No. 08-1569

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 924(c)(1) of Title 18 of the United States Code provides for a series of escalating mandatory minimum sentences depending on the manner in which the basic crime (*viz.*, using or carrying a firearm during and in relation to an underlying offense, or possessing the firearm in furtherance of that offense) is carried out. The question presented is whether the sentence enhancement to a 30-year minimum when the firearm is a machinegun is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by a preponderance of the evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 542 F.3d 921.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2008. A petition for rehearing was denied on January 26, 2009 (Pet. App. 19a-20a). On April 15, 2009, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including May 26, 2009. On May 13, 2009, Justice Souter further extended the time to June 25, 2009, and the petition was filed on June 23, 2009. The petition for a writ of certiorari was granted on September 30, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Following guilty pleas in the United States District Court for the District of Massachusetts, respondents were convicted of conspiring to affect commerce by robbery, in violation of 18 U.S.C. 1951; attempting to affect commerce by robbery, in violation of 18 U.S.C. 1951; and using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, in violation of 18 U.S.C. 924(c)(1). Respondent Burgess additionally was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). O'Brien Judgment 1; Burgess Judgment 1. Respondent O'Brien was sentenced to 180 months of imprisonment, including a 102-month consecutive term on the Section 924(c)(1) conviction, to be followed by three years of supervised release. Gov't C.A. App. 238. Burgess was sentenced as an armed career criminal (see 18 U.S.C. 924(e)) to 264 months of imprisonment, including an 84-month consecutive term on the 18 U.S.C. 924(c)(1) conviction, to be followed by three years of supervised release. Gov't C.A. App. 237, 240. The government asked the district court to increase the sentences under Section 924(c)(1)(B)(ii) because the firearm used, carried, and possessed was a machinegun. The district court refused to impose the higher mandatory minimum term of imprisonment, and the government appealed. The court of appeals affirmed. Pet. App. 1a-13a.

1. Since its enactment in 1968, 18 U.S.C. 924(c) has made it a distinct criminal offense for an individual to

use or carry a firearm during the commission of certain federal crimes. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 233. In 1986, Congress provided for higher fixed mandatory sentences when the firearm has certain characteristics (*e.g.*, is a machinegun or has a silencer). See Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(C)-(E), 100 Stat. 457. In *Castillo* v. *United States*, 530 U.S. 120 (2000), this Court interpreted that former version of Section 924(c)(1), which is reproduced at App., *infra*, 3a. *Castillo* held, as a matter of statutory construction, that the type of firearm was not a sentencing factor for the judge to decide by a preponderance of the evidence, but rather an element of a "separate crime." 530 U.S. at 123-131. The Court therefore held that "the indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt." *Id.* at 123.

In 1998, Congress overhauled Section 924(c)(1).[1] Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469. The new provision describes the offense in the principal paragraph of Subparagraph (A): using or carrying a firearm during and in relation to certain crimes, or possessing a firearm in furtherance of such crimes. Clause (A)(i) sets a baseline mandatory minimum sentence for that offense. The provision then separately lists in Clauses (A)(ii)-(iii), (B)(i)-(ii) and (C)(i)-(ii) circumstances affecting how the defendant is to "be sentenced." Under the current version of the statute, Congress did not limit the sentencing judge to a defined maximum (as the pre-1998 statute did in prescribing

[1] Although decided after enactment of the current version of Section 924(c)(1), *Castillo* interpreted the pre-1998 version. See *Castillo*, 530 U.S. at 121, 125.

determinate sentences). The new statute instead provides an escalating series of mandatory *minimum* sentences. For any violation of the current statute, the implied maximum term is life imprisonment. See, *e.g.*, 18 U.S.C. 924(c)(1)(A)(i) (requiring simply a sentence "of not less than 5 years" for the offense).

Under the terms of the new statute, enhanced penalties apply when the firearm is "brandished" or "discharged," 18 U.S.C. 924(c)(1)(A)(ii)-(iii), which this Court recognizes as sentencing factors. See *Harris* v. *United States*, 536 U.S. 545, 552-556 (2002) (brandishing); *Dean* v. *United States*, 129 S. Ct. 1849, 1854 (2009) (discharging). Enhanced penalties also apply when the firearm is of a particularly dangerous type, 18 U.S.C. 924(c)(1)(B). For example, Clause (B)(i) specifies a ten-year minimum term of imprisonment "[i]f the firearm possessed by a person convicted of a violation of [Section 924(c)] * * * is a * * * short-barreled shotgun." Similarly, and most relevant here, Clause (B)(ii) specifies a 30-year minimum term of imprisonment "[i]f the firearm * * * is a machinegun." Recidivists are also subject to enhanced penalties: second or subsequent convictions under Section 924(c)(1) carry minimum sentences of either 25 years of imprisonment or life imprisonment (if the firearm is a machinegun). 18 U.S.C. 924(c)(1)(C)(i) and (ii).

2. Respondents, along with co-defendants Dennis Quirk, Jason Owens, and Patrick Lacey, conspired and attempted to rob a Loomis-Fargo armored car as it made a scheduled delivery of cash to a bank located on a busy street in the North End of Boston, Massachusetts. Respondents and Quirk hid inside a minivan—O'Brien armed with a semi-automatic Sig-Sauer pistol, Burgess with a semi-automatic AK-47 rifle, and Quirk

with a fully automatic Cobray "MAC-11" machine pistol. The targeted armored car carried almost $2 million in cash, and contrary to usual practice, it had two guards instead of one. As one guard unloaded boxes of coins from the opened rear door of the armored car, the other guard stood near a bag containing about $275,000 in cash that had been placed on the pavement. When one of the robbers exited the minivan with a weapon pointed at the closest guard, that guard dropped to the pavement as ordered, but the second guard used the truck as cover to run down the sidewalk to a nearby restaurant. The robbers' failure to control the second guard caused them to abort the robbery and flee the scene without taking any money. Co-defendant Lacey helped respondents and Quirk get away, and co-defendant Owens provided his apartment as a rendezvous for the robbers. Gov't C.A. App. 176-179, 236; Gov't Supp. C.A. App. 6-9, 49-53; J.A. 49.

Authorities quickly located several of the conspirators based on tips and other information. The evening of the attempted robbery, officers executed a search warrant at Owens' residence and found the three firearms, each loaded: the semi-automatic Sig-Sauer with eight rounds of ammunition, the semi-automatic AK-47 with two banana clips holding 50 rounds, and the fully automatic Cobray with a loaded magazine and a spare holding 48 rounds (some of them hollow point bullets, designed to spread out upon impact to maximize injury). Each gun had a round of ammunition in the chamber. Law enforcement officers also recovered bulletproof vests from the residence. Gov't C.A. App. 179-180; Gov't Supp. C.A. App. 9, 52-53.

3. On July 20, 2005, a grand jury sitting in the District of Massachusetts returned an indictment charging

respondents, along with some of the co-conspirators, with various robbery and gun charges. Indictment 1-8. As relevant here, Count 3 charged respondents with using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, in violation of 18 U.S.C. 924(c) and 18 U.S.C. 2. Count 3 listed the three firearms—the Cobray, the AK-47, and the Sig-Sauer—but did not identify the Cobray, which functioned in fully automatic mode, as a machinegun. Indictment 5; Gov't Supp. C.A. App. 9, 53. On February 21, 2007, a grand jury returned a second superseding indictment adding a Count 4, which charged respondents, based on the presence of the Cobray pistol, with using and carrying a machinegun during and in relation to, and possessing a machinegun in furtherance of, a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) and (B)(ii) and 18 U.S.C. 2. J.A. 20-21. The Cobray pistol remained charged in Count 3 without an assertion that it was a machinegun. J.A. 20.

Respondents moved to strike the reference to the Cobray pistol from Count 3 on the theory that the particular type of firearm is an element of a Section 924(c)(1) offense and therefore properly charged only in a separate count, as it was in Count 4. Docket No. 189. The government responded that Section 924(c)(1)(B)'s firearm-type provisions are sentencing factors for the court to determine under a preponderance standard in the event of a conviction on the offense described in Section 924(c)(1)(A). Because the Cobray was appropriately charged in Count 3, the government argued that Count 4 was not required by Section 924(c)(1) and should be dismissed. J.A. 51. At the same time, the government conceded that if the type of firearm is an offense element, the government could not prove this element be-

yond a reasonable doubt and the court should dismiss Count 4 on this basis. In particular, the government said it could not prove, as it assumed would be necessary, that respondents knew of the Cobray pistol's fully automatic action. J.A. 51-52.

The district court held that the government was required to charge and prove to the jury that the Cobray pistol was a machinegun to trigger the mandatory minimum sentence under Section 924(c)(1)(B)(ii). Pet. App. 15a-18a. Accordingly, the government asked the district court to dismiss Count 4, consistent with its prior concession. *Id.* at 4a; J.A. 42. Upon the dismissal of that count, respondents pleaded guilty to the remaining charges against them, including Count 3. Each respondent acknowledged that he was liable for the three firearms listed in Count 3, including the Cobray pistol. Gov't C.A. App. 172-173.

At sentencing, the district court found, without opposition, that respondents had brandished a firearm while violating Section 924(c), calling for a mandatory minimum sentence of 84 months to be served consecutively to the sentences imposed on the other counts, pursuant to Section 924(c)(1)(A)(ii) and (D)(ii). Gov't C.A. App. 188-189, 209-211, 236-238. The court again rejected the government's argument that respondents were instead subject to a 30-year mandatory minimum consecutive sentence under Section 924(c)(1)(B)(ii) based on their possession of a machinegun. J.A. 45. The district court sentenced O'Brien to 180 months of imprisonment, including a consecutive 102-month term on the Section 924(c) charge. Gov't C.A. App. 238. As an armed career criminal, Burgess was sentenced to an aggregate 264 months of imprisonment, including a consecutive 84-month term on the Section 924(c) charge. *Id.* at 237.

4. The government appealed. A court of appeals held, "with some misgivings," that Section 924(c)(1) requires the characteristics of the firearm to be found "by the jury as an element of the crime." Pet. App. 1a-2a. The court observed that, "[r]ead in a vacuum, the language of [S]ection 924(c) indicates that the 'offense' (carrying a five year minimum sentence) is the carriage, use or possession of a firearm during a drug or violent felony—all elements for the jury," whereas the "type of firearm—which merely raised the mandatory minimum —pose[s] [a] sentencing issue[] to be resolved by the judge." *Id.* at 5a. The court further observed that such a reading "would comport with the statute's structure as well." *Ibid.* (citing *Harris*, 536 U.S. at 552-553). Nevertheless, the court concluded that this Court's decision in *Castillo*—which interpreted the earlier and different version of Section 924(c)(1)—was "close to binding" in the absence of "a clearer or more dramatic change in language or legislative history." *Id.* at 10a. The court thus held that firearm characteristics are offense elements that must be decided by the jury, although it "concede[d] that, if we were writing on a clean slate, the statute's language would be a powerful argument" for the contrary conclusion. *Ibid.*

SUMMARY OF ARGUMENT

The type of firearm that a defendant uses, carries, or possesses in connection with a federal crime of violence or drug trafficking crime, in violation of 18 U.S.C. 924(c)(1), is a sentencing factor to be decided by the judge by a preponderance of the evidence, rather than an element of a distinct offense that must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt.

A. The language of Section 924(c)(1) dictates that firearm type is a sentencing factor. Section 924(c)(1)(B) provides that the firearm-type enhancements apply to "a person *convicted of a violation* of this subsection." 18 U.S.C. 924(c)(1)(B) (emphasis added). "Convicted of" refers to a finding of guilt, which necessarily precedes sentencing. Because firearm type becomes relevant under the statutory scheme only after the defendant has been found guilty (*i.e.*, "convicted of a violation"), firearm type does not bear on whether the defendant should be "convicted of a violation." Firearm type is therefore a sentencing factor. That conclusion is reinforced by the language of Clauses (B)(i) and (B)(ii), which direct how certain defendants "shall be sentenced."

The structure of Section 924(c)(1) confirms that firearm type is a sentencing factor. The statute begins with a lengthy principal paragraph stating the elements of the offense, followed by subsections bearing on the appropriate sentence. As this Court observed in *Harris* v. *United States*, 536 U.S. 545 (2002), in construing this very statute, "[w]hen a statute has this sort of structure, we can presume that its principal paragraph defines a single crime and its subsections identify sentencing factors." *Id.* at 553. *Harris* concluded that Section 924(c)(1)(A)(ii), which increases the minimum sentence when the firearm is brandished, states a sentencing factor. The structural inference that firearm type is a sentencing factor is even stronger, because unlike the brandishing provision of Clause (A)(ii), the firearm-type provisions of Clauses (B)(i) and (ii) are not even in the same sentence or subparagraph as the offense-defining language.

The firearm-type provisions in Subparagraph (B) are surrounded by sentencing factors. Brandishing and dis-

charging in Clauses (A)(ii) and (iii) are sentencing factors. See *Harris*, 536 U.S. at 552-556; *Dean* v. *United States*, 129 S. Ct. 1849, 1854 (2009). Clauses (C)(i) and (ii) relate principally to recidivist sentencing, which is classically a sentencing factor. And Clauses (D)(i) and (ii) expressly pertain to sentencing by prohibiting the imposition of probation and providing for a consecutive sentence. That arrangement strongly suggests that the firearm types specified in Subparagraph (B) are also sentencing factors.

B. Section 924(c)(1)(B) lies at the intersection of two sentencing factor traditions. First, at the time of the 1998 adoption of the current version of Section 924(c)(1), the Sentencing Guidelines reflected a strong practice of treating firearm type as a factor for the judge's consideration at sentencing, especially in firearm-based offenses. Second, unlike provisions that increase the maximum level of punishment—which by tradition often were identified as offense elements, and since *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), must be so treated—mandatory minimum sentencing provisions have traditionally (and perhaps exclusively) been understood as sentencing factors. The mandatory minimum sentences for particularly dangerous firearms prescribed by Section 924(c)(1)(B) belong to both sentencing factor traditions.

The 30-year mandatory minimum sentence prescribed in Section 924(c)(1)(B)(ii) is lengthy, reflecting the enormous risk posed by machineguns. But that length is not a basis to conclude that firearm type is an offense element. The ten-year minimum sentence for brandishing is "precisely what one would expect to see in [a] provision[] meant to identify matters for the sentencing judge's consideration." *Harris*, 536 U.S. at 554.

Although longer, the 30-year enhancement plays a similar role. Congress has directed comparably lengthy enhancements based on judicial findings in cases involving comparably dangerous or heinous conduct—such as aggravated kidnapping, terrorism, and leadership of an organized drug trafficking enterprise. Moreover, numerous recidivist sentencing provisions—like Section 924(c)(1)(C)(i)—require comparably long sentences, even when the offenses involved are less dangerous. In any event, the severity of an enhanced mandatory minimum sentence could not overcome Congress's clear expression, through language and structure, of its intent to create a sentencing factor in Section 924(c)(1)(B)(ii).

C. Congress had sound policy reasons for treating firearm type as a sentencing factor. The particular firearms that trigger enhanced sentences—machineguns, silencers, sawed-off shotguns and rifles, bombs, grenades, missiles, mines, and the like—are some of the most dangerous and threatening weapons available. Treating firearm type as a sentencing factor ensures consistent application of the penalty enhancement reflecting this aggravated potential for destruction. At the same time, this treatment of an essentially technical determination simplifies guilt-stage proceedings without reducing the accuracy of fact-finding.

D. Contrary to the reasoning of the court of appeals, this Court's decision in *Castillo* v. *United States*, 530 U.S. 120, 123 (2000)—which construed an earlier and different version of Section 924(c)(1)—is not controlling here. Indeed, *Castillo* itself acknowledged that Section 924(c)(1) had been rewritten and restructured in a way that pointed to the sentencing factor interpretation. *Id.* at 125. The current version of Section 924(c)(1) adopts a mandatory-minimum scheme, provides for firearm-

type enhancements for "convicted" defendants, and structurally divides elements from sentencing considerations. All of those features were absent from the version construed in *Castillo*. The current version thus makes clear that firearm type is a sentencing factor.

ARGUMENT

SECTION 924(c)(1)(B), WHICH INCREASES THE MINIMUM PENALTY FOR USING, CARRYING, OR POSSESSING A FIREARM IN CONNECTION WITH A CRIME OF VIOLENCE WHEN THE FIREARM IS A MACHINEGUN, STATES SENTENCING FACTORS RATHER THAN OFFENSE ELEMENTS

The court of appeals held that, to obtain the enhanced minimum sentence when the firearm involved in a violation of 18 U.S.C. 924(c)(1)(A) is a machinegun, the government must allege the nature of the firearm in the indictment and prove it to a jury beyond a reasonable doubt. That holding is incorrect. The principal paragraph of Section 924(c)(1)(A) states all of the elements of a single federal crime, and Section 924(c)(1)(B), which provides for increased minimum sentences for various specific firearms, states sentencing factors bearing on how a "person convicted of" that crime "shall be sentenced."

Within broad constitutional limits, "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (brackets in original) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)). When, as in this case, a particular fact in a statute increases a minimum sentence within the authorized range, the question whether that fact states an offense element or a sentencing factor is solely a question of

congressional intent. *Harris* v. *United States*, 536 U.S. 545, 552 (2002); *Castillo* v. *United States*, 530 U.S. 120, 123 (2000); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998); see also *Jones* v. *United States*, 526 U.S. 227, 232-239 (1999). The answer to that question turns on the "language, structure, subject matter, context, and history" of the provision in question. *Almendarez-Torres*, 523 U.S. at 228.

Applying that approach, the majority of courts of appeals to consider the question have correctly held that firearm type is a sentencing factor that need not be charged in the indictment or submitted to a jury.[2] The First Circuit's reliance on *Castillo* to reach a contrary conclusion is misplaced. *Castillo* construed an earlier and quite different version of Section 924(c)(1). Unlike that former version of the statute, the current statute's provision for increased mandatory minimums within the authorized range, and its clear delineation of sentencing considerations separate from the elements of the offense, establish that the involvement of a machinegun as the firearm in a Section 924(c)(1) offense is a sentencing factor.

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[2] See *United States* v. *Cassell*, 530 F.3d 1009, 1017 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1038 (2009); *United States* v. *Harrison*, 272 F.3d 220, 225-226 (4th Cir. 2001), cert. denied, 537 U.S. 839 (2002); *United States* v. *Sandoval*, 241 F.3d 549, 550-552 (7th Cir.), cert. denied, 534 U.S. 1057 (2001); *United States* v. *Gamboa*, 439 F.3d 796, 810-812 (8th Cir.), cert. denied, 549 U.S. 1042 (2006); *United States* v. *Avery*, 295 F.3d 1158, 1171-1172 (10th Cir.), cert. denied, 537 U.S. 1024 (2002); *United States* v. *Ciszkowski*, 492 F.3d 1264, 1268-1269 (11th Cir. 2007); see also *United States* v. *Dixon*, 273 F.3d 636, 640 n.2 (5th Cir. 2001) (dicta), cert. denied, 537 U.S. 829 (2002). In addition to the First Circuit in the decision below, one other court of appeals has held that firearm type is an offense element. See *United States* v. *Harris*, 397 F.3d 404, 412, 414 (6th Cir. 2005).

A. Section 924(c)(1)'s Language And Structure Show That Firearm Type Is A Sentencing Factor

This Court looks principally to a statute's language and structure to determine whether a particular provision states an element of a separate offense, or a sentencing factor to be considered by the judge. See *Harris*, 536 U.S. at 552-554; *Castillo*, 530 U.S. at 124-125; *Jones*, 526 U.S. at 232-234. Here, both of those factors compel the conclusion that the type of firearm involved in a Section 924(c)(1) offense is a sentencing factor.

1. The language of Section 924(c)(1) states that firearm type is a sentencing factor

This Court "start[s], as always, with the language of the statute." *Dean* v. *United States*, 129 S. Ct. 1849, 1853 (2009) (quoting *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000)). The current text of Section 924(c)(1) is unequivocal in specifying that firearm type is a sentencing factor. The opening phrase of Section 924(c)(1)(B) makes clear that the firearm-type enhancements apply to "a person *convicted of a violation* of this subsection." 18 U.S.C. 924(c)(1)(B) (emphasis added). "Convicted of'" refers to a finding of guilt, which necessarily precedes sentencing. See *Deal* v. *United States*, 508 U.S. 129, 132 (1993) ("In the context of [Section] 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury."). Because firearm type becomes relevant under the statutory scheme only after the defendant has been found guilty (*i.e.*, "convicted of a violation"), firearm type cannot be an element of the offense.

That firearm type is a sentencing factor is reinforced by Clauses (B)(i) and (B)(ii), which specify how certain defendants "shall be sentenced." While the principal

paragraph of Section 924(c)(1)(A) focuses on the defendant's active conduct in committing the offense, the balance of the provision focuses on the varied sentencing consequences that may follow depending on the facts. By directing that a person who uses a machinegun in committing the offense defined in the principal paragraph of Section 924(c)(1)(A) "shall be sentenced" to a term not less than 30 years, Clause (B)(ii) makes evident that firearm type is a sentencing factor.

The introductory text of Section 924(c)(1)(A) confirms the conclusion that Clauses (B)(i) and (B)(ii) do not each define a new crime separate from the single offense stated in the principal paragraph of Section 924(c)(1)(A). Section 924(c)(1)(A) begins: "Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." This language ensures that the defendant will be subject to the highest applicable minimum sentence for the conduct described in the principal paragraph of Section 924(c)(1)(A)—whether that sentence is specified in Section 924(c) itself, or elsewhere. See, *e.g.*, *United States* v. *Abbott*, 574 F.3d 203, 208 (3d Cir. 2009), petition for cert. pending, No. 09-479 (filed Oct. 19, 2009). Congress's reference to the existence of "greater minimum sentence[s]" strongly suggests that the enhancements "otherwise provided by this subsection" bear on sentencing, not guilt. Congress did not refer to greater minimum sentences for "greater offenses." Thus, the introductory language of Section 924(c)(1)(A) is most consistent with the view that Congress enacted a single crime in the principal paragraph of Section 924(c)(1)(A), with "greater minimum sentence" provisions specified elsewhere in Section 924(c). Cf. *Almendarez-Torres*, 523 U.S. at 231 ("The statute includes the words 'subject

to subsection (b)' at the beginning of subsection (a) * * *. If Congress intended subsection (b) to set forth substantive crimes, in respect to which subsection (a) would define a lesser included offense, what are those words doing there?") (citation omitted).[3]

"[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)). Because the text of Section 924(c)(1)(B) designates "sentenc[ing]" considerations for persons "convicted of a violation" described in Section 924(c)(1)(A), the language leaves no doubt that firearm type is a sentencing factor.

2. The structure of Section 924(c)(1) shows that firearm type is a sentencing factor

The structure of Section 924(c) provides an equally powerful indication that firearm type is a sentencing factor. See *Harris*, 536 U.S. at 554 (relying on a "presumption drawn from [the] structure" of the

[3] Currently pending before the Court is the government's petition for a writ of certiorari in *United States* v. *Williams*, No. 09-466 (filed Oct. 20, 2009), which presents the question whether the "except" clause prohibits imposition of a Section 924(c) sentence if the defendant is also subject to a greater mandatory minimum sentence on a different count of conviction charging a different offense for different conduct. *Abbott*, *supra*, typifies the overwhelming view of the courts of appeals that the "except" clause is not such a prohibition. But whether or not the "except" clause directs the sentencing court's attention to sentences for other offenses, there can be no dispute that it requires the court to consider the mandatory minimum sentences specified in Subparagraphs (A), (B), and (C). The language thus confirms Congress's intention that the principal paragraph of Section 924(c)(1)(A) state a complete crime, with the balance of Subparagraph (A), and Subparagraphs (B) and (C), stating sentencing factors.

statute in finding that "brandish[ing]" under Section 924(c)(1)(A)(ii) is a sentencing factor). Consistent with the plain meaning of its text, the structure of the current version of Section 924(c)(1) strongly implies that the firearm-type provisions are sentencing factors.

a. Because this is the very statute that *Harris* construed, *Harris*'s inferences from the structure of Section 924(c)(1) apply here with equal force. As *Harris* notes, "[f]ederal laws usually list all offense elements 'in a single sentence' and separate the sentencing factors 'into subsections.'" 536 U.S. at 552 (quoting *Castillo*, 530 U.S. at 125). *Harris* singled out several features that place the current version of Section 924(c)(1) in that mold: "a lengthy principal paragraph listing the elements of a complete crime," followed by "the word 'shall,' which often divides offense-defining provisions from those that specify sentences," and finally "separate subsections, which explain how defendants are to 'be sentenced,'" and which "do not repeat the elements from the principal paragraph." *Id.* at 552-553 (citation omitted). "When a statute has this sort of structure, we can presume that its principal paragraph defines a single crime and its subsections identify sentencing factors." *Id.* at 553; accord *Jones*, 526 U.S. at 232-233.

The structural reasons to presume that Subparagraph (B) states sentencing factors are as strong as, if not stronger than, in *Harris*. The same "lengthy principal paragraph listing the elements of a complete crime," *Harris*, 536 U.S. at 552, is of course present here. Like the brandishing and discharging provisions, the firearm-type provisions are "separate[d] * * * 'into subsections'" that "explain how defendants are to 'be sentenced.'" *Harris*, 536 U.S. at 552 (quoting *Castillo*, 530 U.S. at 125). Subparagraph (B) "do[es] not repeat

the elements from the principal paragraph," *id.* at 553. Rather, Subparagraph (B) addresses specific subcategories of an offense element ("the firearm") already stated in the offense-defining language of Subparagraph (A).[4] And the case is made still stronger because, unlike the brandishing provision, the firearm-type provisions are not even in the same sentence or subparagraph as the offense-defining language. The two are separate sentences with "[t]he principal paragraph [of Section 924(c)(1)(A)] defin[ing] a complete offense." *Dean*,

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[4] Virtually every weapon described in Subparagraph (B) is by definition a "firearm" under 18 U.S.C. 921(a)(3):

> The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

Ibid. Under the definitions in 18 U.S.C. 921(a)(5)-(8), "short-barreled rifle[s]" and "short-barreled shotgun[s]" satisfy the criteria in 18 U.S.C. 921(a)(3)(A). "Destructive device[s]," "firearm silencer[s]," and "firearm muffler[s]" are by definition firearms under 18 U.S.C. 921(a)(3)(C) and (D).

Under 18 U.S.C. 921(a)(23), "the term 'machinegun' has the meaning given such term in * * * 26 U.S.C. 5845(b)." Section 5845(b) in turn provides in relevant part that "'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. 5845(b). That definition covers any fully automatic weapon, see *Staples*, 511 U.S. at 602 & n.1, and the vast majority of "machineguns" are "firearms" under 18 U.S.C. 921(a)(3)(A). Although there are "machineguns" that do not operate "by the action of an explosive," and so are not "firearms" under 18 U.S.C. 921(a)(3)(A), these weapons would not be the basis for an enhanced sentence under Section 924(c)(1)(B)(ii) because they could not properly be the subject of a conviction under Section 924(c)(1)(A) in the first instance.

129 S. Ct. at 1853; see also *id.* at 1854 ("The basic crime here is using or carrying a firearm during and in relation to a violent or drug trafficking crime, or possessing a firearm in furtherance of any such crime.").

b. The structural inference that Section 924(c)(1)(B) states sentencing factors is confirmed by its location in the statute: firearm type is surrounded by matters bearing exclusively on sentencing. This Court held in *Harris* and *Dean* that brandishing and discharging in Clauses (A)(ii) and (iii) are sentencing factors. See *Harris*, 536 U.S. at 552-556; *Dean*, 129 S. Ct. at 1854. Clauses (C)(i) and (ii) relate principally to recidivist sentencing, and the courts of appeals to have considered the question unanimously view those enhancements as sentencing factors.[5] Indeed, this Court has recognized that recidivism is a classic sentencing factor. See *Monge* v. *California*, 524 U.S. 721, 728-729 (1998); *Almendarez-Torres*, 523 U.S. at 230. Finally, Clauses (D)(i) and (ii) explicitly pertain to sentencing by prohibiting the imposition of probation and providing for a consecutive sentence. See *Castillo*, 530 U.S. at 125 (provisions on recidivism and consecutive sentences "refer directly to sen-

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[5] See *United States* v. *Rivera-Rivera*, 555 F.3d 277, 290-292 (1st Cir.), cert. denied, 130 S. Ct. 344 (2009); *United States* v. *Mejia*, 545 F.3d 179, 207-208 (2d Cir. 2008); *United States* v. *Williams*, 65 Fed. Appx. 819, 823 (3d Cir.), cert. denied, 540 U.S. 932 (2003); *United States* v. *Cristobal*, 293 F.3d 134, 147-148 (4th Cir.), cert. denied, 537 U.S. 963 (2002); *United States* v. *Smith*, 296 F.3d 344, 348-349 (5th Cir.), cert. denied, 537 U.S. 1012 (2002), and 538 U.S. 935 (2003); *United States* v. *Davis*, 306 F.3d 398, 411-412 (6th Cir. 2002), cert. denied, 537 U.S. 1208 (2003); *United States* v. *Hatcher*, 501 F.3d 931, 934-935 (8th Cir. 2007), cert. denied, 128 S. Ct. 1133 (2008); *United States* v. *Madrid*, 222 Fed. Appx. 721, 736 (10th Cir. 2007) (per curiam); *United States* v. *Woodruff*, 296 F.3d 1041, 1049-1050 (11th Cir. 2002), cert. denied, 537 U.S. 1114 (2003).

tencing"). The positioning of Subparagraph (B) in the midst of a series of sentencing factors reinforces the conclusion that firearm type is such a factor as well.

In contrast, the court of appeals' interpretation of Section 924(c)(1) produces a structurally disorganized intermingling of sentencing factors and offense elements, rather than an orderly progression from offense elements to sentencing considerations. On the court of appeals' view:

- Congress first spoke of elements, in the principal paragraph of Subparagraph (A). See *Dean*, 129 S. Ct. at 1853.
- Then Congress spoke of sentencing factors, in Clauses (A)(ii) and (iii). See *Harris*, 536 U.S. at 552-556; *Dean*, 129 S. Ct. at 1854.
- Then Congress spoke again of offense elements, in Clauses (B)(i) and (ii). See Pet. App. 1a-10a.
- Then Congress spoke again of sentencing factors, in Clause (C)(i). See, *e.g.*, *United States* v. *Rivera-Rivera*, 555 F.3d 277, 290-292 (1st Cir.), cert. denied, 130 S. Ct. 344 (2009).
- And finally, Congress spoke partly of sentencing factors, but partly of offense elements, in Clause (C)(ii) (which addresses recidivist sentencing when the firearm is a machinegun or other firearm specified in Clause (B)(ii)).

It is most unlikely that the Congress that overhauled the entirety of Section 924(c)(1) with obvious attention to its structure and organization intended such a illogical construction. Cf. *Jones*, 526 U.S. at 256 (Kennedy, J., dissenting) ("It is difficult to see why Congress would dou-

ble back and insert additional elements for the jury's consideration in [later] clauses.").

B. Secondary Factors That This Court Has Considered Also Favor Treating Firearm Type As A Sentencing Factor

In deciding whether Congress intended a statutory provision to state an offense element or a sentencing factor, this Court has also referred to interpretive guides besides language and structure—such as the traditional treatment of the fact at issue, the length of the enhanced sentence, and legislative history. See *Harris*, 536 U.S. at 553-554 (tradition); *id.* at 554 (sentence length); *Castillo*, 530 U.S. at 126 (tradition); *id.* at 129-130 (legislative history); *id.* at 131 (sentence length); *Jones*, 526 U.S. at 233 (sentence length); *id.* at 234-237 (tradition); *id.* at 238-239 (legislative history); *Almendarez-Torres*, 523 U.S. at 230 (tradition); *id.* at 234 (legislative history); *id.* at 235-236 (sentence length).

These guides, however, are secondary to language and structure. Congress may legislate in light of tradition on a given subject matter, but it is also free to break from tradition within broad constitutional limits. See *United States* v. *Harrison*, 272 F.3d 220, 227 (4th Cir. 2001) (Motz, J., concurring in the judgment) ("[T]he goal of our analysis is to ascertain Congress' intent, and Congress can make firearm type a sentencing factor if it writes language that is clear enough to do so, even in light of the strong contrary tradition [asserted in *Castillo*]."), cert. denied, 537 U.S. 839 (2002). Likewise, when "the statutory language is clear, there is no need to reach * * * arguments based on statutory purpose, legislative history, or the rule of lenity." *Boyle* v. *United States*, 129 S. Ct. 2237, 2246 (2009). As for the length of the enhanced sentence, "the fixing of prison

terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" *Harmelin* v. *Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Rummel* v. *Estelle*, 445 U.S. 263, 275-276 (1980)).

Thus, the Court has taken guidance from these secondary considerations only when the statute's language proves "neutral," *Castillo*, 530 U.S. at 124, or "does not justify any confident inference," *Jones*, 526 U.S. at 234. That is manifestly not the case here. See pp. 14-21, *supra*. Even so, these secondary guides favor treating firearm type in Section 924(c)(1)(B)(ii) as a sentencing factor.

1. Enhanced minimum sentences for particularly dangerous firearms have often turned on judicial fact-finding at sentencing

Where tradition is concerned, the *Castillo* Court "[could] not say that courts have typically or traditionally used firearm types * * * as sentencing factors," but neither did it point to any consistent tradition of legislatures treating firearm type as an offense element. 530 U.S. at 126-127. Compare *ibid.* (pointing to no clear tradition), with *Jones*, 526 U.S. at 235 ("[Congress] has unmistakably identified serious bodily injury as an offense element in any number of statutes."). Although *Castillo* may have been correct in seeing no tradition of treating firearm type as a sentencing factor in pre-Sentencing Guidelines statutory law, the current version of Section 924(c)(1) belongs to a somewhat different tradition, for two reasons.

First, at the time of the 1998 overhaul of Section 924(c)(1), the then-mandatory federal Sentencing Guidelines reflected a strong federal practice of elevating sentences based on the sentencing judge's findings about the type of firearm used in a crime. This practice was followed even where the presence of a firearm was "the element lying closest to the heart of the crime at issue," *Castillo*, 530 U.S. at 126-127. For example, under Sentencing Guidelines § 2K2.1(a)(7) (1998), a first-time offender guilty of unlawful receipt, possession, or transportation of a firearm—including the familiar felon-in-possession offense of 18 U.S.C. 922(g)(1)—would have been assigned a base offense level of 12. But under Sentencing Guidelines § 2K2.1(a)(5) (1998), his base offense level would instead be 18 (roughly doubling his ultimate minimum sentence) "if the offense involved a firearm described in 26 U.S.C. § 5845(a)," a provision that covers every one of the firearms singled out in 18 U.S.C. 924(c)(1)(B). A further two-level enhancement applied "[i]f the offense involved a destructive device." Sentencing Guidelines § 2K2.1(b)(3) (1998). Treating firearm type in Section 924(c)(1) as a sentencing factor is entirely consistent with the Guidelines' practice of committing nearly identical questions to the sentencing judge.[6]

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[6] Section 2K2.1 applies to the vast majority of firearm-based offenses. See Sentencing Guidelines § 2K2.1 comment. (statutory provisions) (1998). A similar practice was reflected in the Sentencing Guidelines for unlicensed export of arms: An offense involving ten or fewer "non-fully automatic small arms (rifles, handguns, or shotguns)" was assigned a base offense level of 14, but an offense involving more serious weapons was assigned a base offense level of 22. See *id.* § 2M5.2(a).

More generally, upward departures were potentially available for any offense "[i]f a weapon or dangerous instrumentality was used or possessed in the commission of the offense." Sentencing Guidelines § 5K2.6 (1998). In that scheme, "[t]he extent of the increase ordinarily

Second, Subparagraph (B)'s effect of increasing a minimum sentence within an authorized range places it in the company of traditional sentencing factors. The escalating mandatory minimum sentences in the current version of Section 924(c)(1) direct the sentencing judge to exercise her discretion within the narrower range Congress deems appropriate for the particularly dangerous firearms enumerated in Clauses (B)(i) and (ii). Such mandatory minimum sentences are "more consistent with traditional understandings about how sentencing factors operate" because "the required findings constrain, rather than extend, the sentencing judge's discretion." *Harris*, 536 U.S. at 554. Indeed, this Court has never held a provision that affects only the minimum sentence to be an offense element. Such factors stand in sharp contrast to factors about a crime that allow a judge to impose a longer sentence at her discretion; those factors (except recidivism) now function as "elements" by virtue of constitutional command. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000).

2. The lengths of the sentences provided by Section 924(c)(1)(B) do not suggest that the triggering facts are elements

a. Each of this Court's relevant cases mentions the effect of the statutory provision at issue on the length of the mandatory minimum or maximum possible term of imprisonment. For example, *Jones* adverted to the "steeply higher penalties * * * condition[ed] on fur-

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should depend on the dangerousness of the weapon" among other factors. *Ibid.* See also *id.* § 5K2.17 ("If the defendant possessed a high-capacity, semiautomatic firearm in connection with a crime of violence or controlled substance offense, an upward departure may be warranted.").

ther facts." 526 U.S. at 233. But the importance of sentence length in *Jones* cannot be divorced from the then-unsettled constitutional question whether a statutory maximum sentence could be increased on the basis of a fact that was not charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. See *ibid.* As *Harris* explained in distinguishing *Jones*, sentence length is less indicative of congressional intent when the provision affects only the minimum sentence within an authorized range:

> Section 924(c)(1)(A) does not authorize the judge to impose "steeply higher penalties"—or higher penalties at all—once the facts in question are found. Since the subsections alter only the minimum, the judge may impose a sentence well in excess of [the mandatory minimum], whether or not the [sentencing factor applies].

536 U.S. at 554. *Harris*'s treatment of sentence length is appropriate here too, because Section 924(c)(1)(B) alters only the minimum sentence. The finding of a machinegun's involvement in the offense does not increase the defendant's exposure to punishment because even without such a finding, the judge can impose up to a life sentence for any Section 924(c)(1) conviction.

b. Even if sentence length mattered in deciding whether a statutory provision establishing a mandatory minimum sentence states an offense element or a sentencing factor, the elevated minimum sentences in Section 924(c)(1)(B) are not aberrational. Within Section 924(c)(1), the ten-year minimum sentence prescribed in Clause (B)(i) is the same as the ten-year minimum prescribed in Clause (A)(iii), which this Court characterized as "precisely what one would expect to see in provisions

meant to identify matters for the sentencing judge's consideration." *Harris*, 536 U.S. at 554. The 30-year minimum sentence in Clause (B)(ii) is longer (though the clause is in all other respects precisely parallel to Clause (B)(i)). But the enhancement in Clause (B)(ii) to a 30-year minimum sentence is comparable to enhancements for similarly dangerous or heinous conduct that Congress has identified as sentencing factors:

Enhancement for kidnapping victim being a minor. Under 18 U.S.C. 1201(a), kidnapping is punishable by imprisonment for any term of years, with no minimum term of imprisonment. If, however, the victim is a minor and the offender is a stranger to the victim, 18 U.S.C. 1201(g)(1) requires a term of imprisonment of at least 20 years. Section 1201(g)(1) has not been the subject of an appellate decision, but its language—"If * * * the victim of an offense under this section has not attained the age of eighteen years; and [the offender is an adult who neither has legal custody of the victim nor is a close family relative,] the sentence under this section for such offense shall include imprisonment for not less than 20 years"—unmistakably defines a sentencing factor.

Sentencing Guidelines terrorism adjustment. Sentencing Guidelines § 3A1.4 provides for a 12-level increase in the defendant's offense level (or a minimum offense level of 32) and a criminal history category of VI if the defendant's offense "is a felony that involved * * * a federal crime of terrorism." "Federal crime of terrorism" is defined to include any of several dozen offenses listed in 18 U.S.C. 2332b(g)(5)(B)(i)-(iv), when the offense "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," 18 U.S.C. 2332b(g)(5)(A).

This provision is the product of a congressional directive to the Sentencing Commission.[7] In the context of the then-mandatory Sentencing Guidelines, that directive was functionally similar to the enactment of statutory mandatory minimum sentences for each of the Federal crimes of terrorism enumerated in 18 U.S.C. 2332b(g)(5)(B): either would result in the imposition of elevated minimum terms of imprisonment based on facts found by the judge at sentencing.

Even in the context of advisory Sentencing Guidelines under *United States* v. *Booker*, 543 U.S. 220 (2005), the application of the terrorism adjustment leads to significantly greater advisory sentencing ranges. For example, in *United States* v. *Chandia*, 514 F.3d 365 (4th Cir. 2008), the defendant was convicted of, *inter alia*, providing material support to a designated foreign terrorist organization, and conspiracy to do the same, in violation of 18 U.S.C. 2339B. On those facts, without the terrorism adjustment, the defendant's advisory Sentencing Guidelines range would have been 63-78 months; but with the adjustment, it was 360 months to life. *Chandia*, 514 F.3d at 370. The magnitude of that enhancement almost exactly equals the enhancement prescribed by Section 924(c)(1)(B)(ii).

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[7] Originally, the provision existed to address international terrorism. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 2022 (congressional directive); Sentencing Guidelines App. C, amend. 526 (adding Sentencing Guidelines § 3A1.4). Congress later directed that the international terrorism adjustment—including its offense level and criminal history category increases—be applied to the newly defined Federal crimes of terrorism. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1303 (congressional directive); Sentencing Guidelines App. C, amend. 539 (temporary amendment of Sentencing Guidelines § 3A1.4); *id.* amend. 565 (permanent amendment).

Enhancement for leadership role in a continuing criminal enterprise. Under 21 U.S.C. 848(a), any person who engages in a continuing criminal enterprise (defined in 21 U.S.C. 848(c) as a type of organized drug trafficking) is subject to a 20-year mandatory minimum sentence. Under 21 U.S.C. 848(b), the principal leaders of large enterprises are subject to a mandatory life term of imprisonment. The 21 U.S.C. 848(b) determination raising the minimum sentence from 20 years of imprisonment to life imprisonment is a sentencing factor. See, *e.g.*, *United States* v. *Tidwell*, 521 F.3d 236 (3d Cir.), cert. denied, 129 S. Ct. 762 (2008); *United States* v. *Smith*, 223 F.3d 554, 562, 566 (7th Cir. 2000) (Wood, J.), cert. denied, 536 U.S. 957 (2002).

Recidivism enhancements. As this Court recognized in *Almendarez-Torres*, 523 U.S. at 236, a number of federal statutes provide for greatly increased minimum (or maximum) sentences for repeat offenders, which is "as typical a sentencing factor as one might imagine," *id.* at 230. Section 924(c)(1) itself is an example: a first offense carries a minimum five-year sentence under Clause (A)(i), but a second offense carries a minimum 25-year sentence under Clause (C)(i). Substantial recidivism enhancements imposing long mandatory minimum sentences—even when the offenses involved are less dangerous than the conduct at issue here—appear in numerous statutes.[8] They too show that treating Section

[8] See, *e.g.*, 18 U.S.C. 2241(c) (aggravated sexual abuse of a child; 30-year minimum sentence for first offense; mandatory life imprisonment for second offense); 18 U.S.C. 2251(e) (sexual exploitation of children; 15-year minimum sentence for first offense; 25-year minimum sentence for second offense; 35-year minimum sentence for third offense); 18 U.S.C. 2252(b)(1) (commerce in depictions of a minor engaging in sexually explicit conduct; 5-year minimum sentence for first offense; 15-

924(c)(1)(B)(ii) as a sentencing factor, notwithstanding the lengthy mandatory minimum it provides, is consistent with other federal sentencing law.

3. The relevant legislative history is silent, but the nature and context of the 1998 overhaul of Section 924(c)(1) favor treating firearm type as a sentencing factor

The legislative history of the 1998 overhaul of Section 924(c)(1) is silent on the question presented. From that silence, respondents infer that Congress's sole intent was to broaden Section 924(c)(1)'s reach beyond the limits recognized in *Bailey* v. *United States*, 516 U.S. 137 (1995), a purpose that is evident throughout the legislative history. See O'Brien Br. in Opp. 15; Burgess Br. in Opp. 21-22. But this Court does not interpret statutes

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year minimum sentence for second offense); 18 U.S.C. 2252A(b)(1) (same for child pornography); 18 U.S.C. 2252(b)(2) (possession of depictions of a minor engaging in sexually explicit conduct; no minimum sentence for first offense; 10-year minimum sentence for second offense); 18 U.S.C. 2252A(b)(2) (same for child pornography); 18 U.S.C. 922(g), 924(a)(2) and (e)(1) (Armed Career Criminal Act; no minimum sentence for first offense of felon-in-possession; 15-year minimum sentence for offender with three prior convictions for a violent felony or serious drug offense); 21 U.S.C. 841(b)(1)(A) (manufacture or distribution of one kilogram of heroin or equivalent quantities of other controlled substances; 10-year minimum sentence for first offense, or 20 years if death or serious bodily injury results; 20-year minimum sentence for second offense, or mandatory life imprisonment if death or serious bodily injury results; mandatory life imprisonment for offender with two prior convictions for felony drug offenses); 21 U.S.C. 960(b)(1) (same for unlawful importation of controlled substances, except no special provision for offender with two prior convictions for felony drug offenses); 21 U.S.C. 848(a) (continuing criminal enterprise; 20-year minimum sentence for first offense; 30-year minimum sentence for second offense).

based on what Congress did not say in the legislative history. "[L]egislative history need not confirm the details of changes in the law effected by statutory language before [this Court] will interpret that language according to its natural meaning." *Morales* v. *TWA*, 504 U.S. 374, 385 n.2 (1992).

More significant is what Congress actually did. The nature and context of the 1998 changes to Section 924(c)(1) support treating firearm type as a sentencing factor. Most prominently, the 1998 overhaul had the effect of (1) moving the firearm-type provisions into a separate sentence prefaced with the phrase "a person convicted of"; (2) structuring the basic offense in a principal paragraph followed by subparagraphs declaring how defendants are "to be sentenced"; and (3) discarding escalating determinate sentences in favor of creating a single maximum coupled with mandatory minimum sentences. These changes were made before *Jones* and *Castillo* stressed the importance of structural features in signaling that a provision is a sentencing factor, but Congress's structural choices are no less significant because they anticipated this Court's explicit recognition of their meaning. And in turning to mandatory minimum sentences, Congress acted with presumptive awareness of this Court's decision in *McMillan* v. *Pennsylvania*, 477 U.S. 79, 89-90 (1986), which established the constitutionality of increasing a minimum sentence within a statutory range based on sentencing factors relating to the offense. Indeed, at the time of the 1998 amendment to Section 924(c)(1), this Court had never construed any federal criminal law to treat as an element a fact that raised the minimum sentence within an already authorized range—nor, for that matter, has the Court done so since.

C. This Court Should Respect Congress's Sound Policy Choice To Treat Firearm Type As A Sentencing Factor

This Court has also been mindful of the policy considerations behind Congress's choice to make a provision an offense element or a sentencing factor. See *Castillo*, 530 U.S. at 127-128; *Almendarez-Torres*, 523 U.S. at 234-235. Congress's choice to create sentencing factors in Section 924(c)(1)(B) serves sound policy objectives. The particular firearms that trigger enhanced sentences—machineguns, silencers, sawed-off shotguns and rifles, bombs, grenades, missiles, mines, and the like—are some of the most dangerous and threatening weapons available.[9] Most can readily inflict enormous harm in a very short time, and many have no legitimate purpose outside the military and law enforcement contexts. For example, short-barreled shotguns (covered by Clause (B)(i)) are "particularly dangerous because of the

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[9] For a time, Section 924(c)(1) also provided an enhanced minimum sentence when the firearm involved was a "semiautomatic assault weapon." The reference was added in 1994 by the Public Safety and Recreational Firearms Use Protection Act (PSRFUPA), Pub. L. No. 103-322, Tit. XI, Subtit. A, § 110102(c)(2), 108 Stat. 1998. But PSRFUPA further provided that it would sunset ten years after its effective date. § 110105(2), 108 Stat. 2000. The Office of Legal Counsel has recently concluded that the intervening 1998 amendment of Section 924(c)(1), which carried forward the reference to semiautomatic assault weapons in Clause (B)(i), did not repeal the PSRFUPA sunset. See Memorandum from Jeannie Rhee, Deputy Assistant Att'y Gen., Dep't of Justice, *Whether the Ten-Year Minimum Sentence in 18 U.S.C. § 924(c)(1)(B)(i) Applies to Semiautomatic Assault Weapons* (Nov. 24, 2009). The semiautomatic assault weapon language was therefore repealed in 2004, taking Section 924(c)(1) offenses involving semiautomatic assault weapons out of Section 924(c)(1)(B)(i), though leaving them subject to the general penalty provisions of Section 924(c)(1)(A). *Id.* at 1, 14.

wide pattern in which the pellets are distributed." *United States* v. *Duerson*, 25 F.3d 376, 384 (6th Cir. 1984). Machineguns, silencers, and destructive devices (covered by Clause (B)(ii)) are even more dangerous. Machinegun fire "can be devastating: A fully automatic MAC-10 can fire more than 1,000 rounds per minute." *Smith* v. *United States*, 508 U.S. 223, 225 (1993). The 31-round magazine in the Cobray MAC-11 machinegun at issue here could have been emptied with one pull of the trigger in under two seconds. Silencers and mufflers are the tools of stealthy, premeditated crimes. And destructive devices—bombs, missiles, rockets, and the like —are typically instruments of warfare with enormous destructive potential. *United States* v. *Freed*, 401 U.S. 601, 609 (1971) ("[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons.") (footnote omitted).

Every Section 924(c)(1) offense is serious. As this Court noted with reference to the prior version of Section 924(c)(1), Congress "was no doubt aware that drugs and guns are a dangerous combination," and firearms and violent crime are the same. *Smith*, 508 U.S. at 240. That alone "creates a grave possibility of violence and death," *ibid.*, irrespective of the particular firearm's capabilities. But Congress's evident judgment is that certain types of firearms are so dangerous, so threatening, and so often illegitimate, that when used to facilitate a drug trafficking crime or a crime of violence, an enhanced minimum sentence is required. More specifically, Congress's judgment is that use of those particular firearms is grave enough to require elevated minimum penalties for an offense that, even without such use, is grave enough to carry a life maximum.

Congress's treatment of firearm type as a sentencing factor has at least two important benefits. First, judicial fact-finding and appellate review ensure consistent application of the firearm-type enhancement. That is no small concern where such an important crime-control interest is at stake. Second, this treatment simplifies and streamlines guilt-stage proceedings, without interfering with the accuracy of fact-finding. The evidence showing that a firearm has the characteristics that make it one of the firearms enumerated in Subparagraph (B) is essentially technical. Such evidence concerns, for example, whether certain parts of the weapon measure less than a certain length, the weapon fires fully automatically, or the device contains a certain minimum quantity of explosive. Although such evidence is usually clear-cut and can be grasped by a jury, see *Castillo*, 530 U.S. at 127, Congress could reasonably wish to avoid burdening the trial process with it. Even if that burden and additional complexity are modest, no great policy interest would be served by treating firearm type as an offense element because a jury determination is unlikely to improve the accuracy of fact-finding on such an issue.

Finally, treating firearm type as an offense element would seriously disserve Congress's policy objectives if that meant the government would have to prove the defendant's knowledge of his firearm's characteristics, as some courts (and the government in this case) have assumed.[10] Compare *United States* v. *Ciszkowski*, 492 F.3d 1264, 1268 (11th Cir. 2007) (firearm characteristics

[10] The correctness of the government's concession below is not a question presented here. No count before this Court charges, as an element, that the Cobray was a machinegun. The availability of the increased minimum sentence in this case therefore rises or falls on whether the machinegun determination is a sentencing factor for the judge.

are sentencing factors, and the government need not prove a defendant's knowledge of those characteristics); *United States* v. *Gamboa*, 439 F.3d 796, 812 (8th Cir.) (same), cert. denied, 549 U.S. 1042 (2006), with J.A. 42 (government's concession below that if firearm characteristics are offense elements, the government would need to prove respondents' knowledge of the characteristics); Pet. App. 8a (decision below implying that it would require proof of defendant's knowledge); *United States* v. *Hoosier*, 442 F.3d 939, 944 (6th Cir. 2006) (describing indictment alleging "knowing possession of an SKS assault rifle").

As in this case, knowledge of firearm characteristics may be difficult to establish. For example, "virtually any semiautomatic weapon may be converted, either by internal modification or, in some cases, simply by wear and tear, into a machinegun," yet "[s]uch a gun may give no externally visible indication that it is fully automatic," *Staples*, 511 U.S. at 615. Thus, it can be difficult or impossible for the government to prove a defendant's knowledge of the nature of the firearm other than by specific witness testimony on that issue, which the government often lacks. But the offender who does not know the danger his firearm poses is no less likely to cause great harm than the offender who does. There is no indication Congress wanted to exonerate oblivious offenders in this statute. Cf. *Dean*, 129 S. Ct. at 1855 ("The fact that the actual discharge of a gun * * * may be accidental does not mean that the defendant is blameless.").

D. This Court's Decision In *Castillo* Does Not Control The Interpretation Of The Current Version Of Section 924(c)(1)

In *Castillo*, this Court construed the prior version of Section 924(c)(1) to treat firearm type as an offense element. The Court relied on five factors in reaching that conclusion: language and structure, tradition, policy, legislative history, and the length and severity of the sentence. *Castillo*, 530 U.S. at 124-131. The court of appeals found *Castillo* "close to binding" in the absence of "a clearer or more dramatic change in language or legislative history expressing a specific intent." Pet. App. 10a. But most of these factors—and certainly the most important ones—do in fact evince a "clear[]" and "dramatic" change from the prior version of the statute.

First, the current version of Section 924(c)(1) differs decisively in language and structure from the prior version. The "literal language" of the prior version, "taken alone, appear[ed] neutral," because its first sentence included not only the "basic elements" of "uses or carries a firearm" and "during and in relation to a crime of violence," but also "the subsequent 'machinegun' phrase." *Castillo*, 530 U.S. at 124. The single sentence did not specify the relationship between the basic elements and the "machinegun" phrase. Thus, "one could read" the basic elements as stating the complete crime, "[b]ut, with equal ease, by emphasizing the phrase 'if *the* firearm is a . . . ,'" read the "machinegun" phrase as "creating a different crime containing one new element." *Ibid.* That is, "one can read the [prior version's] language as simply substituting the word 'machinegun' for the initial word 'firearm.'" *Ibid.*

The current version of Section 924(c)(1) is not so variously interpreted. The principal paragraph of Subpara-

graph (A) is on its face a complete enumeration of the elements of an offense. The firearm type provisions of Subparagraph (B) are grammatically, structurally, and conceptually removed from Subparagraph (A), leaving no ambiguity about where to place the emphasis in the offense-defining sentence. Nor is *Castillo*'s approach of "substituting the word 'machinegun' for the initial word 'firearm,'" 530 U.S. at 124, viable here, because Subparagraph (B)'s restriction to "a person convicted of a violation" precludes pressing the requirement of a "machinegun" into the service of deciding whether the defendant should be "convicted of a violation" to begin with.

As for structure, *Castillo*'s analysis relied entirely on features of the prior version of Section 924(c)(1) that now are gone. In the prior version, "Congress placed the element 'uses or carries a firearm' and the word 'machinegun' in a single sentence not broken up with dashes or separated into subsections." *Castillo*, 530 U.S. at 124-125. Now, of course, "machinegun" is in a different sentence, and it is "broken up with dashes" and "separated into subsections." The court of appeals below gave these structural dissimilarities no weight, dismissing them as the product of a "current trend" to reorganize criminal statutes "in the fashion of the tax code." Pet. App. 9a. But that cannot be squared with this Court's recognition that structure is an important guide to meaning. And as *Castillo* itself acknowledged, the "statutory restructuring" of Section 924(c) "suggest[s] a contrary interpretation" to the one this Court reached in *Castillo*. 530 U.S. at 125.

Second, even if there were no federal tradition of treating firearm type as a sentencing consideration in 1986 (when the provision at issue in *Castillo* was first

enacted), see *Castillo*, 530 U.S. at 126-127, that tradition had emerged by the time of the 1998 overhaul of Section 924(c)(1), reflected most obviously in the Sentencing Guidelines, see pp. 22-23 and note 6, *supra*. Moreover, the prior version of Section 924(c)(1) prescribed determinate sentences for specific conduct. Determinate sentences may be more in line with the offense element tradition (and after *Apprendi*, necessarily are associated with offense elements); mandatory minimum sentences, by contrast, are overwhelmingly (perhaps even exclusively) associated with the sentencing factor tradition. See *Harrison*, 272 F.3d at 227 (Motz, J., concurring in the judgment) ("Congress * * * ma[d]e firearm type a sentencing factor * * * by failing to provide for determinate sentences.").

Third, the Court's principal policy concern in *Castillo* was that in cases involving multiple firearms, a sentencing judge could conceivably apply a firearm-type enhancement based on a weapon that was not the basis of the jury's finding of guilt. See 530 U.S. at 128. But that consideration should not carry too much weight. The issue seems to arise infrequently (if at all), even though many circuits have held that firearm type is a sentencing factor under the current version of Section 924(c)(1). And when it arises, the jury can be asked to return a special verdict form identifying the firearm(s) on which it based its verdict.

Fourth, if legislative history was instructive in *Castillo*, it "argue[d] *against* (not *for*) the Government's position." 530 U.S. at 130. Here, there is no relevant legislative history, but nothing can be gleaned from that silence. See *Morales*, 504 U.S. at 385 n.2. Nor can anything be taken from Congress's inaction after *Castillo*, given that *Castillo* did not address the new version of

the statute. If anything, *Castillo*'s refusal to construe the new statute, see 530 U.S. at 125, would have given Congress confidence that the new version would be taken on its own terms—which is precisely what the majority of the courts of appeals have done. This Court's decision in *Harris* would only have reinforced the view that no further amendment of Section 924(c)(1) was necessary to achieve Congress's objective of stating a single, complete offense in the principal paragraph of Subparagraph (A), followed by a variety of sentencing factors.

Fifth, the multiple, significant changes in Section 924(c)(1) make the length of the sentence enhancement at issue less meaningful than in *Castillo*. When longer and more severe sentences are at stake, the Court may —"after considering traditional interpretive factors" and finding itself "genuinely uncertain as to Congress' intent"—"assume a preference for traditional jury determination." *Castillo*, 530 U.S. at 131. But there can be no "genuine[] uncertain[ty]" here. Section 924(c)(1)'s current language and structure overwhelmingly favor treating firearm type as a sentencing factor. And in any event, the current version of Section 924(c)(1)(B)(ii), unlike its precursor, does not authorize longer sentences. Congress's decision to set only minimum sentences in the current statute means that any violation of Section 924(c)(1) is punishable by life imprisonment. Firearm type in the current version of the statute ensures a level of punishment within that range, but leaves an offender's maximum exposure unaffected.

For all the reasons previously provided, the rule of lenity does not apply here. "The mere possibility of articulating a narrower construction * * * does not by itself make the rule of lenity applicable." *Smith*,

508 U.S. at 239. Rather, the rule of lenity applies only if there is a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citation omitted). There is no "grievous ambiguity" here. To the contrary, firearm type is unambiguously a sentencing factor in the current statute because the statute states that firearm type bears only on how "a person convicted of a violation" is to "be sentenced," 18 U.S.C. 924(c)(1)(B) and (B)(ii), and because the provision as a whole is structured to separate the offense elements in the principal paragraph of Section 924(c)(1)(A) from the sentencing factors in the balance of the statute.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

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

Penalties

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

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

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

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

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

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the

person shall be sentenced to a term of imprisonment of not less than 10 years; or

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

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

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

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

(D) Notwithstanding any other provision of law—

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

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

2. 18 U.S.C. 924(c)(1) (Supp. V 1993) provided:

Penalties

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle,[1] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release.[] Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

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[1] So in original. The comma probably should be "or a".

3. 18 U.S.C. 2119 (Supp. V 1993) provided:

Motor vehicles

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.