then sped away in the rental car with the accomplice in the passenger seat. PSR ¶ 9.

2. A grand jury in the Eastern District of Virginia indicted petitioner on one count of robbery affecting interstate commerce, in violation of 18 U.S.C. 1951(a) and 2, and one count of "us[ing], carry[ing], brandish-[ing], and possess[ing]" a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1) and 2. J.A. 14-15. The jury, which was instructed that it could find petitioner guilty either for personally committing the charged violations or for aiding and abetting them, found petitioner guilty on both counts. J.A. 24-26, 34-37, 40.

The verdict form asked the jury, if it found petitioner guilty on the Section 924(c)(1) count, to determine whether he "[u]sed or carried a firearm during and in relation to a crime of violence," "[p]ossessed a firearm in furtherance of a crime of violence," or "[b]randished a firearm in connection with the crime of violence." J.A. 40. In response to questions from the jury during deliberations, the court instructed the jury that it had to find "at least one" of those options in order to find petitioner guilty on that count, but that it did not have to check "all three," so long as the jurors were unanimous about whatever they selected. J.A. 38-39. The jury selected the first option ("[u]sed or carried a firearm during and in relation to a crime of violence") without indicating any further findings on the other options. J.A. 40.

3. The presentence investigation report calculated an advisory Sentencing Guidelines range of 46 to 57 months of imprisonment on the robbery count. PSR ¶ 80. It

further recommended that the statutory penalty for the Section 924(c)(1) offense was "a mandatory minimum of 7 years to Life, consecutive," PSR Addendum 1, reflecting the minimum penalty for cases in which the defendant brandishes (or aids and abets the brandishing of) a firearm, see 18 U.S.C. 924(c)(1)(A)(ii).

Petitioner objected to the seven-year mandatory minimum, contending that the court lacked constitutional authority to find brandishing and that, in any event, the evidence did not support such a finding. 3:10-cr-134-REP Docket entry No. 7, at 2 n.1 (Jan. 7, 2011) (Pet. PSR Objection); J.A. 43-47. Petitioner acknowledged that the legal argument against the court's power to make a finding on brandishing was foreclosed by this Court's decision in *Harris* v. *United States*, 536 U.S. 545 (2002), which held that brandishing under Section 924(c)(1)(A)(ii) is a sentencing factor for the court to determine and that judicial factfinding that raises the mandatory minimum penalty for a Section 924(c)(1)(A) violation is constitutional. Pet. PSR Objection 2 n.1; J.A. 43-44.

The district court concluded that "the decision in *Harris* combined with the evidence in this case calls for the overruling of the objection." J.A. 61. It reasoned that "brandishing is a sentencing factor * * * to be determined by the preponderance of the evidence"; that the "preponderance of the evidence here would support a finding that the defendant aided and abetted the brandishing that actually, undeniably, and undisputedly occurred"; and that "[a]lthough the jury did not find beyond a reasonable doubt that the defendant reasonably foresaw his coconspirator brandishing a firearm for the express purpose of intimidation, the Court is not precluded from finding by the lower preponderance of

the evidence [standard] that he did." J.A. 61-62. The court sentenced petitioner to a 46-month term of imprisonment on the robbery count and a consecutive 84-month (seven-year) term of imprisonment on the Section 924(c)(1) count. J.A. 63, 65.

4. The court of appeals affirmed in an unpublished, per curiam opinion. J.A. 73-78. The court held, as petitioner again conceded, that *Harris* foreclosed a constitutional challenge to the mandatory minimum sentence on the Section 924(c)(1) count. J.A. 78.

SUMMARY OF ARGUMENT

This Court has twice upheld a legislature's constitutional authority to guide a judge's otherwise-discretionary sentencing determination by providing for a specific increase in a minimum sentence, within the otherwise-authorized range, upon the finding of a specified fact. See *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986); *Harris* v. *United States*, 536 U.S. 545 (2002). *Harris* involved a Section 924(c)(1)(A)(ii) sentence essentially identical to petitioner's. The Court should reaffirm *Harris*.

I. Mandatory minimum sentencing statutes represent a twentieth-century innovation designed to promote consistency in sentencing and establish legislative restraints on judicial discretion. In *McMillan*, this Court held that permitting a legislature to dictate the precise weight of a sentencing factor within a range that the judge already had available by virtue of the jury verdict did not infringe constitutional protections. After the Court held in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), that, other than a prior conviction, any fact that results in a sentence above the otherwise-authorized maximum term is subject to the jury-trial and reasonable-doubt guarantees, the Court revisited *McMillan*.

Although members of the majority relied on different rationales, *Harris* reaffirmed that mandatory minimum sentencing statutes that rely on judicial factfinding do not infringe the *Apprendi* rule. And it did so in upholding an increased mandatory minimum sentence under Section 924(c)(1)(A). As the plurality explained, *Apprendi* prevents a judge from increasing his zone of discretion by finding a fact that enlarges the sentencing range. But that rationale does not apply when a legislature specifies that a particular fact restricts judicial discretion by removing authority to impose a lower sentence *within* the range. The protection of *Apprendi* remains intact, since the sentence cannot exceed the maximum based on the facts found by the jury.

II. Petitioner, having sought certiorari on the theory that *Harris*'s constitutional holding should be overruled (Pet. 7-14), now advances (for the first time in this case) statutory-construction arguments that Section 924(c)(1)(A) does not, in fact, establish mandatory minimum sentencing factors for the judge to consider. Those claims are forfeited, inconsistent with the Court's statutory holding in *Harris,* and unsound.

Petitioner first argues that Congress intended to treat brandishing and discharging as elements that must be proved to the jury, rather than as judicially determined sentencing factors. That argument was raised and rejected in *Harris*. The Court's holding in *Harris* is entitled to the added force that *stare decisis* has in statutory cases, and petitioner offers nothing that would carry his considerable burden. Petitioner's alternative argument—that Section 924(c)(1)(A) should be interpreted as setting forth fixed-term sentences, rather than mandatory minimums—is also inconsistent with *Harris*, as well as with other decisions of this Court that discuss

Section 924(c)(1)(A)'s operation. In any event, petitioner offers no sound reason to interpret the phrase "not less than [five, seven, or ten] years," 18 U.S.C. 924(c)(1)(A)(i)-(iii), to mean "not less than *and not more than* [five, seven, or ten] years."

III. The Court should adhere to *Harris*'s constitutional holding. Judicial factfinding in a discretionary system, this Court has recognized, is consistent with *Apprendi* and the right to a jury trial. Judges therefore may find facts, and may calibrate the sentence based on those findings, when the judge determines that those facts are relevant to selecting a sentence within the range authorized by the jury verdict. Such judicial factfinding raises no constitutional concern because the facts found by the jury authorize the sentence imposed. The same is true when a legislature determines that, to ensure consistency and appropriate punishment, one fact that a judge must find shall be given a consistent minimum weight by all judges in sentencing similarly situated offenders. Once the jury verdict authorizes a particular maximum sentence, the finding of a fact—here, for example, brandishing—that raises the minimum sentence within the authorized range poses no threat to the jury's power.

Petitioner's contention that the Constitution precludes such sentencing provisions rests primarily on this Court's decision in *Apprendi*. But as the Court has repeatedly recognized, the holding of *Apprendi* is that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 536 U.S. at 490 (emphasis added). Nothing in *Apprendi* dictates that juries must also find facts that trigger an increase

in a mandatory minimum. And statutes like Section 924(c)(1)(A) do not raise *Apprendi*'s concern: that allowing judge-found facts to raise the maximum *increases* the judge's sentencing authority at the expense of the jury. To the contrary, such statutes *decrease* judicial sentencing authority upon the finding of a specified fact.

Petitioner espouses a broader reading of *Apprendi's* principle, applying it to "facts that increase the range of punishment to which a criminal defendant is exposed." Pet. Br. 9. That formulation not only expands *Apprendi*, but is difficult to reconcile with this Court's decision in *Oregon* v. *Ice*, 555 U.S. 160 (2009), which upheld a legislature's conditioning of consecutive sentences based on judge-found facts. Its adoption here would also threaten legislative reliance on affirmative defenses and sentencing mitigation factors. The Court found ample historical support for the result it reached in *Apprendi* (and in later cases that likewise involved increased maximum sentences). Petitioner and his amici, however, identify no historical precedent in sentencing law for the novel rule they seek in this case.

Finally, regardless of whether this Court would agree with *McMillan* and *Harris* as an original matter, *stare decisis* counsels strongly against overruling them. Congress and state legislatures enacted numerous mandatory minimum sentencing schemes (including Section 924(c)(1)(A) itself) in the wake of *McMillan*, and they have enacted still more since *Harris*. And overturning *McMillan* and *Harris* could provoke unpredictable legislative responses with potentially adverse consequences for defendants, prosecutors, and courts.

ARGUMENT

For more than two and one-half decades, this Court has upheld the authority of a legislature to constrain

judicial discretion at sentencing by providing that a court's specific findings of fact may require an increase in a minimum sentence within the otherwise-authorized range. See *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). Section 924(c)(1)(A) comports with this tradition by making the fact of brandishing a firearm a basis for increasing the mandatory minimum sentence for a Section 924(c)(1)(A) violation from five years to seven years—with the maximum sentence remaining at all times life imprisonment.

In *Harris* v. *United States*, 536 U.S. 545 (2002), the Court held that Section 924(c)(1)(A)(ii) validly constrained the sentencing court's discretion. It should adhere to that decision notwithstanding the Court's pre-*Harris* decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). *Apprendi* reined in legislative schemes in which a judicial finding of fact *extended* the judge's discretion by authorizing a longer maximum sentence. *Harris* sustained a scheme in which the legislature specifies the sentencing consequences of a particular judicial fact-finding *within* the authorized range. *Harris*'s reaffirmation of *McMillan* was sound, and the Court should adhere to it today.

I. THIS COURT HAS ENDORSED LEGISLATIVE AUTHORITY TO REQUIRE INCREASES IN A MINIMUM SENTENCE WITHIN AN AUTHORIZED RANGE BASED ON JUDICIAL FACTUAL FINDINGS

This Court's analysis of the role of mandatory minimum sentences responds to the background principle that the primary responsibility for establishing sentencing practices and policies resides with the legislature, so long as the sentences stay within constitutional bounds. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("Congress has the power to define criminal punish-

ments without giving the courts any sentencing discretion."). As this Court has held, Section 924(c)(1)(A)(ii) fits comfortably within the legislature's authority to channel judicial discretion in sentencing.

Early in the Nation's history, legislatures generally specified fixed or mandatory sentences that supplied a determinate and precise punishment for each particular offense. See, *e.g.*, *United States* v. *Grayson*, 438 U.S. 41, 45 (1978). Over time, however, Congress and various state legislatures largely "abandoned fixed-sentence rigidity * * * and put in place a system of ranges within which the sentencer could choose the precise punishment." *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989); see *Grayson*, 438 U.S. at 45. Under that system, a judge deciding on a sentence could "appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); see *Williams* v. *New York*, 337 U.S. 241, 246 (1949) (discussing the "historical latitude allowed sentencing judges").

In the twentieth century "the pendulum * * * swung back," *Payne* v. *Tennessee*, 501 U.S. 808, 820 (1991), as legislatures explored mechanisms to regain control over judicial discretion in sentencing. One mechanism for achieving that legislative purpose came under review in *McMillan*. In that case, Pennsylvania had provided that a person convicted of a specified felony was subject to a mandatory minimum penalty of five years of imprisonment if the sentencing judge found, by a preponderance of the evidence, that the person visibly possessed a firearm while committing the offense. *McMillan*, 477 U.S. at 80-94. The Court held that neither due process nor the Sixth Amendment required the

State to treat visible possession as an element of the offense or to prove its existence beyond a reasonable doubt to a jury. *Id.* at 84-93. The Court observed that the sentencing provision "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding." *Id.* at 87-88.

Eleven years after *McMillan*, Congress enacted the current version of 18 U.S.C. 924(c). Act of Nov. 13, 1998, Pub. L. No. 105–386, § 1(a), 112 Stat. 3469. Section 924(c) is "one of several measures to punish gun possession by persons engaged in crime" and makes it "a discrete offense to use, carry, or possess a deadly weapon in connection with 'any crime of violence or drug trafficking crime.'" *Abbott* v. *United States*, 131 S. Ct. 18, 22 (2010) (quoting 18 U.S.C. 924(c)(1)). As relevant here, Section 924(c)(1)(A) provides that anyone who violates that prohibition "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 five 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).

In *Harris*, this Court "[r]eaffirm[ed] *McMillan*" in the context of a prosecution under Section 924(c)(1)(A). 536 U.S. at 568. The district court in *Harris* found by a preponderance of the evidence that the defendant brandished a firearm during a drug-trafficking offense and relied on that finding to impose a seven-year mandatory minimum sentence under Section 924(c)(1)(A)(ii). *Id.* at

551. This Court upheld the sentence. *Id.* at 551, 569. The Court first concluded, as a statutory matter, that Section 924(c)(1)(A) "regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury." *Id.* at 556. It reasoned, among other things, that *McMillan* would have led Congress to believe that a statute structured in that fashion was constitutional. *Ibid.*

The Court additionally concluded, as a constitutional matter, that it would adhere to *McMillan*, notwithstanding the petitioner's argument that *McMillan* had been superseded by *Apprendi*. *Harris*, 536 U.S. at 568; see Pet. Br. 40, *Harris*, *supra* (No. 00-10666) (*Harris* Pet. Br.). No single rationale for rejecting that argument commanded a majority of the Justices. Four members of the Court concluded that mandatory minimums did not implicate the rationale or historical basis of *Apprendi*. *Harris*, 536 U.S. at 556-568 (plurality opinion of Kennedy, J.). Justice Breyer concurred in part and concurred in the judgment, finding it difficult to distinguish *Apprendi* "in terms of logic," but maintaining his disagreement with *Apprendi* and joining the Court's opinion "to the extent that it holds that *Apprendi* does not apply to mandatory minimums." *Id.* at 569-572 (Breyer, J., concurring in part and concurring in the judgment). Accordingly, the opinion of the Court concluded that, "employing the approach outlined in" *McMillan*, "[b]asing a 2-year increase in the defendant's minimum sentence on a judicial finding of brandishing does not evade the requirements of the Fifth and Sixth Amendments." *Id.* at 568. The Court explained that by increasing the minimum sentence on that basis, "Congress 'simply took one fact that has always been considered by sentencing courts to bear on punishment and

dictated the precise weight to be given that factor.'" *Id.* at 568 (quoting *McMillan*, 477 U.S. at 89-90) (alteration omitted). That sentencing factor, the Court held, "need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt." *Ibid.*

Harris's statutory and constitutional holdings should be reaffirmed today. As was true then (and was equally true years earlier in *McMillan*), legislatures can regulate sentencing, within the otherwise-authorized range, by providing for judicial factfinding to raise a minimum sentence. Such a provision restricts judicial discretion but does not redefine the offense or empower the court to impose a sentence that it otherwise lacked authority to impose. As a means of channeling judicial discretion within the authorized range (of five years to life imprisonment), Section 924(c)(1)(A)(ii) is constitutionally sound.

II. THE COURT SHOULD REAFFIRM *HARRIS*'S HOLDING THAT SECTION 924(c)(1)(A) DEFINES A SINGLE FEDERAL CRIME WITH THREE SENTENCING PROVISIONS AND A MAXIMUM TERM OF LIFE IMPRISONMENT

In the courts below, petitioner objected to the imposition of a seven-year mandatory minimum sentence only on factual and constitutional grounds. See Pet. PSR Objection 2 n.1; J.A. 43-47; Pet. C.A. Br. 31-35. And when he filed his petition for a writ of certiorari, he raised only one argument: that *Harris*'s constitutional holding was incorrect and should be overruled. See Pet. 7-14. This Court granted certiorari based on that question presented and specified no other issue. J.A. 80. At the tail end of his merits brief, however, petitioner for the first time challenges his sentence on statutory grounds. See Pet. Br. 43-51. This Court typically does

not consider issues that were neither pressed nor passed on in the lower courts. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). And even if the Court were to consider petitioner's statutory arguments, both are foreclosed by *Harris*; principles of statutory *stare decisis* counsel strongly against revisiting *Harris*'s interpretation of Section 924(c)(1)(A); and petitioner identifies no error in *Harris*'s conclusions.

A. *Harris* Held That Section 924(c)(1)(A)'s Brandishing And Discharging Provisions Are Sentencing Factors, Not Offense Elements

This Court concluded in *Harris* that, "as a matter of statutory interpretation, § 924(c)(1)(A) defines a single offense" that "regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury." 536 U.S. at 556. The Court observed that the statute "begins with a lengthy principal paragraph listing the elements of a complete crime—the basic federal offense of using or carrying a gun during and in relation to a violent crime or drug offense"; that "[t]oward the end of the paragraph is the word 'shall,' which often divides offense-defining provisions from those that specify sentences"; and that "following 'shall' are the separate subsections, which explain how defendants are to 'be sentenced'" by setting forth graduated minimum penalties. *Id.* at 552 (internal quotation marks and citations omitted). "When a statute has this structure," the Court explained, "we can presume that its principal paragraph defines a single crime and its subsections identify sentencing factors." *Id.* at 553.

The Court also found that "critical textual clues * * * reinforce the single-offense interpretation implied by the statute's structure." *Harris*, 536 U.S. at 553. The Court noted that its decision in *Castillo* v. *United States*, 530 U.S. 120 (2000), had "singled out brandishing as a paradigmatic sentencing factor" and that sentencing enhancements in the federal Sentencing Guidelines "appear to have been the only antecedents for the statute's brandishing provision." *Harris*, 536 U.S. at 553-554; see *Castillo*, 530 U.S. at 126. The Court also noted that the brandishing and discharging provisions did not create "'steeply higher penalties'" that might cast doubt on Congress's intent to make those penalties "contingent on judicial factfinding." *Harris*, 536 U.S. at 554 (quoting *Jones* v. *United States*, 526 U.S. 227, 233 (1999)). Rather, the statute's "incremental changes in the minimum—from 5 years, to 7, to 10—are precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration." *Ibid.*

Finally, the Court rejected the argument that the canon of constitutional avoidance favored an interpretation of Section 924(c)(1)(A) that would treat brandishing and discharging as elements. *Harris*, 536 U.S. at 555. The Court observed that the "avoidance canon rests upon our 'respect for Congress, which we assume legislates in the light of constitutional limitations.'" *Id.* at 556 (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991)). And because Section 924(c)(1)(A) "was passed when *McMillan* provided the controlling [constitutional] instruction"—namely, that legislatures *could* authorize judges to find facts that increase mandatory minimums—"Congress would have had no reason to believe

that it was approaching the constitutional line by following that instruction." *Ibid.*

B. Petitioner Provides No Reason To Reconsider *Harris*'s Statutory Holding

1. The version of Section 924(c)(1)(A) before the Court in this case is the same version analyzed in *Harris*. Compare *Harris*, 536 U.S. at 550-551, with App., *infra*, 1a-2a. The meaning of the statutory language has not changed, and revising *Harris*'s interpretation of it "would ill serve the goals of 'stability' and 'predictability' that the doctrine of statutory *stare decisis* aims to ensure." *CSX Transp. Inc.* v. *McBride*, 131 S. Ct. 2630, 2641 (2011) (quoting *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991)). As petitioner acknowledges (Pet. Br. 51), "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what [the Court has] done.'" *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989)); see, *e.g.*, *United States* v. *Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1841 (2012). This Court should respect Congress's choice not to amend Section 924(c)(1)(A) following *Harris*.

In support of his contention (Pet. Br. 47-51) that *Harris* misinterpreted Section 924(c)(1)(A), petitioner cites only one post-*Harris* decision, *United States* v. *O'Brien*, 130 S. Ct. 2169 (2010). Far from casting doubt on *Harris*, that decision reiterates that "the brandishing and discharge provisions codified in § 924[(c)(1)](A)(ii) and (iii) do state sentencing factors." *Id.* at 2180; see also *Dean* v. *United States*, 556 U.S. 568, 574 (2009). Indeed, the Court in *O'Brien* supported its holding—that a weapon's status as a machinegun under Section

924(c)(1)(B)(ii) is an element of an offense, rather than a sentencing factor—in part by highlighting a structural difference between that provision and the provisions at issue in *Harris*. 130 S. Ct. at 2180. The Court noted that if Congress had intended "firearm type as a sentencing factor, it likely would have listed firearm types" in subsections adjacent to the brandishing and discharge provisions; instead, it "set [them] apart from the sentencing factors in (A)(ii) and (iii)." *Ibid.* *O'Brien* thus reaffirmed the sentencing-factor interpretation of Section 924(c)(1)(A)(ii) on which Congress had every reason to rely.

2. Petitioner cannot carry his "considerable burden" to overcome this settled interpretation. *CBOCS West, Inc.* v. *Humphries*, 553 U.S. 442, 451 (2008). Indeed, he fails to identify any error in *Harris*'s analysis. Contrary to petitioner's suggestion, the five factors this Court has relied on to distinguish sentencing factors from elements—"(1) language and structure, (2) tradition, (3) risk of unfairness, (4) severity of the sentence, and (5) legislative history," *O'Brien*, 130 S. Ct. at 2169 (citing *Castillo*, 530 U.S. at 124-131)—demonstrate that brandishing and discharging are sentencing factors.

First, the structural placement of brandishing and discharging in subsections immediately following the base offense signals that they are sentencing factors. *O'Brien*, 130 S. Ct. at 2176; see *Castillo*, 530 U.S. at 124-125; *Jones*, 526 U.S. at 232-233. Petitioner's suggestion (Pet. Br. 48) that brandishing and discharging must be offense elements because they make a defendant's offense "more serious" would eliminate the statutory inquiry into sentencing factors altogether. Petitioner also fails to support his claim (*ibid.*) that sentencing factors typically do not include both an act and a mental state.

To the contrary, this Court has observed that "[t]raditional sentencing factors often involve * * * special features of the manner in which a basic crime was carried out," including features like "abus[ing] a position of trust or brandish[ing] a gun," both of which have both an act and a mental-state component. *Castillo*, 530 U.S. at 126.

Second, brandishing has long been considered a quintessential sentencing factor under federal law. See, *e.g.*, Report of The Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* 57 (1976) (Task Force Report) ("brandish[ing] a weapon" is factor affecting the appropriate sentence for the crime of burglary); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 203(e)(2)(E)(ii), 110 Stat. 3009-567 (directing Sentencing Commission to enhance sentence for alien-smuggling on a finding of brandishing); Sentencing Guidelines § 1A1.1 n.3 (using brandishing a gun as an example of a factor relevant to sentencing); *id.* §§ 2A2.2(b)(2)(C), 2B3.2(b)(3)(A)(iii) (enhancements for brandishing); see also *McMillan*, 477 U.S. at 81, 90-91 (declining to hold that "visible possession" of a firearm has historically been treated as an element); cf. Sentencing Guidelines §§ 2A2.2(b)(2)(A), 2B3.2(b)(3)(A)(i), 5K2.6 (enhancements for discharging). Although some state statutes define brandishing or discharging a firearm (in certain circumstances) as a stand-alone offense (Pet. Br. 48-49), those statutes do not inform whether brandishing and discharging are sentencing factors when a firearm facilitates *another* offense. See 18 U.S.C. 924(c)(1)(A). And this Court has recognized that in distinguishing sentencing factors from elements, "state practice is not * * *

direct authority for reading" a federal statute. *Jones*, 526 U.S. at 237.

Third, the only "unfairness" petitioner claims (Pet. Br. 49) in treating brandishing and discharging as sentencing factors is that a judge might make different findings than a jury. But judicial factfinding is an inherent feature of all sentencing factors. Petitioner's assertion that Congress would consider a procedure "unfair" if a judge might differ from a jury implies that no sentencing factors are fair. But this Court has consistently recognized that judicial factfinding to support a sentence within a predetermined range is permissible when the judge determines what facts are relevant, see *United States* v. *Booker*, 543 U.S. 220, 233 (2005), and under such a regime, the judge can find by a preponderance of the evidence the same fact that a jury declined to find. Even "an acquittal in a criminal case"—which reflects the jury's failure to make a particular finding beyond a reasonable doubt—"does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof," such as a sentencing proceeding. *United States* v. *Watts*, 519 U.S. 148, 156 (1997) (per curiam) (quoting *Dowling* v. *United States*, 493 U.S. 342, 349 (1990)).

Fourth, cases in which this Court has found the severity of a sentencing increase to cut in favor of treating a provision as an element have involved much greater increases than the two- and five-year increases at issue here. See *O'Brien*, 130 S. Ct. at 2178 (increase from five-year mandatory minimum to 30-year mandatory minimum for carrying a machinegun); *Castillo*, 530 U.S. at 131 (increase from five-year mandatory sentence to ten-year or 30-year mandatory sentence for carrying

certain firearms); see also *Jones*, 526 U.S. at 230, 233 (increasing statutory maximum from 15 years to 25 years or to life). Petitioner's contention (Pet. Br. 50) that any increase in a defendant's sentence suggests an intent to create an element would effectively eliminate severity as a consideration.

Finally, the legislative history supports treating brandishing and discharging as sentencing factors. The House proposed a bill in which brandishing and discharging would, in fact, have been elements of discrete offenses: the principal paragraph would not itself have defined a full offense and the three subsections would each have described the penalty for specific conduct ("possess[ing]," "brandish[ing]," or "discharg[ing]" a firearm, respectively). H.R. 424, 105th Cong., 2d Sess. (1998). The House Report relied on by petitioner (Pet. Br. 50-51) refers to the House bill, not the statute as enacted. See H.R. Rep. No. 344, 105th Cong., 1st Sess. 2 (1997). The final version of the statute, however, adopted the structure common to a single offense with multiple sentencing factors. See 18 U.S.C. 924(c)(1)(A); see *Harris*, 536 U.S. at 552-553.

C. The Penalties Set Forth In Section 924(c)(1)(A) Are Mandatory Minimums, Not Fixed Terms Of Imprisonment

1. As an alternative to his argument that the brandishing and discharging provisions are elements of discrete offenses, petitioner (along with one of his amici) separately contends that the three subsections of Section 924(c)(1)(A) set forth fixed terms of imprisonment. See Pet. Br. 44-47; Nat'l Ass'n of Crim. Defense Lawyers Amicus Br. 2-28 (NACDL Br.). On that theory, the five-year, seven-year, or ten-year term mentioned in each subsection is not only the minimum sentence, but

also the maximum sentence when the specified conditions are met. If that were the case, having a judge, rather than a jury, make a finding that increased the sentence would violate the rule in *Apprendi* that "any fact (other than prior conviction) that increases the *maximum* penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476 (emphasis added).

Petitioner has never raised this argument before, and it cannot be reconciled with the petition for a writ of certiorari. There, petitioner represented to the Court that this case would be a good vehicle for addressing the constitutionality of judicial factfinding for mandatory minimums because "[u]nder § 924(c), a finding of brandishing or discharging increases the mandatory minimum, but the maximum remains the same as in the unenhanced penalty." Pet. 13. Even if petitioner were entitled to argue otherwise now, his original position was the correct one. As every court of appeals to address the issue has recognized, the subsections of Section 924(c)(1)(A) set forth mandatory minimums with a maximum sentence of life. See, *e.g.*, *United States* v. *Shabazz*, 564 F.3d 280, 288-289 (3d Cir. 2009) (citing cases).

2. *Harris* settles this issue. In concluding that brandishing and discharging did not create "steeply higher penalties," the Court reasoned in part that "[s]ince the subsections [of Section 924(c)(1)(A)] alter only the minimum, the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished the firearm." 536 U.S. at 554. And throughout its statutory-construction discussion, the Court repeatedly referred to Section 924(c)(1)(A)'s prescriptions of "not less than" five, seven, and ten years as "minimum[s]"

rather than fixed terms. *Id.* at 551-553; see *id.* at 569-572 (Breyer, J., concurring in part and concurring in the judgment); see also *id.* at 575-576 (Thomas, J., dissenting) (treating the statutory maximum as "life in prison"). That understanding of the statute was critical to the outcome of the case. Not only did it inform the statutory analysis, *id.* at 554, but the Court could not have affirmed an increase in the defendant's sentence based on judicial factfinding had the Court believed that the increase was to a statutory maximum, see *id.* at 550 (recognizing that a fact, other than a prior conviction, that increases a statutory maximum must be found by a jury). The Court's construction of the sentencing provisions of Section 924(c)(1)(A) as providing a uniform maximum—namely, "life imprisonment," *id.* at 574 (Thomas, J., dissenting)—is accordingly entitled to statutory *stare decisis* treatment.

Other decisions of this Court have likewise described the sentences in Section 924(c)(1) as "minimum" sentences. See *Abbott*, 131 S. Ct. at 22-23; *O'Brien*, 130 S. Ct. at 2177; *Dean*, 556 U.S. at 570. Petitioner's contrary construction would implausibly read the phrase "not less than [five, seven, or ten] years," 18 U.S.C. 924(c)(1)(A)(i)-(iii), to mean "not less than *and not more than* [five, seven, or ten] years." See *United States* v. *Dorsey*, 677 F.3d 944, 957 (9th Cir. 2012), petition for cert. pending, No. 12-6571 (filed Sept. 28, 2012). While that would be an odd construction under any circumstance, it is especially odd in this circumstance, because when Congress prescribes a statutory maximum, it ordinarily uses the phrase "not more than" expressly—as it has in Section 924's other provisions prescribing penalties for firearm violations. See, *e.g.*, 18 U.S.C. 924(a)(1)-(7), (b), (f), (g), (h), (i), (k), (*l*), (m), (n), (*o*) and

(p)(1)(A)(ii); accord 18 U.S.C. 930(a) and (b); 18 U.S.C. 930(e) (2006 & Supp. V 2011).

Petitioner derives no meaningful support for his construction from his citation (Pet. Br. 46) of *Stimpson* v. *Pond*, 23 F. Cas. 101 (C.C.D. Mass. 1855) (No. 13,455), in which Justice Curtis concluded that a patent-related statute authorizing a civil penalty of "not less than one hundred dollars" did not authorize higher fines. Terms of imprisonment, unlike fines, have a natural outer bound. Uncertainty over whether the legislature "confer[red] *unlimited* power over the estates of citizens" in a civil action for penalties under the patent laws, *id.* at 102 (emphasis added), does not translate to prison terms, which are necessarily bounded at life. See, *e.g.*, *People* v. *Raymond*, 96 N.Y. 38, 40 (1884) (observing, in the context of a forgery statute, that "the penalty prescribed was imprisonment for not less than ten years, and, therefore, might be for life").

3. Petitioner's countertextual reading also cannot be squared with the statute's history. The pre-1998 version of Section 924(c) did, in fact, provide for a fixed-term sentence, stating that a defendant who uses or carries a firearm during and in relation to a crime of violence or drug-trafficking crime "shall * * * be sentenced to imprisonment for five years." 18 U.S.C. 924(c)(1) (1994). Congress had good reason to believe that by adding a new phrase clearly imposing a mandatory minimum ("not less than"), the statute's sentencing provisions would be interpreted as mandatory minimums. That is especially true because this Court had previously read the phrase "not less than fifteen years" in a neighboring provision of Section 924 (18 U.S.C. 924(e)(1)) to prescribe "a mandatory minimum sentence of 15 years and a maximum of life in prison." *Custis* v. *United States*,

511 U.S. 485, 487 (1994); see *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, * * * it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

Petitioner's amicus posits (NACDL Br. 11) that Congress added the new language simply to clarify that district courts could not impose sentences lower than those specified in the statute. But amicus offers no evidence that a sentence below the prior five-year fixed term had ever survived appellate review. And its argument overlooks Congress's choice to model Section 924(c)(1)(A)(ii) on language that this Court had already interpreted as establishing only a minimum, not a maximum. See *Custis*, 511 U.S. at 487. Finally, amicus's reliance on the constitutional-avoidance canon (NACDL Br. 22) is on no firmer ground here than in *Harris*: in light of *McMillan*, "Congress would have had no reason to believe that it was approaching the constitutional line." 536 U.S. at 555-556. The purpose of avoiding difficult constitutional questions—to avert "friction with our coordinate branch"—would not be served "by adopting a strained reading of a statute that Congress had enacted in reliance" on a decision of this Court. *Id.* at 556.

III. THIS COURT SHOULD REAFFIRM *HARRIS*'S HOLDING THAT LEGISLATURES MAY CONSTITUTIONALLY MANDATE MINIMUM SENTENCES BASED ON JUDICIALLY DETERMINED FACTS

Judicial factfinding is an intrinsic feature of many discretionary sentencing schemes, and no constitutional problem arises when a judge finds "facts that the judge deems relevant" in that context. *Booker*, 543 U.S. at

233; *Apprendi*, 530 U.S. at 481; see *Dillon* v. *United States*, 130 S. Ct. 2683, 2692 (2010) ("[W]ithin established limits, * * * the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts.") (italics and internal quotation marks omitted). Accordingly, as the sentencing court in this case correctly recognized, the court would have been free to find brandishing and impose a seven-year (or greater) sentence if, as petitioner argued, the sentencing range were five years to life. J.A. 51, 58. As a constitutional matter, the legislature's direction of such a rule for all sentencing judges is equally valid. That approach fosters consistency, gives expression to legislative policy, and exposes the defendant to no sentence that he could not have otherwise received. The approach precludes judicial discretion to grant greater leniency than the legislature desires. But removing such leniency does not offend *Apprendi*, which protects against judicial factfinding that "increase[s] the judge's power and diminish[es] that of the jury * * * [to] determine[] the *upper limits* of sentencing." *Booker*, 543 U.S. at 236 (emphasis added).

A. Mandatory Minimums Like Section 924(c)(1)(A) Assign A Uniform Minimum Weight To Facts Courts Have Long Been Authorized To Find

1. For as long as discretionary sentencing has existed, the information available to sentencing judges was not limited to the facts alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. See, *e.g.*, *Williams*, 337 U.S. at 246 ("Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders."); see also *Harris*, 536

U.S. at 558 (plurality opinion). As a leading nineteenth-century treatise explained, "within the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment." 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 85, at 54 (2d ed. 1872) (Bishop). That was because any "aggravating circumstances" that the judge might find "cannot swell the penalty above what the law has provided for the acts charged against the prisoner, and they are interposed merely to check the judicial discretion in the exercise of the permitted mercy." *Ibid.* "Where the law permits the heaviest punishment, on a scale laid down, to be inflicted, and has merely committed to the judge the authority to interpose its mercy and inflict a punishment of a lighter grade, no rights of the accused are violated though in the indictment there is no mention of mitigating circumstances." *Ibid.*

Accordingly, this Court has recognized that nothing in the history of sentencing in this country "suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute." *Apprendi*, 530 U.S. at 481 (emphasis omitted). And it has affirmatively upheld the constitutionality of that practice. See *Williams*, 337 U.S. at 251 ("In determining whether a defendant shall receive a one-year minimum or a twenty-year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court."); see also

Harris, 536 U.S. at 558 (plurality opinion) (citing additional cases).

2. Statutory mandatory minimums represent a legislative effort to make judges' sentencing decisions more consistent. Beginning in the 1970s, the disparities produced by indeterminate sentencing regimes underwent increasing criticism. See Arthur Campbell, *Law of Sentencing* § 1:3, at 9-10 (2d ed. 1991) (Campbell); Peter Hoffman & Michael Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 Hofstra L. Rev. 89 (1978); *e.g.*, Task Force Report 3-9; Am. Friends Serv. Comm., *Struggle for Justice* (1971). In the wake of those criticisms, one popular sentencing reform was increased use of mandatory minimum prison terms. See Campbell §§ 1:3, 4:2, 4:5, at 13, 73-74, 80-83; Task Force Report 16; Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 123 (1998) (*Fear of Judging*). Such laws specified minimum sentences—within the sentencing range otherwise specified for the crime of conviction—that should attach to the finding of specific aggravating factors such as repeat offender status, use of a firearm or other dangerous weapon during the offense, the particular vulnerability of the victim, or the amount of drugs involved in narcotics offenses. See *Fear of Judging* 123, 210 n.38; Gary Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Calif. L. Rev. 61, 69, 70-71 & nn.37-48 (1993); Sandra Shane-DuBow et al., *Sentencing Reform in the United States: History, Content, and Effect* (1985).

As generally formulated, mandatory minimum sentences are a feature of the sentencing process, not a part of the definition of crimes. They replicate—but make

more uniform—a policy judgment that a sentencing court could make itself. If a particular sentencing judge characteristically imposed a minimum sentence of seven years on defendants who brandished firearms (rather than merely carrying them or using them in a less dangerous way), that practice would not redefine the crime for which the sentences were imposed or require that the fact of brandishing to be charged in the indictment and proved at trial beyond a reasonable doubt. Cf. 1 Bishop § 85, at 54 (describing the imposition of a heightened sentence based on aggravating factors as "an entirely different thing from punishing one for what is not alleged against him"). Nor would a sentencing factor be transformed into an "element" if sentencing judges, after conducting a survey that revealed that most judges imposed such a minimum sentence, agreed that each judge would follow the general practice. See Campbell § 1:3, at 13-14 (discussing experimentation with voluntary sentencing guidelines in the 1970s). Likewise, when a legislature "simply [takes] one factor that has always been considered by sentencing courts to bear on punishment * * * and dictate[s] the precise weight to be given that factor" within the range already available to the judge, it is not creating a new crime, but is providing "additional guidance" to the sentencing court. *McMillan*, 477 U.S. at 89-90, 92; see *Harris*, 536 U.S. at 559 (plurality opinion) (similar).

3. Legislatures have valid reasons for mandating the transparent and uniform treatment of particular sentencing factors, rather than defining new aggravated offenses with elements that must be alleged in the indictment and found by the jury. First, creating new crimes with multiple factors could complicate indictments and trials—particularly if relevant facts might be

expected to emerge at sentencing. A wide array of facts bears on the appropriate sentence, see, *e.g.*, *Williams*, 337 U.S. at 246, and a legislature might determine that specific facts warrant imposition of a mandatory minimum term. A legislature may conclude that those more fine-grained determinations are collateral to the basic question of guilt and better addressed at sentencing.

Second, legislatures could reasonably desire to permit litigation of the specific way a basic offense was committed without forcing a defendant to make inconsistent arguments before a jury. "In many cases, a defendant, claiming innocence and arguing, say, mistaken identity, will find it impossible simultaneously to argue to the jury that the prosecutor has overstated the drug amount. How, the jury might ask, could this 'innocent' defendant know anything about the matter?" *Harris*, 536 U.S. at 571 (Breyer, J., concurring in part and concurring in the judgment); see, *e.g.*, *Monge* v. *California*, 524 U.S. 721, 729 (1998) (noting the existence of "cases in which fairness calls for defining a fact as a sentencing factor"). Although that problem might potentially be addressed through additional procedures such as bifurcated trials, a legislature might view judicial factfinding as a way to achieve some degree of sentencing consistency without placing such additional burdens on courts, jurors, and witnesses.

Third, legislatures might conclude that separating mandatory minimums into different offenses will give too much power to prosecutors, "who can determine sentences through the charges they decide to bring." *Harris*, 536 U.S. at 571 (Breyer, J., concurring in part and concurring in the judgment). The effect would be particularly significant in plea bargaining, which resolves well above 90% of all state and federal criminal

cases. See *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012). If the indictment charges a series of graduated offenses, each with a higher minimum sentence, the selection of the offense to which the defendant pleads would provide a great deal of control over the ultimate sentence. Such a scheme would thus, as a practical matter, "take from the judge the power to make a factual determination, while giving that power not to juries, but to prosecutors." *Harris*, 536 U.S. at 571 (Breyer, J., concurring in part and concurring in the judgment).

Finally, a legislature could reasonably conclude that mandatory minimum sentencing factors, rather than new offense elements, would enhance sentencing consistency by permitting effective appellate review. Under double jeopardy principles, the prosecution may not appeal a jury's finding of insufficient evidence of a fact that constitutes an element of the offense. See *United States* v. *Scott*, 437 U.S. 82, 91 (1978). Appeals of a judge's finding do not present that problem and thus "should lead to a greater degree of consistency in sentencing." *United States* v. *DiFrancesco*, 449 U.S. 117, 143 (1980).

B. *Harris* And *McMillan* Correctly Concluded That The Constitution Permits Legislatures To Calibrate Judicial Sentencing Decisions Through Mandatory Minimums

Congress's regulation of sentencing through the mandatory minimum provisions in Section 924(c)(1)(A)(ii) is constitutionally valid. Notwithstanding petitioner's claim (Pet. Br. 36) that the Court "broke with tradition" when it upheld the mandatory minimum sentences in *McMillan* and *Harris*, petitioner and his amici cite not a single authority, from any period in this Nation's history, that would foreclose a legislature from specifying a

minimum sentence, within the otherwise existing range, triggered by a judicial finding of a particular fact.

1. McMillan *and* Harris *are consistent with* Apprendi

Petitioner's primary constitutional argument (Pet. Br. 8, 11-28) is that *McMillan* and *Harris* conflict with *Apprendi*. But this Court has consistently recognized that *Apprendi*'s holding addresses only statutory maximums: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490 (emphasis added); see *Southern Union Co.* v. *United States*, 132 S. Ct. 2344, 2350 (2012) (quoting from that statement); *Dillon*, 130 S. Ct. at 2696 (same); *Oregon* v. *Ice*, 555 U.S. 160, 167 (2009) (same); *Cunningham* v. *California*, 549 U.S. 270, 282 (2007) (same); *Washington* v. *Recuenco*, 548 U.S. 212, 216 (2006) (same); *Booker*, 543 U.S. at 228 (same); *Blakely* v. *Washington*, 542 U.S. 296, 301 (2004) (same); *Schriro* v. *Summerlin*, 542 U.S. 348, 350 (2004) (same); see also *O'Brien*, 130 S. Ct. at 2174-2175 (similar); *Ring* v. *Arizona*, 536 U.S. 584, 588 (2002) (similar). Nothing in the holding, or the reasoning, of *Apprendi* precludes legislatures from prescribing mandatory *minimums* based on judicially determined facts.

a. *The holding of* Apprendi. The defendant in *Apprendi* pleaded guilty to a state firearm offense punishable by a term of imprisonment between five and ten years. 530 U.S. at 470. The sentencing judge subsequently determined "that the crime was motivated by racial bias" and applied a separate "hate crime" law that provided for an "extended term" of ten to 20 years of imprisonment. *Id.* at 468-469, 471 (internal quotation marks and citations omitted). The sentencing court

imposed a 12-year term on that count, two years higher than it could have imposed without the judicial finding that activated the hate-crime law. *Id.* at 471.

This Court found that sentencing procedure to be unconstitutional. *Apprendi*, 530 U.S. at 497. The Court was troubled by the "novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-483. And it derived from historical practices the rule that "facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense" that had to be charged in an indictment and found by a jury beyond a reasonable doubt. *Id.* at 483 n.10.

Apprendi decided the constitutionality only of judicial factfinding that raised statutory maximums. The question presented in *Apprendi* was limited to the constitutionality of "an increase in the maximum prison sentence," 530 U.S. at 469, and the Court's holding turns on factfinding that resulted in a sentence in excess of the "prescribed statutory maximum," *id.* at 490. The Court's treatment of *McMillan* made the scope of its decision even clearer: "We do not overrule *McMillan*," the Court explained, but instead "limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." *Id.* 487 n.13. The Court "reserve[d] for another day" the question whether "reconsideration" of *McMillan* would be warranted. *Ibid.* That day came in *Harris*, and the Court there "[r]eaffirm[ed] *McMillan*." 536 U.S. at 568.

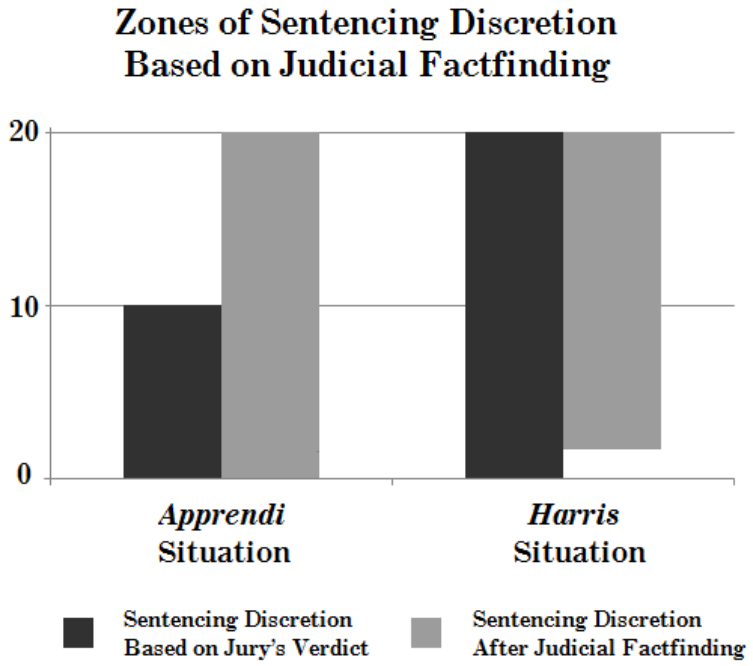
Petitioner's broader reading of *Apprendi* hinges primarily on the Court's statement that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." 530 U.S. at 490 (quoting *Jones*, 526 U.S. at 252-253 (Stevens, J., concurring)); see, *e.g.*, Pet. Br. 7, 19-20. But that statement immediately followed the Court's limitation of its rule to "any fact that increases the penalty for a crime beyond the prescribed statutory maximum," which this Court has consistently reiterated as *Apprendi*'s holding. 530 U.S. at 490; see p. 31, *supra*. The Court's reference to an "increase [in] the prescribed range of penalties," 530 U.S. at 490, must be understood in that context, *i.e.*, to denote a sentencing range whose maximum is higher than the original range. As the Court recently summed up in *Southern Union*, "exactly what *Apprendi* guards against [is] judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow." 132 S. Ct. at 2352.

All of the post-*Apprendi* decisions enforcing its rule have involved, like *Apprendi* itself, "sentencing schemes that allowed judges to find facts that increased a defendant's maximum authorized sentence." *Southern Union*, 132 S. Ct. at 2350; see *id.* at 2352 (increased "maximum fine"); *Cunningham*, 549 U.S. at 274 (increased "upper term" of imprisonment); *Booker*, 543 U.S. at 226-227 (increased sentence beyond maximum prescribed by then-binding Federal Sentencing Guidelines); *Blakely*, 542 U.S. at 299-300 (increased sentence above "standard range" in statutory guidelines); *Ring*, 536 U.S. at 588-589 (aggravating factors that authorize death sentence).

Contrary to the suggestion of one of petitioner's amici, *United States* v. *Booker*, *supra*, does not call into question the constitutionality of judicial factfinding for mandatory minimums. See Ctr. on the Admin. of Crim. Law Amicus Br. 17-20 (Center Br.). *Booker* faulted the mandatory federal Sentencing Guidelines because they established a maximum sentence that was effectively binding on the court and that, in Booker's case, relied on judicial factfinding to exceed the sentence based on the facts found by the jury alone. 543 U.S. at 232-235. Amicus claims that *Booker* must have turned "the *mandatory* effect of the factual finding," and not its impact on the maximum sentence, because Booker's own sentence "was below the statutory maximum." Center Br. 18-19. Amicus misconceives "the 'statutory maximum' for *Apprendi* purposes." *Booker*, 543 U.S. at 232 (quoting *Blakely*, 542 U.S. at 303). *Booker* applied the definition of the "statutory maximum" announced in *Blakely*: "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Ibid.* (quoting *Blakely*, 542 U.S. at 303). Even if a higher statutory maximum is theoretically available, as it was in *Booker*, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. at 303-304. *Booker* thus summed up its decision as "reaffirm[ing] our holding in *Apprendi*" that, other than the fact of a prior conviction, judicial factfinding cannot "support a sentence exceeding the maximum authorized" by the plea or the jury's verdict. 543 U.S. at 244. It did not establish a new rule that turns solely on a factfinding's "mandatory effect." Center Br. 19.

b. *The distinction between the* Apprendi *problem and mandatory minimum schemes*. The holding of *Apprendi* responds to a problem not presented by mandatory minimum statutes. *Apprendi* protects the jury's role in determining the facts that establish the upper limit of the court's sentencing authority; it precludes "a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." 530 U.S. at 482-483. A scheme that allows extended maximums based on judicial factfinding could reduce the jury's verdict to "low-level gatekeeping," *Jones*, 526 U.S. at 244, after which the judge's factfindings could dramatically enhance the zone of judicial discretion to impose a harsher sentence. See *Blakely*, 542 U.S. at 306-307. Section 924(c)(1)(A)(ii) does not permit that result. Instead, the jury's verdict embraces a serious offense that itself authorizes the judge to exercise discretion up to the full statutory maximum. The judge's factfinding in accordance with the statute then constrains his discretion to exercise leniency in the exercise of that authority.

The distinction between the *Apprendi* situation and the mandatory minimum situation is illustrated below:



In the first situation, involving a statute that limits the judge to ten years unless he makes an additional factual finding (say, biased purpose) that authorizes him to impose a sentence up to 20 years, the biased-purpose finding "extend[s] the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury." *Harris*, 536 U.S. at 567 (plurality opinion). In the second situation, by contrast, under which the judge has a 20-year range based on the jury's verdict, but must impose a minimum of two years if he finds, say, brandishing of a firearm, the finding "restrain[s] the judge's power, limiting his or her choices within the authorized range." *Ibid.* "It is quite consistent to maintain that the former type of fact must be

submitted to the jury while the latter need not be." *Ibid.* Only in the former situation is the judge empowered to "inflict punishment that the jury's verdict alone does not allow." *Southern Union*, 132 S. Ct. at 2350 (quoting *Blakely*, 542 U.S. at 304) (brackets omitted).

c. *The purposes of* Apprendi *in relation to mandatory minimum sentencing schemes.* The underlying purposes of the *Apprendi* rule—to protect the role of the jury, and grand jury, and the stringent burden of proof in criminal cases—are not implicated by mandatory minimum schemes.

Mandatory minimums triggered by judicial factfinding do not undermine the jury-trial right's protection "against the corrupt or overzealous prosecutor and against the compliant, biased, and eccentric judge." *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). A harsh or prejudiced judge can impose a longer sentence within the duly-authorized range, whether or not it is mandated. And an overzealous prosecutor can seek such a sentence, whether or not it is required. Even if a jury were to reject the factual predicate for the mandatory increase under the reasonable-doubt standard, the sentencing court would remain free to find the same fact by a preponderance of the evidence and to impose the same sentence. See *Watts*, 519 U.S. at 157. Or the judge could impose the heightened sentence as a matter of his discretion without making any additional formal factfindings at all.

For similar reasons, mandatory minimums triggered by judicial factfinding also do not undermine the reasonable-doubt standard's protection against erroneous deprivations of liberty and impositions of stigma. See *Apprendi*, 530 U.S. at 484; *In re Winship*, 397 U.S. 358, 363-364 (1970). The constitutional error identified in

Apprendi was the imposition of a 12-year sentence that was "above the 10-year maximum for the offense charged." 530 U.S. at 474; see, *e.g.*, *Blakely*, 542 U.S. at 303 ("In this case, petitioner was sentenced to more than three years above the 53–month statutory maximum of the standard range."). But in the mandatory minimum context, the jury's verdict by itself exposes the defendant to the punishment that he receives. The loss of liberty and stigma associated with a particular sentence do not increase simply because the sentence was guided by a legislative mandatory minimum, rather than solely by the judge's exercise of sentencing discretion. While a mandatory minimum, when applicable, will have the practical impact of foreclosing a sentence at the lower end of what the jury's verdict would authorize, *Apprendi* does not create any right to "the mercy of a tenderhearted judge," 530 U.S. at 498 (Scalia, J., concurring), with unlimited discretion to impose any sentence below the maximum.

Nor do mandatory minimums based on judicial fact-finding undermine the protections of the Grand Jury Clause. One function of the indictment produced by a grand jury is to provide the defendant with notice of the charge and enable him to plead double jeopardy. *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 108 (2007). An indictment can fulfill those functions without alleging facts that bear on a mandatory minimum—a matter that effective counsel will surely cover with the defendant before he elects trial or pleads guilty. See also Fed. R. Crim. P. 11(b)(1)(I) (requiring a judge at a guilty plea colloquy to address "any mandatory minimum penalty"). Another function of the Grand Jury Clause is to assure that a criminal charge will be "founded upon reason" and not "dictated by an intimidating power or by

malice and personal ill will." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). But a grand jury protects that value by the necessity that it find probable cause to charge an offense that authorizes a *maximum* punishment available; having done so, it necessarily has exposed the defendant to any lesser sentence, whether based on factfinding by the court in a discretionary system or factfinding to establish a mandatory minimum. The grand jury has no role in sentencing and is "not [to] consider punishment in the event of conviction." Judicial Conference of the United States, *Model Grand Jury Charge* ¶ 10, Mar. 2005, http://www.uscourts.gov/FederalCourts/JuryService/ModelGrandJuryCharge.aspx.

As the foregoing discussion makes clear, the concern of one of petitioner's amici that judicially triggered mandatory minimums will provide a "loophole" to circumvent *Apprendi* (Center Br. 29) is unfounded. The Court in *Apprendi* recognized that the rule it adopted did not foreclose every sentencing scheme that a creative legislature might theoretically devise, but it emphasized that the rule "ensures that a State is obliged to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices of exposing all who are convicted to the maximum sentence it provides." 530 U.S. at 490 n.16 (internal quotation marks and citation omitted). And it reasoned that this obligation of transparency, together with "structural democratic constraints," would provide powerful protection for criminal defendants. *Ibid.*

d. *The support for a limited reading of* Apprendi *in* Oregon *v.* Ice. Petitioner's broad reading of *Apprendi* is also difficult to square with this Court's decision in *Oregon* v. *Ice*, *supra*. In that case, the Court addressed the

constitutionality of an Oregon sentencing scheme that required sentences for multiple offenses to run concurrently unless the judge found certain facts. 555 U.S. at 163, 165. The Court upheld the scheme, declining to "extend *Apprendi*'s rule to the imposition of sentences for discrete crimes." *Id.* at 168. The Court observed that, historically, the choice between concurrent and consecutive sentences "rested exclusively with the judge," *ibid.*, and that "state legislative innovations like Oregon's seek to rein in the discretion judges possessed at common law to impose consecutive sentences at will," *id.* at 171.

Recognizing that "[l]imiting judicial discretion to impose consecutive sentences serves the 'salutary objectives' of promoting sentences proportionate to 'the gravity of the offense' and of reducing disparities in sentence length," the Court refused "[t]o hem in States" by constitutionalizing one particular sentencing methodology. *Ice*, 555 U.S. at 171 (quoting *Blakely*, 542 U.S. at 308). The Court also expressed concern about "how many other state initiatives would fall" if it adopted the proposed expansion of *Apprendi*. *Id.* at 171-172. The Court was additionally reluctant, "absent any genuine affront to *Apprendi*'s instruction," to "burden the Nation's trial courts" with the "bifurcated or trifurcated trials" that might be necessary to establish "predicate facts for consecutive sentences" that "could substantially prejudice the defense at the guilt phase of a trial." *Id.* at 172.

Petitioner's view that *Apprendi* requires submission to juries of "facts that increase the range of punishment to which a criminal defendant is exposed," Pet. Br. 9, is hard to reconcile with *Ice*. *Ice* allows for judicial fact-finding in multiple-count convictions that "increase[s] the range of punishment" beyond the range established

by the jury's verdict. *Ice* would also permit a legislature to make consecutive sentencing mandatory, thus effectively establishing mandatory minimum sentences greater than the judge might otherwise have imposed. The formality that *Ice* involved two convictions, rather than only one (as under Section 924(c)(1)), has no substantive effect on the defendant's interests. In each instance, the minimum sentence within an authorized range would increase, thus depriving the defendant of a measure of judicial discretion. For all of the reasons discussed in *Ice*, mandatory minimum sentencing provisions can validly express the legislature's intent "to rein in the discretion judges possessed," with the "'salutary objectives' of promoting sentences proportionate to 'the gravity of the offense' and of reducing disparities in sentence length." *Ice*, 555 U.S. at 171 (quoting *Blakely*, 542 U.S. at 308).

In addition, as in *Ice*, an extension of *Apprendi* to mandatory minimum provisions based on petitioner's formulation might cast doubt upon other legislative efforts. *Ice,* 555 U.S. at 171-172. Most prominently, legislatures have long established affirmative defenses that place the burden of proof on defendants in order to justify a lower sentencing ceiling. See *Patterson* v. *New York*, 432 U.S. 197, 201-202 (1977). Legislatures also establish mitigating factors that preclude harsher punishment. See, *e.g.*, 18 U.S.C. 3559(c)(3). In *Apprendi,* this Court recognized that these practices do not run afoul of the Court's rule. See 530 U.S. at 485 n.12, 491 n.16. Yet the "fact" that supports an "increase in the range of punishment"—the absence of a mitigating factor—will not have been submitted to the jury and will not have been negated "beyond a reasonable doubt." Pet. Br. 9. Petitioner's expansion of *Apprendi* would

therefore call established sentencing practices into question.

2. *History casts no doubt on the constitutionality of mandatory minimum sentencing factors*

Because "'the scope of the constitutional jury right must be informed by the historical role of the jury at common law,'" this Court has extended the *Apprendi* rule only when "ample historical evidence" supports doing so. *Southern Union*, 132 S. Ct. at 2353, 2356 (quoting *Ice*, 555 U.S. at 170). As the plurality concluded in *Harris*, "historical evidence showing that facts increasing the defendant's minimum sentence (but not affecting the maximum) have, as a matter of course, been treated as elements * * * is lacking." 536 U.S. at 560. As in *Harris,* petitioner and his amici cite no historical example of mandatory minimum provisions like Section 924(c)(1)(A), and the historical analogies they invoke are readily distinguishable.

a. Statutory provisions that require imposition of a minimum sentence without also increasing the statutory maximum did not come into general use until the twentieth century. See Nancy King & Susan Klein, *Essential Elements*, 54 Vand. L. Rev. 1467, 1474-1477 (2001). Therefore, courts in the nineteenth century were not generally "presented with the necessity of deciding whether a fact, other than prior conviction, that triggers a mandatory minimum sentence *but not a higher maximum sentence*, was an essential ingredient of an offense that must be pled in the indictment and proven to a jury beyond a reasonable doubt." *Id.* at 1474. For that reason, history cannot justify extending *Apprendi*'s reach to mandatory minimum sentencing statutes.

b. One of petitioner's amici nevertheless contends that "the framers *were* familiar with statutes that * * *

removed discretion that a judge otherwise would have had to impose a more lenient sentence." Families Against Mandatory Minimums Amicus Br. 5 (FAMM Br.). But neither of the practices it identifies demonstrates an original understanding that legislatures could not link mandatory minimum sentencing provisions to judicially determined facts.

(i) *Statutory offenses.* The first practice is the requirement that a charging instrument identify the elements of a statutory offense to support a penalty above the comparable common law crime. FAMM Br. 8-16. This example illustrates only the uncontested principle that an indictment must charge all the elements of the specific statutory *or* common-law offense to support a conviction for that specific offense. See, *e.g.*, *O'Brien*, 130 S. Ct. at 2174 ("Elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt."). As FAMM acknowledges, statutory offenses, while often modeled on the common law, were generally not written as sentencing provisions that aggravated the punishment for a preexisting common-law offense, but instead "would usually specify both *the elements of the offense and* the resulting punishment." FAMM Br. 10 (emphasis added). See, *e.g.*, *Gregory* v. *Commonwealth*, 32 Ky. (2 Dana) 417, 417 (1834) (FAMM Br. 15) (statute declared that "when any fence shall be made across or in any public road, the owner or tenant of the land shall pay" a particular penalty; indictment had to allege ownership or tenancy to invoke this provision); *Hope* v. *Commonwealth*, 50 Mass. (9 Met.) 134, 137 (1845) (FAMM Br. 14) (discussing a larceny indictment that failed to charge "the value of the property stolen" as prescribed in "[o]ur statutes," presumably referring to Mass. Rev. Stat., ch. 126, § 17 (1836), which

included elements of the offense ("by stealing of the property of another") and punishment graded by the property's value); see also *Apprendi*, 530 U.S. at 502-503 & n.3 (Thomas, J., concurring) (discussing *Hope*).

A statutory provision that specifies both the elements of an offense and the punishment for that offense was (and still is) properly understood to constitute a separate crime from a common-law analogue. See, *e.g.*, Joel Prentiss Bishop, *Commentaries on the Law of Statutory Crimes* § 250, at 234 (2d ed. 1883) ("Where the offense which a statute creates is such also at the common law, and the statute and common law are not repugnant, all new provisions thus legislatively ordained are cumulative, and the procedure may conform to either law."). It is therefore unexceptional that early courts required the prosecution to set forth the particular elements of the statutory offense in order to obtain a conviction on that offense. See, *e.g.*, *United States* v. *Mills*, 32 U.S. 138, 142 (1833) (referring to the "general rule" for "indictments for misdemeanors created by statute"); *United States* v. *Lindsay*, 26 F. Ca. 971, 971 (C.C.D.C. 1805) (No. 15,602) (indictment "d[id] not sufficiently set forth any offence under either of the acts of Maryland," but did "state[] an offence at common law"); *Gregory*, 32 Ky. (2 Dana) at 417 (indictment "does not contain a charge which can be deemed a violation of [the] enactment"); *State* v. *McLeran*, 1 Aik. 311, 313-314 (Vt. 1826) (act charged in the indictment "is not forgery within the statute," but did establish "a crime at common law"); *Commonwealth* v. *Hoxey*, 16 Mass. (16 Tyng) 385, 387 (1820) (indictment "charge[d] the offence to have been committed *contra formam statuti*; but no statute is found to describe the offence as alleged"); *Commonwealth* v. *Boyer*, 1 Binn. 201, 208 (Pa. 1807) (Smith, J.)

(referring to the legislative "act" as "*creating* the crimes * * * for which the defendant has been indicted").

(ii) *Benefit of clergy.* The practice of charging facts that would preclude the "benefit of clergy" procedure likewise has no material bearing on modern mandatory minimums. FAMM Br. 16-22. Benefit of clergy originated in medieval England as "a procedural device that effected a transfer from the secular to the ecclesiastical jurisdiction" and thereby allowed a defendant to avoid the mandatory judgment of death that typically attached to a felony conviction. *Mullaney* v. *Wilbur*, 421 U.S. 684, 692 (1975); see 5 St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 365-366 (1803) (5 *Blackstone's Commentaries*). By colonial times, nearly any first-time felon could avoid a capital judgment by invoking the legal fiction that the ecclesiastical court would take over his case, although claiming the benefit of that procedure often required the defendant to accept "being burnt in the hand, whipped, or fined, or suffering a discretionary imprisonment." 5 *Blackstone's Commentaries* 373.

Legislatures would sometimes eliminate the benefit of clergy procedure in cases involving certain statutory or common-law offenses committed in particular circumstances. See, *e.g.*, 1 Brev. Dig., tit. 21, § 2 (S.C. 1814) (withdrawing benefit of clergy for, *inter alia*, "robbing of any churches, chapels, or other holy places"). As the amicus notes (FAMM Br. 20-22), various contemporary authorities stated that the circumstances rendering benefit of the clergy unavailable had to be charged in the indictment. That requirement, however, did not reflect a limitation on legislatures' ability to constrain judges'

sentencing authority. Contrary to the amicus's contention (*id.* at 20), statutes eliminating benefit of the clergy did not remove a "lesser punishment" to which a judge could otherwise "sentence" a defendant. Benefit of clergy was neither a "punishment" nor a "sentence," but instead "operat[ed] as a kind of statute pardon." 5 *Blackstone's Commentaries* 373.

Consistent with its origins as a jurisdictional doctrine, benefit of clergy was a procedural escape hatch for avoiding criminal judgment and sentencing altogether. The only sentence prescribed by law for a capital felony was death. See 5 *Blackstone's Commentaries* 373-374 (describing clergyable offenses); *id.* at 376 (describing the "judgment" available for such offenses); see also *Tennessee* v. *Garner*, 471 U.S. 1, 13 n.11 (1985) (describing common-law capital punishment). A court would impose that sentence by entering "judgment" against the defendant. 5 *Blackstone's Commentaries* 376. A request for benefit of clergy was not a request for a certain type of judgment, but was instead a "motion[] *in arrest of* judgment." *Ibid.* (emphasis added). And the granting of the motion did not constitute the imposition of a sentence, but instead operated to preclude a criminal judgment from being entered at all. See *id.* at 375-376; see also *id.* at 365 ("After trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstances; of which the principal is, *the benefit of clergy*."). Although the defendant might be subjected to "branding, fine, whipping, [or] imprisonment" in return for receiving benefit of clergy, those were "concomitant conditions" of "receiving [the] indulgence," rather than a form of substantive punishment. *Id.* at 373. Indeed, as Attorney General Pinckney explained to this Court in

1813, because benefit of clergy simply resulted in a "final stay of the proceedings," rather than a "judgment," a defendant who received benefit of clergy could not file an appellate writ of error. *Livingston* v. *Dorgenois*, 11 U.S. (7 Cranch) 577, 582-583 (1813) (presentation of Attorney General Pinckney); see *Long's Case,* (1596) 78 Eng. Rep. 740, 741 (K.B.) (declining to entertain defendant's writ of error because "when he prayed his clergy, which was allowed him, there never was any judgment afterwards given").

The Framers would accordingly have understood a statute eliminating the benefit of clergy procedure as quite distinct from a substantive sentencing statute prescribing a mandatory minimum within a statutory range. A statute eliminating benefit of clergy could lead to a motion to arrest judgment based on defects in the indictment, and "in favour of life, great strictness [was] at all times * * * observed, in every point of an indictment." 5 *Blackstone's Commentaries* 375. Sentencing provisions, in contrast, would be relevant to the entry of judgment itself, which, for certain non-capital offenses, involved the imposition of a "discretionary length of imprisonment." *Id.* at 378. And the choice of sentence within the permissible range was not tied to the indictment, but was instead left for the judge to decide. *Ibid.* (explaining that a prison sentence was something that "courts [were] enabled to impose," as the "duration * * * must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances").

Nothing demonstrates that the Framers would have foreclosed additional legislative guidance for judges in the exercise of their sentencing authority. To the contrary, more determinate sentences were the norm, with

indeterminate sentencing something of an anomaly. See 5 *Blackstone's Commentaries* 376-377. Blackstone ranked as "one of the glories of our English law, that the species, though not always the quantity or degree of punishment, is *ascertained* for every offence; at that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike." *Id.* at 377. In light of that background, it is doubtful that legislative efforts to also make the "quantity or degree of punishment" more predictable would have been objectionable.

c. To the extent that nineteenth-century practices after the Founding era are considered evidence of the Constitution's original meaning, petitioner fails to identify anything from that period that demonstrates a constitutional bar on judicially triggered mandatory minimums. Petitioner primarily relies on broad generalizations about the role of the jury, and his proffer of specific historical evidence consists principally of three cases cited in Justice Thomas's concurring opinion in *Apprendi*. See Pet. Br. 33. In each of those cases, however, the aggravating fact raised not only the minimum, but also the maximum, of the sentencing range.

In *Lacy* v. *State*, 15 Wis. 13 (1862), the statutory scheme made arson of a dwelling house punishable by three to ten years of imprisonment and made arson of a lawfully occupied dwelling house punishable by seven to 14 years of imprisonment. *Id.* at 15. The defendant received a 14-year sentence (four years above the default ten-year maximum), and the court reversed because the indictment had not alleged that the house was occupied. *Ibid.* In *Garcia* v. *State*, 19 Tex. Ct. App. 389 (1885), the statutory scheme made assault with intent to murder punishable by two to seven years of imprison-

ment and made such assault "with a bowie-knife or dagger" punishable by four to 14 years of imprisonment. *Id.* at 393. The defendant received a ten-year sentence (three years above the default seven-year maximum), and the court reversed because the indictment had not alleged use of a bowie knife or dagger. *Ibid.* And in *Jones* v. *State*, 63 Ga. 141 (1879), the statutory scheme made daytime burglary punishable by three to five years of imprisonment and made nighttime burglary punishable by five to 20 years of imprisonment. *Id.* at 144. The court concluded, among other things, that an indictment failing to specify whether the burglary occurred in daytime or nighttime was subject to dismissal. *Id.* at 143.

Each of these cases fits within *Apprendi*'s statutory-maximum rule, and in none of them did the court express particular concern about the increase to the lower end of the statutory range. In fact, only one of the cases cited by Justice Thomas in his *Apprendi* concurrence appears to have involved a fact that increased only the minimum penalty. That case, *People* v. *Coleman*, 145 Cal. 609 (1904), involved California's robbery statute, which increased the mandatory minimum penalty from one year to ten years if the defendant had a prior robbery conviction. *Id.* at 610-611. A separate California statute required the fact of the prior conviction to be found by the jury. *Id.* at 611. The court upheld the constitutionality of that procedure, but it did not hold that any constitutional principle required jury determination of the prior conviction. See *id.* at 611-615; cf. *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) (finding constitutionally unproblematic use of a prior conviction to enhance a sentence).

To the contrary, earlier that year, the Supreme Court of California had reaffirmed an 1862 decision upholding

the constitutionality of a statutory procedure that permitted a judge, rather than a jury, to determine the degree of the offense a defendant had committed "for the purpose of fixing the punishment" following a guilty plea. *People* v. *Chew Lan Ong*, 75 P. 186, 187 (Cal. 1904) (quoting *People* v. *Noll*, 20 Cal. 164, 165 (1862)); see, *e.g.*, *People* v. *Jefferson*, 52 Cal. 452, 453-455 (1877). Several other States (but not all States) followed a similar practice. See Jonathan F. Mitchell, Apprendi*'s Domain*, 2006 Sup. Ct. Rev. 297, 339 & n.226 (citing cases); see, *e.g.*, *Wicks* v. *Commonwealth*, 2 Va. Cas. 387, 392 (Va. Gen. Ct. 1824) (quoting Virginia law specifying that on a guilty plea for murder, "the Court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly") (emphasis omitted).

Nineteenth-century decisions of the New York Court of Appeals likewise rebut the notion that narrowing the permissible scope of punishment within a statutory range was exclusively the province of the jury. In *Johnson* v. *State*, 55 N.Y. 512 (1874), that court treated a defendant's prior conviction as an element in a context where it raised the maximum punishment from five to ten years. *Id.* at 513-514; see 2 N.Y. Rev. Stat. 699, § 8.2 (1829). But in *People* v. *Raymond*, *supra*, that same court stated that a defendant's prior conviction "was *not* an element of" an offense when that prior conviction raised the sentencing range from ten years to life in prison to mandatory life imprisonment. 96 N.Y. at 39 (emphasis added). The only way to reconcile the two cases is that *Johnson* involved an increase in the maximum penalty while *Raymond* involved an increase to the minimum penalty. That is also what separates this case

from *Apprendi* and warrants a different constitutional conclusion.

C. *Stare Decisis* Supports The Continuing Validity Of *McMillan* And *Harris*

"Whether or not" the Court "would agree with" the reasoning or result of *McMillan* and *Harris* today, "principles of *stare decisis* weigh heavily against overruling" them. *Dickerson* v. *United States,* 530 U.S. 428, 443 (2000). Although "*stare decisis* is not an inexorable command, * * * even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification." *Ibid.* (internal quotation marks and citations omitted). If "mere demonstration that [an] opinion was wrong" were sufficient to justify overruling it, the doctrine of *stare decisis* "would be no doctrine at all." *Hubbard* v. *United States,* 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment).

Petitioner's primary argument (Pet. Br. 39-41) for casting *stare decisis* aside is that judicial factfinding that increases a mandatory minimum sentence cannot logically be reconciled with *Apprendi*. But that repeats his merits argument; it does not provide special justification for overruling two precedents—especially when one of those precedents (*Harris*) post-dates *Apprendi*. Although petitioner correctly points out (*id.* at 41) that only a plurality of the Court in *Harris* expressly distinguished *Apprendi*, a majority of the Court in *Harris* expressly "[r]eaffirm[ed] *McMillan*," notwithstanding *Apprendi*. 536 U.S. at 568. And this Court's more recent cases have consistently reinforced the constitutional distinction between statutory maximums and mandatory minimums by repeatedly describing the *Apprendi*

rule to reach only maximum-enhancing facts. See p. 31, *supra*.

Although reliance interests may be diminished with respect to some rules of criminal procedure, see *Payne*, 501 U.S. at 828, *stare decisis* "has special force when legislators or citizens have acted in reliance on a previous decision, for in th[at] instance overruling the decision would * * * require an extensive legislative response." *Hubbard*, 514 U.S. at 714 (opinion of Stevens, J.) (internal quotation marks and citation omitted). Even in *Apprendi*, this Court was "[c]onscious of the likelihood that legislative decisions may have been made in reliance on *McMillan*," 530 U.S. at 487 n.13, and it turns out that many were. Not only did the *Harris* majority recognize that Section 924(c)(1)(A) was itself enacted in reliance on *McMillan*, 536 U.S. at 556, but the plurality observed that "[l]egislatures and their constituents have relied upon *McMillan* to exercise control over sentencing through dozens of statutes like the one the Court approved in that case," *id.* at 567; see *id.* at 568 (plurality opinion) (citing, as examples, Ala. Code § 13A-5-6(a)(4) (1994); Kan. Stat. Ann. § 21-4618 (1995); Minn. Stat. Ann. § 609.11 (Supp. 2002); N.J. Stat. Ann. § 2C:43-6(c) and (d) (1998); 42 Pa. Cons. Stat. § 9717(a) (1998); Ill. Comp. Stat. § 5/5-5-3(c)(2)(D) (2000); Alaska Stat. § 12.55.125(b) (2000); Md. Ann. Code, art. 27, § 286 (Supp. 2000)); see *id.* at 570 (Breyer, J., concurring in part and concurring in the judgment) (recognizing that "[d]uring the past two decades, * * * mandatory minimum sentencing statutes have proliferated in number and importance").

Since 2002, Congress and state legislatures have continued to enact new mandatory minimum sentences against a constitutional backdrop that now includes not

only *McMillan*, but also *Harris*. See, *e.g.*, Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 208, 120 Stat. 615 (codified as amended at 18 U.S.C. 1591(b)(1)-(2) (2006 & Supp. V 2011)); Prevention of Terrorist Access to Destructive Weapons Act of 2004, Pub. L. No. 108-458, Tit. VI, Subtit. J, § 6904(b), 118 Stat. 3771 (codified at 42 U.S.C. 2272(b)); Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, Tit. I, § 104(b), 117 Stat. 653 (codified at 18 U.S.C. 1201(g)); 2011 Ala. Acts 621 (codified at Ala. Code § 32-5A-191(i) and (j) (LexisNexis 2012 Supp.)) (includes misdemeanors); 2008 Ariz. Sess. Laws 1252 (codified at Ariz. Rev. Stat. Ann. § 28-1382(D)(1) (2012)) (misdemeanor); 2007 Conn. Acts 444 (Reg. Sess.) (codified at Conn. Gen. Stat. Ann. § 53-21(a) (West 2007)); 2004 Ga. Laws 1071 (codified as amended at Ga. Code Ann. § 16-13-31.1 (2011)); 2005 Nev. Stat. 87 (codified at Nev. Rev. Stat. 200.463(2) (LexisNexis 2012)); 2010 Wyo. Sess. Laws 540 (codified at Wyo. Stat. Ann. § 6-2-314 (2011)); see also *Rogers* v. *Cota*, 219 P.3d 254, 257 (Ariz. Ct. App. 2009) (concluding that above-cited Arizona statute authorizes judicial factfinding); *State* v. *Clarke*, 134 P.3d 188, 193-194 (Wash. 2006) (concluding that judicial factfinding can increase a defendant's minimum sentence), cert. denied, 552 U.S. 885 (2007); *Commonwealth* v. *Kleinicke*, 895 A.2d 562, 570-574 (Pa. Super. Ct. 2006) (concluding that Pennsylvania mandatory minimums, which "serve only to limit the sentencing court's discretion," are consistent with this Court's *Apprendi* line of cases).

It would be even more disruptive now than a decade ago to "overturn" such statutes or to "cast uncertainty upon the sentences imposed under them." *Harris*, 536

U.S. at 568 (plurality opinion). Although courts and prosecutors can adjust to charging and proving to the jury any fact that increases a mandatory minimum, the legislatures that enacted these statutes may have neither considered nor wanted the additional procedural complexities and altered power dynamics that such an approach would produce. See pp. 28-30, *supra*.

The legislative response to the effective invalidation of judicial factfinding for mandatory minimum statutes is not readily predictable. Depending on the breadth of the potential rationale for finding petitioner's sentence in this case to be unconstitutional, one legislative response might be to restructure provisions like Section 924(c)(1)(A) to provide a much higher default minimum sentence (*e.g.*, ten years), with mitigating factors (*e.g.*, that the defendant did *not* brandish a gun or did *not* discharge a gun) that allow for reductions (*e.g.*, five years or three years). See *Patterson*, 432 U.S. at 201-202 (concluding that State could require murder defendant to prove affirmative defense of extreme emotional disturbance); cf. 18 U.S.C. 3553(f) (safety-valve provision permitting certain defendants to avoid the application of mandatory minimum drug sentences). Another response might be to collapse graduated sentencing provisions like Section 924(c)(1)(A) into a single minimum sentence somewhere in the middle (say, six years for every defendant). Such changes in sentencing structure would have important practical consequences to the parties involved—particularly criminal defendants, who may or may not find themselves in a better position than they were before. The unpredictability of unsettling a quarter-century of constitutional jurisprudence in this area accordingly reinforces the soundness of adhering to

stare decisis, preserving *McMillan* and *Harris*, and declining to change the rules at this time.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor be deprived of life, liberty, or property, without due process of law.

2. The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * and to be informed of the nature and cause of the accusation.

3. 18 U.S.C. 924(c)(1) and (4) provides in pertinent part:

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 fire-

arm, 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.

* * * * *

(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.