Nos. 12-673 and 12-7723

In the Supreme Court of the United States

RANDY VANA HAILE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

MARK ANTHONY BECKFORD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

As part of their drug-trafficking conspiracy, petitioners agreed to exchange firearms, including a machinegun, for marijuana and cocaine. They were convicted under, *inter alia*, 18 U.S.C. 924(c)(1)(A) and (B)(ii), which makes it a crime to possess a machinegun in furtherance of a drug-trafficking crime. The question presented is whether Section 924(c)(1)(B)(ii) requires the government to prove that the defendant knew the firearm he possessed was a machinegun.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-27)[1] is reported at 685 F.3d 1211.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2012. Petitions for rehearing were denied on August 23, 2012 (Pet. App. 28-29; 12-7723 Pet. App. B).

[1] Unless otherwise indicated, citations to "Pet. App." refer to the petition appendix in No. 12-673.

The petition for a writ of certiorari in No. 12-673 was filed on November 20, 2012. The petition for a writ of certiorari in No. 12-7723 was filed on November 21, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of conspiracy to possess with the intent to distribute at least 500 grams of cocaine and 100 kilograms of marijuana, in violation of 21 U.S.C. 846, 841(a)(1), (b)(1)(B)(ii) and (vii) (Count 1); attempt to do the same, in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1), (b)(1)(B)(ii) and (vii) (Counts 2 and 3); knowing possession of several enumerated firearms, including a machinegun, in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A), (B)(i) and (ii) (Count 4); possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k) (Count 6); and possession of an unregistered machinegun, in violation of 26 U.S.C. 5841, 5845(b) and 5861(d) (Count 7). Petitioner Haile was also convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g) (Count 5). Haile Judgment; Beckford Judgment. Petitioner Haile was sentenced to 468 months of imprisonment, which included a term of 360 months on Count 4 (the Section 924(c) count), to be served consecutively to terms of imprisonment imposed on the other counts; and petitioner Beckford was sentenced to 438 months of imprisonment, which also included a 360-month consecutive term on Count 4. *Ibid.* The court of appeals affirmed Haile's convictions and sentence. Pet. App. 26. It affirmed Beckford's convictions on all but Count 6, reversed his conviction on Count 6 because it found the

evidence insufficient to show that he had knowledge of the obliterated serial number on the firearm, and affirmed his sentence, noting that the sentence on Count 6 ran concurrently with sentences on the other counts. *Id.* at 16-19, 26-27.

1. In March 2009, a confidential informant (CI) told agents of the Drug Enforcement Agency (DEA) that Beckford was seeking a marijuana supplier. The CI and an undercover DEA agent posing as a supply source (Rodriguez) met with Beckford in San Antonio, Texas; during the meeting, Beckford and Rodriguez discussed the purchase of up to 1000 pounds of marijuana and multiple kilograms of cocaine. Pet. App. 3; Gov't C.A. Br. 3. In a follow-up telephone conversation, Beckford agreed to meet with one of Rodriguez's associates, undercover agent Arrugueta, in Atlanta, Georgia, and also confirmed that he (Beckford) had easy access to guns. Pet. App. 3-4.

On April 22, 2009, Beckford and Haile met with Arrugueta in Beckford's truck at a truck stop in Atlanta. 9/9/10 Tr. 379-381. The three discussed a marijuana deal, and Haile showed Arrugueta $25,000 in cash. *Id.* at 383-388; 9/8/10 Tr. 145-146. Arrugueta also asked Beckford whether he and Rodriguez had talked about "the tools." Beckford replied, "Yeah, yeah. He talked to me about it." 9/9/10 Tr. 388-389. When Arrugueta asked, "What kind do you have?" Beckford said, "my people . . . got the AK." Pet. App. 4; 9/9/10 Tr. 390-92. Arrugueta asked, "machine gun?" and Beckford replied, "Yep." *Ibid.* Beckford also said his "people" wanted drugs for the machinegun, not money. Pet. App. 4; 9/9/10 Tr. 392-393. Beckford said he had "like six [guns] so far" to exchange in the deal. Pet. App. 4. At the end of the conversation, Haile and Beckford agreed with

Arregueta to trade two pounds of marijuana for each AK or machinegun. Pet. App. 4; 9/9/10 Tr. 394-398.

After their meeting with Arrugueta, Haile and Beckford spoke with Rodriguez, and they agreed to fly to San Antonio the next day to discuss the marijuana deal. Pet. App. 4. Rodriguez confirmed that he would deliver 500 pounds of marijuana, at $300 per pound, to a restaurant in Atlanta, the Jamaica Flava. *Ibid.* Rodriguez also asked what kind of "nail gun" Beckford had. Beckford replied, "It's a machine gun, AK." *Id.* at 5. When Rodriguez further asked, "you want white?" Haile said Rodriguez "could throw two or three" kilograms onto the marijuana load. *Ibid.* Rodriguez agreed, and at the end of the meeting, Haile and Beckford gave Rodriguez a $25,000 deposit. *Ibid.*

On the morning of the scheduled delivery, Rodriguez called Beckford to ask if he had the "power tool." Pet. App. 5. Repeatedly, Beckford replied, "I'm working on it right now." *Ibid.* That same day, Rodriguez and other DEA agents placed hundreds of pounds of marijuana and several kilograms of cocaine in a U-Haul trailer and parked it at an Atlanta hotel. *Ibid.* Haile and Beckford met Rodriguez there, and Haile inspected the drugs. Beckford said the two had access to at least $70,000, and when Rodriguez asked about "the tool," the three continued to negotiate the payment of guns and money. *Id.* at 5-6. When Rodriguez asked, "you bring five gun?" Beckford said, "Yeah." *Id.* at 6. Beckford and Haile then left to obtain the payment. *Ibid.*

At the Jamaica Flava, DEA agents witnessed several men loading large, heavy bags into the back of Beckford's truck. Beckford and Haile drove the truck back to the hotel, but when Rodriguez was not there, they drove to a nearby restaurant, where they were arrested.

Pet. App. 6. In the subsequent search, agents found a Glock .45 caliber pistol on Haile; in the truck, agents found $70,000 in a plastic bag, a loaded .40 caliber handgun, two Norinco 7.62 caliber SKS rifles, one with an obliterated serial number, a 9-millimeter M-11 machinegun, a bulletproof vest, and .40 caliber, 7.62 caliber and 9-millimeter ammunition. *Ibid.*

2. Petitioners were charged by a grand jury with the offenses described above and proceeded to a jury trial. At the conclusion of the trial, petitioners moved for a judgment of acquittal and argued, *inter alia*, that the evidence was insufficient to establish that they knew they possessed a machinegun. See 9/13/10 Tr. 673-676. The court denied the motion, but granted petitioners' request that the jury be required in a special verdict form to decide whether petitioners knew the M-11 had the characteristics of a machinegun. *Id.* at 677-680; see Dkt. 174, 175 (Special Verdict Form: "Did the Defendant know that the SWD, Model M-11 had the characteristics of a machine gun?"); see also 9/13/10 Tr. 683 (district court: "It's clear to me there's evidence that * * * both [petitioners] knew exactly what kind of guns they were.").

Although petitioners had proposed a separate instruction requiring the jury to find that they knew the M-11 was a machinegun, see Dkt. 152, 157, at the charge conference, petitioners did not renew that request or object to the lack of that instruction in the court's proposed charge on Count 4. See 9/13/10 Tr. 689-690. At trial, the court gave the pattern instruction for a Section 924(c) offense. A moment later, in instructing on Count 7—possession of an unregistered machinegun—the court instructed that "it's a federal crime for anyone to possess certain kinds of firearms that are not properly

registered to him" and that a "firearm includes a SWD Model M-11 nine-millimeter machine gun." *Id.* at 769. The court further instructed that a defendant can be found guilty of that crime only if the government proves beyond a reasonable doubt that he "knew about the specific characteristics or features of the firearm that made it subject to registration, namely that it was a machine gun." *Id.* at 770.[2]

The court also instructed the jury that its verdicts had to be unanimous and to use the verdict forms in rendering the verdicts. 9/13/10 Tr. 775-778; see, *id.* at 777 ("If you find the Defendant guilty of possessing the following firearms in furtherance of a drug trafficking conspiracy, you have to put a check mark next to each of the firearms that you find the Defendant possessed * * * . And then you have to * * * answer one additional question which is: Did the Defendant know that the SWD Model M-11 had the characteristics of a machine gun? And you check either yes or no.").

After the jury was instructed, Haile objected that the instruction on the Section 924(c) count should have required the jury to find that he knew one of the firearms was a machinegun, "even though the verdict form seems to correct the problem." 9/13/10 Tr. 782. The court declined to re-instruct the jury, explaining that "the verdict form is absolutely crystal clear that they've got to find that he knew it was a machine gun." *Id.* at 782-783.

3. The jury convicted petitioners on all counts. With respect to Count 4, the jury found that both petitioners possessed four of the five firearms (including the machinegun) listed on the verdict form, but found that only

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[2] Petitioners did not contest at trial that the M-11 was in fact a machinegun. Gov't C.A. Br. 30.

Haile possessed the Glock handgun. See 9/14/10 Tr. 793-795; see also Dkt. 174, 175 (verdict forms). The jury also found that petitioners knew the M-11 was a machinegun. *Ibid.*; see 9/14/10 Tr. 793, 795 (reading of the verdict: "Did the Defendant know that the SWD Model M-11 had the characteristics of a machine gun? Yes."); see also *ibid.* (finding petitioners guilty of possessing an unregistered machinegun, Count 7).

4. The court of appeals affirmed in relevant part. Pet. App. 1-27. As relevant here, the court of appeals rejected petitioners' challenge to the jury instructions on Count 4. *Id.* at 11-13. Reviewing the instructions de novo, the court held that Section 924(c)(1)(B)(ii)—which provides for a sentence of not less than 30 years of imprisonment if the firearm possessed in furtherance of a drug-trafficking crime is a machinegun—does not require knowledge that the firearm has the characteristics of a machinegun. *Id.* at 12-13.

The court rejected petitioners' contention that this Court's decision in *United States* v. *O'Brien*, 130 S. Ct. 2169, 2180 (2010), which held that the possession of a machinegun is an element of a Section 924(c)(1)(B)(ii) offense, also made knowledge of the type of firearm an element of the offense. Pet. App. 12-13. The court of appeals explained that while *O'Brien* requires the government to prove beyond a reasonable doubt "that the firearm in question was actually a machine gun," this Court "did not hold that a defendant's knowledge that a firearm is a machine gun must also be so proved." *Ibid.* (citing 130 S. Ct. at 2175-2180). The court of appeals also found that "nothing in the text of [Section] 924(c)(1)(B)(ii) makes knowledge of the firearm's characteristics an element of the offense." *Id.* at 13.

The court of appeals further relied on its decision in *United States* v. *Ciszkowski*, 492 F.3d 1264, 1269 (11th Cir. 2007), which held that Section 924(c)(1)(B)(ii) does not require proof that a defendant knew of a weapon's characteristics. Pet. App. 13. The court explained that although *Ciszkowski* had (erroneously in light of *O'Brien*) understood Section 924(c)(1)(B)(ii) to set forth a sentencing factor and not an element, *O'Brien* did not overrule *Ciszkowski* on the question presented here. *Ibid.* Thus, the court concluded that under its "prior-precedent rule," *Ciszkowski*'s "holding * * * remains controlling." *Ibid.* For the same reasons the court of appeals held that the district court's jury instructions were not erroneous, the court also rejected Beckford's contention that the evidence was insufficient to show he knew the firearm he possessed had the characteristics of a machinegun. *Id.* at 14 n.2.

ARGUMENT

Petitioners ask this Court to decide whether a conviction under Section 924(c)(1)(B)(ii) requires proof that the defendant knew the firearm he possessed in furtherance of a drug-trafficking crime was a machinegun (*i.e.*, could fire automatically). 12-673 Pet. i, 8-14; 12-7723 Pet. i, 11-22. Because the jury at petitioners' trial expressly found that they, in fact, knew the M-11 they possessed was a machinegun, petitioners could not benefit from a favorable result on the question they present. Review is not warranted in a case in which resolution of the legal issue presented could not affect the judgment. In addition, the decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. The Court recently denied review of a petition presenting the same question,

Burwell v. *United States*, cert. denied, No. 12-7099 (Feb. 25, 2013), and the same result is warranted here.

1. These cases would present no proper occasion for resolving the question presented. Petitioners present their claim about the mens rea requirement of Section 924(c)(1)(B)(ii) principally as a challenge to the jury instructions. See 12-673 Pet. 6-7; 12-7723 Pet. i, 4-5. But at petitioners' behest, the district court instructed the jury that, in rendering its verdicts, it had to fill out a special verdict form and to decide whether petitioners knew they possessed a machinegun. Accordingly, for Count 4, the form directed the jury to determine whether each petitioner possessed the M-11 machinegun in furtherance of a drug-trafficking conspiracy, and then required them to answer "yes" or "no" to the question: "Did the Defendant know that the SWD, Model M-11 had the characteristics of a machine gun?" Dkt. 174, 175. For each petitioner, the jury checked off the blank corresponding to the M-11 machinegun and answered "yes" to the knowledge question. *Ibid.* As the district court itself noted, "the verdict form is absolutely crystal clear that [to convict, the jury has] got to find that [each defendant] knew it was a machine gun." 9/13/10 Tr. 782-783.[3]

Moreover, with respect to Count 7—which charged petitioners with possessing an unregistered ma-

[3] Although the verdict form did not itself state that the knowledge finding had to be made beyond a reasonable doubt, that is the only standard of proof the court instructed on, see 9/13/10 Tr. 759-760, 764, 766-774, and the standard of proof petitioners argued to the jury. See, *e.g.*, *id.* at 753 ("In order for the Government to prove beyond a reasonable doubt that Mr. Haile should be found guilty of any of the counts involving the machine gun * * * the Government has to prove he knew it was a machine gun in the car.").

chinegun, the same machinegun that was the subject of the Section 924(c) count—the instructions specifically required a finding of knowledge beyond a reasonable doubt. See 9/13/10 Tr. 770 ("The Government * * * has to prove beyond a reasonable doubt that the Defendant knew about the specific characteristics or features of the firearm that made it subject to registration, namely that it was a machine gun."). Thus, even if petitioners' construction of Section 924(c)(1)(B)(ii) were correct, any instructional error would be harmless beyond a reasonable doubt, see *Neder* v. *United States*, 527 U.S. 1, 8-15 (1999), because the jury actually found beyond a reasonable doubt that petitioners knew the M-11 was a machinegun.[4]

2. In any event, the court of appeals' decision is correct.

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

> (A) * * * [A]ny person who, during and in relation to any crime of violence or drug trafficking crime[,] * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, 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;

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[4] In light of the jury's verdict and the overwhelming evidence to support it, see, *e.g.*, Pet. App. 5 (Beckford to Rodriguez: "It's a machine gun, AK."); Gov't C.A. Br. 24-27, Beckford's additional factbound claim (12-7723 Pet. 17-22) that the evidence was insufficient on this point similarly would not present a suitable opportunity to decide the question presented.

> (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.

Whether Section 924(c)(1)(B)(ii) requires proof that the defendant knew the firearm in question was a machinegun is a question of statutory construction. *Staples* v. *United States*, 511 U.S. 600, 604 (1994). The "starting place [of the] inquiry" is "[t]he language of the statute." *Id.* at 605. Section 924(c)(1)(B)(ii) provides that a defendant shall be sentenced to a minimum of 30 years of imprisonment "[i]f the firearm possessed * * * is a machinegun." That language does not require that the defendant have "knowingly" used, carried or possessed a machinegun, and this Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Dean* v. *United States*, 556 U.S. 568, 572 (2009) (quoting *Bates* v. *United States*, 522 U.S. 23, 29 (1997)).

Congress's use of the passive voice ("[i]f the firearm possessed * * * is a machinegun") also indicates that Section 924(c)(1)(B)(ii) does not require proof of mens rea. As *Dean* explained in holding that Section

924(c)(1)(A)(iii)'s enhanced sentence when the firearm in question is discharged does not require proof that the defendant intended to discharge the weapon, "[t]he passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability. * * * It is whether something happened—not how or why it happened—that matters." 556 U.S. at 572.

The structure of the statute also suggests that Section 924(c)(1)(B)(ii) does not require knowledge of the firearm's status as a machinegun. Unlike Section 924(c)(1)(B)(ii), other provisions of Section 924(c)(1) include an explicit mens rea requirement. As this Court noted in *Dean*, Congress defined the provision that enhances the penalty for "brandishing" a firearm to include a mens rea requirement—to "brandish" means "to display * * * in order to intimidate," 18 U.S.C. 924(c)(1)(A)(ii) and (4)—but "did not * * * separately define 'discharge' to include an intent requirement." 556 U.S. at 572-573. As the Court explained, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Id.* at 573 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

b. Neither petitioner addresses the statutory text or structure. They claim instead that courts have read mens rea requirements into statutes in order to "protect * * * the less culpable," 12-673 Pet. 9-10; 12-7723 Pet. 12-13, and they rely on the "ordinary presumption" that a mens rea requirement applies to all the elements of an offense. 12-7723 Pet. 22. From this, they argue that this Court should infer that Section 924(c)(1)(B)(ii) in

particular requires proof of the defendant's knowledge that the firearm in question was a machinegun. These arguments are misplaced.

As the en banc D.C. Circuit recently recognized, the presumption in favor of mens rea is designed "to avoid criminalizing otherwise lawful conduct." *United States* v. *Burwell*, 690 F.3d 500, 505-507 (2012) (discussing *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), *Morrisette* v. *United States*, 342 U.S. 246 (1952), *Staples*, *supra*, and *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994)), cert. denied, No. 12-7099 (Feb. 25, 2013); see also *Carter* v. *United States*, 530 U.S. 255, 269 (2000) ("The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct.") (internal quotation marks and citation omitted); *X-Citement Video*, 513 U.S. at 72-73 (recognizing that presumption does not apply to each element of a criminal offense, but to "each of the statutory elements that criminalize otherwise innocent conduct").

Petitioners suggest, however, that this Court "ha[s] often read a knowledge requirement into a statute to protect, not just the innocent but, the less culpable." 12-673 Pet. 9; see 12-7723 Pet. 12-13. But the cases they cite do not stand for the proposition that petitioners would apply here. *Flores-Figueroa* v. *United States*, 556 U.S. 646 (2009), relied on "ordinary English grammar," *id.* at 650, not background presumptions, to reach its conclusion about the scienter requirement of the crime at issue. And *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513 (1994), was decided on the same day as *Staples* and rests on the same skepticism as *Staples* of

the proposition "that Congress intended to dispense entirely with a scienter requirement." *Id.* at 522.

No such concern arises with respect to Section 924(c)(1)(B)(ii). In any prosecution under Section 924(c)(1), the government must prove, *inter alia*, that (1) the defendant committed a drug-trafficking crime or a violent crime (either of which will have one or more mens rea requirements) and (2) the defendant intended to possess a firearm in connection with that offense. Such a defendant unquestionably "knows from the very outset that his planned course of conduct is wrongful." *Burwell*, 690 F.3d at 507 (quoting *United States* v. *Feola*, 420 U.S. 671, 685 (1975)); see also *Dean*, 556 U.S. at 576 ("Here the defendant is already guilty of unlawful conduct twice over."). In turn, a mens rea requirement for facts that aggravate the basic offense, such as the "machinegun" element in Section 924(c)(1)(B)(ii), is not necessary to avoid punishing otherwise innocent conduct.

That result accords with this Court's recognition in closely related contexts that harsher punishments may be imposed on individuals for the unintended aggravated consequences of their clearly unlawful acts. For example, in holding that Section 924(c)(1)(A)(iii)'s discharge provision applies to a defendant whose gun is discharged accidentally, *Dean* observed:

> It is unusual to impose criminal punishment for the consequences of purely accidental conduct. But it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts. * * * The felony-murder rule is a familiar example: If a defendant commits an unintended homicide while committing another felony, the defendant can be convicted of murder.

556 U.S. at 575 (emphasis in original). See also *X-Citement Video*, 513 U.S. at 73 n.3 ("Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful."). As *Dean* explained, "[t]he fact that the actual discharge * * * may be accidental does not mean that the defendant is blameless" and the increased minimum sentence required by Section 924(c)(1)(A)(iii) "accounts for the risk of harm resulting from the manner in which the crime is carried out, for which the defendant is responsible." 556 U.S. at 576. Likewise in a Section 924(c)(1)(B)(ii) case, a defendant who operates unaware of his machinegun's awesome potential for destruction and mayhem is anything but "blameless" and surely runs an increased "risk of harm resulting from the manner in which [his] crime is carried out." *Ibid.*

The result below accords with the interpretation of numerous criminal offenses that require mens rea as to some elements of an offense but not for additional facts that aggravate the offense by enhancing punishment. See *Burwell*, 690 F.3d at 508 (citing, *inter alia*, 21 U.S.C. 841, which does not require proof of the defendant's knowledge of the particular type or quantity of a controlled substance, which enhances the punishment and must be found by the jury to authorize a sentence above the otherwise-authorized maximum; 18 U.S.C. 2241(c), 18 U.S.C. 2423, and 21 U.S.C. 861, which criminalize acts involving juveniles but do not require proof of mens rea with respect to the juvenile's age; 18 U.S.C. 2113, which defines different bank robbery offenses based on the value of the property stolen, but does not require proof that the defendant knew the monetary

value); see also *Feola*, 420 U.S. at 684 ("[I]n order to effectuate the congressional purpose of according maximum protection to federal officers by making prosecution for assaults upon them cognizable in the federal courts, [18 U.S.C. 111] cannot be construed as embodying an unexpressed requirement that an assailant be aware that his victim is a federal officer.").

3. Petitioners contend that the decision below conflicts with *United States* v. *O'Brien*, 130 S. Ct. 2169 (2010), which held that Section 924(c)(1)(B)(ii)'s machinegun requirement is an element of an aggravated offense that must be charged in the indictment and proved to the jury beyond a reasonable doubt, *id.* at 2172, 2180. 12-673 Pet. 8-9; 12-7723 Pet. 11-12. As petitioners concede (*ibid.*), *O'Brien* explicitly left open the question here presented. See 130 S. Ct. at 2173 ("This opinion expresses no views" as to "any contention that a defendant who uses, carries, or possesses a firearm must be aware of the weapon's characteristics."); see Pet. App. 12-13 ("*O'Brien* did not hold that a defendant's knowledge that a firearm is a machine gun must also be * * * proved.").

Petitioners nonetheless contend that because *O'Brien* suggests that carrying a machinegun involves heightened culpability, that case establishes that a conviction under Section 924(c)(1)(B)(ii) requires proof that the defendant knew the firearm in question was a machinegun. In *O'Brien*, this Court pointed to "[t]he immense danger posed by machineguns [and] the moral depravity in choosing the weapon," as one of several factors supporting its conclusion that Congress intended Section 924(c)(1)(B)(ii) to set forth elements of a separate offense. 130 S. Ct. at 2178. Petitioners do not explain how those broad observations would control over

the specific terms of the statute. Nor does it follow from those observations that every prosecution under Section 924(c)(1)(B)(ii) requires proof that the defendant knew the weapon was capable of firing automatically: A machinegun presents an "immense danger" even in the hands—indeed, *especially* in the hands—of one who does not know it will fire automatically. And the "moral depravity" of one who would thoughtlessly carry or traffic in weapons of such vast destructive potential in connection with a drug-trafficking crime is perhaps different in kind, but not necessarily in degree, from the moral depravity of one who does so knowingly. See *Burwell*, 690 F.3d at 512-513 (noting that the statute's deterrent value arises in part from encouraging would-be offenders to know the characteristics of their weapons and eschew the more dangerous types).

In any event, the suggestion that Section 924(c)(1)'s heightened penalties must correspond to additional mens rea requirements directly conflicts with *Dean*'s holding that the sentencing enhancement that Section 924(c)(1)(A)(iii) imposes when a firearm is discharged "requires no separate proof of intent." 556 U.S. at 577. This Court specifically rejected Dean's argument that the three subsections of Section 924(c)(1)(A) were "intended to provide harsher penalties for increasingly culpable conduct," concluding instead that Congress intended the discharge provision to "account[] for the *risk of harm* resulting from the manner in which the crime is carried out, for which the defendant is responsible." *Id.* at 575-576 (emphasis added).

4. The courts of appeals are not in conflict on the question presented. Most recently, the D.C. Circuit reaffirmed its holding that "Congress intended no additional *mens rea* requirement to apply to the machinegun

element" of Section 924(c)(1)(B)(ii). *Burwell*, 690 F.3d at 503-504 (citing *United States* v. *Harris*, 959 F.2d 246 (D.C. Cir.) (per curiam), cert. denied, 506 U.S. 932, 933 (1992)). Two other circuits reached the same conclusion before this Court decided *O'Brien*. See *United States* v. *Gamboa*, 439 F.3d 796, 812 (8th Cir.), cert. denied, 549 U.S. 1042 (2006); *United States* v. *Eads*, 191 F.3d 1206, 1212-1214 (10th Cir. 1999), cert. denied, 530 U.S. 1231 (2000); see also *United States* v. *Shea*, 150 F.3d 44, 52 (1st Cir.) (semiautomatic-assault-weapon provision in 18 U.S.C. 924(c)(1)(B)(i) does not contain an implied knowledge requirement), cert. denied, 525 U.S. 1030 (1998), abrogated on other grounds, *United States* v. *Mojica-Baez*, 229 F.3d 292, 310 (1st Cir. 2000), cert. denied, 532 U.S. 1065 (2001).

Although petitioners assert a split in the pre-*O'Brien* precedent, 12-673 Pet. 10-12; 12-7723 Pet. 14-16, and Beckford also asserts current "conflict and discordance" in the circuits, 12-7723 Pet. 16, none of the cases they cite conflicts with the decision below. In *United States* v. *Franklin*, 321 F.3d 1231, 1240, cert. denied, 540 U.S. 853 (2003), the Ninth Circuit rejected a sufficiency-of-the-evidence challenge to a conviction under Section 924(c)(1)(B)(ii), assuming only for the sake of argument that the government was required to prove that the defendant knew the firearm in question was a machinegun. The unpublished decision in *United States* v. *Rodriguez*, 54 Fed. Appx. 739, 747 (3d Cir. 2002), cert. denied, 537 U.S. 1179, and 538 U.S. 938, 1022 (2003), made the same assumption. See also *United States* v. *Dixon*, 273 F.3d 636, 640 (5th Cir. 2001) (assuming *arguendo* that enhanced penalty for carrying a short-barreled shotgun required proof that the defendant

knew the nature of the gun), cert. denied, 537 U.S. 829 (2002).

Finally, *United States* v. *Rivera-Rivera*, 555 F.3d 277 (1st Cir.), cert. denied, 130 S. Ct. 344 (2009), addressed a different provision of Section 924(c), so its observations about Section 924(c)(1)(B)(ii) are dicta. In a footnote, the *Rivera-Rivera* court stated that the court of appeals' decision in *United States* v. *O'Brien*, 542 F.3d 921 (1st Cir. 2008)—which this Court later reviewed—"concluded that knowing possession of a machine gun is an element of the crime that must be proven to the jury." 555 F.3d at 291 n.14. That misdescribes the issues in *O'Brien*; in fact, the prosecutor in *O'Brien* had conceded (erroneously) that if the machinegun provision stated an element (rather than a sentencing factor), then the government would be required to prove the defendant's knowledge. See, *e.g.*, Pet. at 8 & n.2, *O'Brien*, 130 S. Ct. 2169 (No. 08-1569). Accordingly, the First Circuit's *O'Brien* decision considered only "whether * * * the nature of the weapon is to be found by the judge as a sentencing matter or by the jury as an element of the crime." 542 F.3d at 922. The erroneous footnote dictum in *Rivera-Rivera* does not create a conflict warranting this Court's review.

Petitioners also suggest (12-673 Pet. 10-12; 12-7723 Pet. 14-16) that cases holding that the government is not required to prove the defendant knew the firearm in question was a machinegun rest on the premise (revealed by *O'Brien* to be erroneous) that the machinegun provision states a sentencing factor rather than an element of the offense. But the distinction between sentencing factors and elements is not controlling on the question presented, which ultimately is one of Congress's intent. And in any event, few courts have ad-

dressed how *O'Brien*'s "elements" holding affects the separate knowledge-of-weapon-type issue because the decision in *O'Brien* is relatively recent. That fact further counsels against this Court's reviewing the issue now and in favor of allowing the courts of appeals to consider in the first instance whether *O'Brien* disturbs their conclusions that knowledge is not a requirement for conviction under Section 924(c)(1)(B)(ii).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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