No. 11-9335

IN THE

Supreme Court of the United States

ALLEN RYAN ALLEYNE,

Petitioner,

v.

UNITED STATES.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amici Curiae are the National Association of Criminal Defense Lawyers ("NACDL") and the National Association of Federal Defenders ("NAFD").

NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes the NACDL as an affiliate organization and awards it representation in the ABA's House of Delegates.

NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving sentencing and the Sixth Amendment. In further-

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amici* states that no counsel for a party authored any part of the brief, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

ance of this and its other objectives, NACDL files approximately 50 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

NAFD is a nationwide, non-profit, volunteer organization, formed in 1995 in an effort to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. Its membership comprises attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD pursues its commitment to promoting fair adjudication of criminal matters by appearing as *amicus curiae* in cases of significant and recurring importance to indigent defendants.

Because the question presented by this case is regularly confronted by clients of *Amici*'s members, implicates important liberty interests protected by the Sixth Amendment, and recurs with significant frequency, *Amici* have a particular interest in this Court's resolution of the question. *Amici* submit this brief in support of petitioner, and respectfully urge the Court to reverse the Fourth Circuit's decision.

SUMMARY OF ARGUMENT

In *Apprendi* v. *New Jersey*, this Court held that the Sixth Amendment requires all "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" to be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. 466, 490 (2000) (internal quotation marks omitted).

The lower courts' application of 18 U.S.C. § 924(c)(1)(A)—which authorizes sentences of "not less than 5 years" for the offense of using or carrying a firearm during and in relation to a crime of violence, sentences of "not less than 7 years" if the firearm is brandished, and sentences of "not less than 10 years" if the firearm is discharged—violated the *Apprendi* rule in one of two ways.

If the Fourth Circuit were correct that § 924(c)(1)(A) implicitly authorizes sentencing ranges of five years to life, seven years to life, and ten years to life, then the "brandishing" fact "increase[d] the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490. Because this increase in the mandatory minimum "heightens the loss of liberty and represents the increased stigma society attaches to the offense," *United States* v. *O'Brien*, 130 S. Ct. 2169, 2184 (2010) (Thomas, J., concurring) (citation omitted), *Apprendi* requires that a jury find the brandishing fact beyond a reasonable doubt.

But the Fourth Circuit misinterpreted the terms of imprisonment authorized by § 924(c)(1)(A), and thus overlooked an even more straightforward violation of the *Apprendi* rule.[2] Properly construed, § 924(c)(1)(A) establishes *fixed sentencing terms* for distinct offense conduct: a fixed five-year term for a conviction for the basic offense; a fixed seven-year term if the firearm is brandished; and a fixed ten-year term if the firearm is discharged. This construc-

[2] Other circuits have likewise misinterpreted the terms of imprisonment authorized in § 924(c)(1)(A). *See infra* n.8.

tion is supported by the statutory text, settled canons of statutory interpretation, and principles of notice and lenity.

When the statute is read faithfully to its text, the fact that the firearm was "brandished" increases the applicable fixed term from five to seven years, and *Apprendi* therefore requires this fact to be proved to a jury beyond a reasonable doubt. Indeed, even the Government agrees that if the fixed-term construction "were correct, then the 'fixed sentences' in Sections 924(c)(1)(A)(i), (ii), and (iii) would reflect varying statutory maximum sentences, and would plainly be subject to *Apprendi*." Brief for United States in Opposition 10 n.2, *Lucas* v. *United States*, No. 11-1536. This result follows regardless of whether facts that increase a mandatory minimum at the lower bound of a sentencing range must be proved to a jury.

Amici urge this Court to reverse the Fourth Circuit based on this alternative argument, which has not yet been squarely addressed by the Court and easily falls within the question presented in this case. Despite the district court's assessment that it was "fair to say [the jury] didn't find brandishing beyond a reasonable doubt," JA 45, the court nonetheless imposed a seven-year sentence on petitioner's § 924(c)(1)(A) count based on its own finding, by a preponderance of the evidence, that petitioner reasonably foresaw that his alleged accomplice would brandish a firearm. This increase in petitioner's sentence contravened the Sixth Amendment for reasons that render it irrelevant whether the *Apprendi* rule applies to facts that dictate mandatory

minimums. Here, the district judge's finding increased the statutory *maximum*.

A holding that § 924(c)(1)(A) establishes fixed-term sentences would not have an appreciable impact on criminal procedure in § 924(c)(1)(A) cases. Where there is evidence of brandishing, it takes scarcely more effort by prosecutors to prove to a jury that a defendant brandished a firearm in addition to proving that he used or carried it. And sentences pursuant to § 924(c)(1)(A) already cluster at or near the five, seven, or ten year marks.

ARGUMENT

I. Section 924(c)(1)(A) Creates Three Fixed-Term Sentences.

Even if the Court were not inclined to hold that facts dictating a mandatory-minimum sentence are subject to *Apprendi*, it should still reverse the Fourth Circuit. *Apprendi* undoubtedly requires a jury to find facts that subject a defendant to a higher fixed-term sentence. For purposes of 18 U.S.C. § 924(c)(1)(A), the brandishing of a firearm is just such a fact: It increases the sentence that a defendant faces from a fixed five-year term to a fixed seven-year term. The Fourth Circuit erred when it held that this fact could be found by a judge.

A. The Text of § 924(c)(1)(A) Establishes Fixed-Term Sentences, Not Sentencing Ranges.

The text of § 924(c)(1)(A) imposes three separate fixed-term sentences: a five-year sentence for the

basic offense; a seven-year sentence if the firearm is brandished; and a ten-year sentence if the firearm is discharged. These fixed terms are mandatory and consecutive to any underlying offense. Congress prohibited sentencing courts from imposing a lesser sentence by expressly requiring that a convicted defendant "shall . . . be sentenced to a term of imprisonment of *not less than*" five, seven, or ten years. 18 U.S.C. § 924(c)(1)(A)(i)-(iii) (emphasis added).

Congress did not, however, authorize a sentence in excess of the statutory fixed terms for these offenses. There are numerous criminal statutes in the U.S. Code that authorize a range of permissible sentences. They accomplish this objective by expressly identifying the upper and lower bound of the sentencing range. *See, e.g.*, 18 U.S.C. § 844(f)(1) ("not less than 5 years and not more than 20 years");[3] 21 U.S.C. § 841(b)(1)(A) ("such person [convicted of certain drug crimes] shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life").[4] As this statutory authority well

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[3] For additional statutes creating sentencing ranges bounded by a specific minimum and maximum sentence, *see, e.g.*, 2 U.S.C. § 390 ("imprisonment for not less than one month nor more than twelve months"); 7 U.S.C. § 15b(k) ("imprisonment for not less than 30 days nor more than 90 days"); *see also* 16 U.S.C. §§ 413, 414; 18 U.S.C. §§ 844(f)(1)-(3), 844(i); 21 U.S.C. §§ 212, 844(a), 960(b)(2); 46 U.S.C. § 58109.

[4] For additional statutes creating sentencing ranges bounded by a specific minimum and a maximum of life imprisonment, *see, e.g.*, 18 U.S.C. § 33(b) ("imprisoned for any term of years not less than 30, or for life"), *id.* § 1591(b)(1) ("imprisonment for any term of years not less than 15 or for life"); *see also* 18 U.S.C. §§ 175c(c)(1), 175c(c)(2), 225(a), 1121(b)(1), 1591(b)(2), 1658(b),

establishes, Congress knows how to create a range of permissible sentences, including sentencing ranges with a maximum of a fixed term of years or even life imprisonment. But it pointedly did not do any of those things in § 924(c)(1)(A), which does not state any upper bounds that would create sentencing ranges. *See Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) (it is the "duty" of courts "to refrain from reading a phrase into the statute when Congress has left it out").

Indeed, the balance of § 924 establishes that Congress could not have meant to forgo upper limits for the sentences in § 924(c)(1)(A), thereby authorizing sentences of up to life imprisonment. That is because Congress *explicitly* authorized "life" sentences for those offenses it thought warranted such a penalty. For example, § 924(c)(5)(B)(i) expressly authorizes a "life" sentence for conduct involving armor piercing ammunition that results in death. *See also* 18 U.S.C. § 924(j)(1) (authorizing "life" sentence for defendants who cause the murder of a person in the course of a violation of § 924(c)); 18 U.S.C. § 924(o) (authorizing "life" sentence for defendants who conspire to commit an offense under § 924(c) with a firearm that is a machinegun or destructive device, or is equipped with a silencer or muffler).[5] Similarly, outside of § 924, literally dozens

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2241(c), 2251(e), 2251A(a)-(b), 2252A(g), 2332g(c)(1), 2332g(c)(2), 2332h(c)(1), 2332h(c)(2), 2423(a), 3559(f)(1), 3559(f)(2), 3559(f)(3); 21 U.S.C. §§ 841(b)(1)(B), 841(b)(1)(C), 848(a), 960(b)(1); 42 U.S.C. § 2272(b).

[5] *Cf.* 18 U.S.C. § 924(c)(1)(C)(ii) (imposing a sentence of "imprisonment for life" on certain repeat offenders whose crimes

of provisions authorize a sentencing range bounded by a mandatory minimum term and life imprisonment, all by expressly stating that the upper boundary is imprisonment for "life."[6] But as members of this Court have recognized, § 924(c)(1)(A) "mentions nothing about life." Tr. of Oral Arg. 13, *United States* v. *O'Brien*, 130 S. Ct. 2169 (2010) (No. 08-1569) (questioning by Justice Scalia).[7]

The text of § 924(c) makes clear that Congress knows how to authorize a life sentence. It decided not to do so for § 924(c)(1)(A). And "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Departing from § 924(c)(1)(A)'s plain text, the Government and courts of appeals have concluded that § 924(c)(1)(A) *implicitly* authorizes sentencing

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involve machineguns, destructive devices, silencers, or mufflers).

[6] *See supra* n.4.

[7] *See also* Tr. of Oral Arg. 13, *O'Brien* (questioning by Justice Scalia) ("[W]here is the life sentence maximum, by the way? . . . I'm reading through, and there's—it mentions nothing about life. . . . And if it mentions nothing about life, then these are not mandatory minimums. To the contrary, they are—they are new maximums."); *id.* at 14-15 (questioning by Justice Ginsburg) ("[B]ut where do you get the maximum?"); *id.* at 15 (questioning by Justice Sotomayor) ("Is there a Sixth Amendment problem . . . with reading a statute to provide for an unlimited maximum when Congress hasn't specified it . . . ?").

ranges of up to life imprisonment. The position of the government is that although the statute contains "no stated maximum" of life imprisonment, the "*implied* maximum term . . . is life." Tr. of Oral Arg. 15, *O'Brien* (emphasis added). The courts of appeals that have confronted this question generally employ the same rationale.[8]

The argument that § 924(c)(1)(A) authorizes a life sentence relies on the phrase "not less than." But that phrase does not impliedly authorize a sentence up to life imprisonment. The "not less than" language is best understood as intended to establish a fixed term while at the same time expressly conveying the admonition that lesser sentences are not permissible. That is exactly how Justice Curtis construed a federal statute imposing a penalty of "not less than one hundred dollars" that came before him while he rode circuit in the District of Massachusetts. *See Stimpson* v. *Pond*, 23 F. Cas. 101, 102 (C.C. Mass. 1855) (construing Act of August 29, 1842, § 5). Justice Curtis held that this "anomalous provision" did

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[8] *See, e.g.*, *United States* v. *Lucas*, 670 F.3d 784, 796 (7th Cir. 2012) (holding that § 924(c)(1)(A) "implicitly authorized district courts to impose a sentence up to a maximum of life imprisonment"); *United States* v. *Shabazz*, 564 F.3d 280, 289 (3d Cir. 2009) (same); *United States* v. *Johnson*, 507 F.3d 793, 798 (2d Cir. 2007) (recognizing that "18 U.S.C. § 924(c)(1)(A) does not specify a maximum sentence," but nonetheless holding that "the maximum sentence under that statute is life imprisonment"); *United States* v. *Sias*, 227 F.3d 244, 246 (5th Cir. 2000) ("By implication, Congress left open the ceiling of sentences imposed under § 924(c).").

> not authorize the infliction of a greater penalty than one hundred dollars. Power to inflict a particular penalty must be conferred by congress in such terms as will bear a strict construction. The only power expressly given by this act is to impose a penalty of not less than one hundred dollars. . . . The terms of the act do not authorize the infliction of a penalty greater than one hundred dollars.

Ibid.

Justice Curtis specifically rejected the "authorization by implication" theory that the Government now presses in the context of § 924(c)(1)(A). "[M]ere implication can hardly ever be safe ground on which to rest a penalty, and when penalties of unlimited magnitude are the subjects of the implication, the danger of making it, and the improbability of its correctness, are proportionably increased." *Ibid.*; *see also Lin* v. *United States*, 250 F. 694, 695 (8th Cir. 1918) (construing a federal statute authorizing "imprisonment for not less than five years," and holding that the "statute fixe[d] a certain punishment of five years" and did not permit a sentence of "life imprisonment").

Nor does the history of § 924(c) weigh against the fixed-term construction. Prior to 1998, § 924(c) provided that a defendant convicted of the basic offense of using or carrying a firearm during and in relation to a crime of violence "shall . . . be sentenced to imprisonment for five years." 18 U.S.C. § 924(c)(1)

(1993). It did not address offenses involving brandishing or discharging a firearm. *See ibid*. In 1998, Congress restructured the statute to create three separate terms: "not less than 5 years" for the basic offense; "not less than 7 years" for brandishing a firearm"; and "not less than 10 years" for discharging a firearm. 18 U.S.C. § 924(c)(1)(A).

The addition of this hortatory "not less than" language amounts to a belt-and-suspenders technique, designed to avoid any ambiguity as to whether a court could impose a sentence lower than the specified term. That concern was not an idle one: prior to the 1998 amendments, district courts had repeatedly imposed sentences of *less than* five years on criminal defendants convicted of § 924(c) violations. *See, e.g.*, *United States* v. *Maddox*, 48 F.3d 791, 795 (4th Cir. 1995) (district court sentenced defendant "to five years probation, notwithstanding the five-year mandatory minimum sentence required by his conviction for using a firearm during a crime of violence under 18 U.S.C. § 924(c)"); *United States* v. *Higgs*, 1991 WL 23580, at *1 (4th Cir. Feb. 28, 1991) (district court "acknowledged the mandatory provision of a five year sentence" but imposed three-year sentence because "'Congress in enacting § 924(c) may not have adequately taken into consideration certain factors'").[9]

[9] Accordingly, there is no need—as some courts have suggested—to construe the "not less than" phrase "to mean 'not more than.'" *United States* v. *Dorsey*, 677 F.3d 944, 957 (9th Cir. 2012). In the context of Section 924(c)(1)(A), "not less than" means what it says: it reinforces the statutory prohibition on sentences *shorter* than five, seven, or ten years.

Congress's purpose of ensuring fixed-term sentences that are binding on district courts was reflected in the floor debate. One of the bill's original sponsors explained that the bill would "[p]rovide a seven year sentence for 'brandishing'" and "[r]aise the penalty to ten years if the gun is discharged." 144 CONG. REC. S12671 (1998) (Sen. DeWine). The presidential signing statement also reflected this purpose. *See* Presidential Statement on Signing S. 191, 34 WEEKLY COMP. PRES. DOC. 46, at 2309 (Nov. 13, 1998) ("[T]he bill I sign today will add 5 years of hard time to sentences of criminals who even possess firearms when they commit drug-related or violent crimes. Brandishing the firearm will draw an extra 7 years; firing it, another 10.").

As Justice Scalia previously observed from the bench, the current version of § 924(c)(1)(A) "says there will be added to whatever the sentence is for the crime of violence or the drug trafficking crime—there will be added to that sentence. Then it says you'll add 7 years [for brandishing a firearm]. . . . Those are not mandatory minimums. Those are add-ons to the sentence provided by the substantive crime to which (c)(1)(A) refers. That way, the whole thing makes sense." Tr. of Oral Arg. 16, *O'Brien*.

The sentencing-range interpretation, by contrast, does not make sense. It entails that Congress deliberately increased the maximum penalty for the crime of using or carrying a firearm during and in relation to a crime of violence from five years to life in prison, but chose to do so *sub silentio*, via the circuitous route of foreclosing sentences shorter than five years. This theory of life imprisonment by implication is made

more improbable considering that *Amici* have found no mention in the legislative history of any intent to create new sentencing ranges extending to life in prison. *See, e.g.*, H.R. REP. NO. 105-344 (1997); *see generally Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 63-64 (2004) (rejecting proposed interpretation of the Truth in Lending Act following congressional amendment where "[t]he text does not dictate this result" and "there is scant indication Congress meant to" effect it). It would be passing strange for Congress to authorize a sentence of life imprisonment, "the second most severe penalty permitted by law," *Graham* v. *Florida*, 130 S. Ct. 2011, 2027 (2010) (internal quotation marks and citation omitted), without including the word "life" in the statute or referencing it anywhere in the legislative history. [10]

Moreover, the sentencing-range interpretation is contrary to the canon that courts must "construe statutes, where possible, so as to avoid rendering superfluous any parts thereof." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 112 (1991). If the phrase "not less than X years" were sufficient, by itself, to create a sentencing range of X years to life, it would render superfluous the explicit grant of authority for "life" imprisonment in dozens of federal sentencing statutes. For example, the words "or more than life" would be unnecessary in 21 U.S.C.

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[10] Indeed, applying the Government's faulty logic, one could equally argue that the statute implicitly authorizes a sentence of death—because by providing that sentences must be "not less than 5 years," Congress implicitly left any more severe punishment on the table.

§ 841(b)(1)(C), which creates a sentencing range for certain crimes involving controlled substances of "not less than twenty years or more than life." *See also supra* n.4 (collecting statutes). That is reason enough to reject the Government's interpretation, for it is "a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks and citation omitted).

The countervailing surplusage argument—that a "fixed term" interpretation is impermissible because it would render the words "not less than" superfluous—is unpersuasive for three reasons. First, the history establishes that these words *do* serve a purpose by reinforcing the prohibition against shorter sentences. *See supra* 11. Second, even if the fixed-term interpretation would render superfluous the words "not less than" in a few statutory provisions,[11] the sentencing-range interpretation would render superfluous a comparatively greater amount of language in other federal statutes.[12] Because "the canon against surplusage merely favors that interpretation which *avoids* surplusage," *Freeman* v. *Quicken Loans, Inc.*, 132 S. Ct. 2034, 2043

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[11] *See* 18 U.S.C. §§ 924(c), 924(e)(1), 929(a)(1), 1201(g)(1), 2113(e), 2261(b)(6), 3600(f)(3); 21 U.S.C. §§ 859(a)-(b), 860(a).

[12] *See, e.g.*, 18 U.S.C. §§ 33(b), 175c(c)(1), 175c(c)(2), 225(a), 1121(b)(1), 1591(b)(1), 1591(b)(2), 1658(b), 2241(c), 2251(e), 2251A(a)-(b), 2252A(g), 2332g(c)(1), 2332g(c)(2), 2332h(c)(1), 2332h(c)(2), 2423(a), 3559(f)(1), 3559(f)(2), 3559(f)(3); 21 U.S.C. §§ 841(b)(1)(A), 841(b)(1)(B), 841(b)(1)(C), 848(a), 960(b)(1); 42 U.S.C. § 2272(b).

(2012), that comparison weighs in favor of the fixed-term interpretation. Third, in the event the Court concludes that these offsetting surplusage arguments result in a statutory ambiguity, that ambiguity must be resolved in favor of the fixed-term interpretation under the rule of lenity, as explained below. *See infra* at 15-17.

Finally, that some authorities have characterized § 924(c)(1)(A) as creating "minimum" or "mandatory minimum" sentences does not weigh against the fixed-term interpretation. *See, e.g.*, *Abbott* v. *United States*, 131 S. Ct. 18, 22-23 (2010) ("The minimum prison term for the offense described in § 924(c) is five years."); *Dean* v. *United States*, 556 U.S. 568, 570 (2009) ("5-year mandatory minimum sentence"); U.S. SENTENCING GUIDELINES MANUAL § 2K2.4, cmt. n.2(A) (2011) (describing § 924(c) as "provid[ing] mandatory minimum terms of imprisonment"); *cf.* 18 U.S.C. § 924(c)(1)(A) (referring to "minimum sentence[s]" outside of § 924(c)(1)(A)). The five-, seven-, and ten-year sentences authorized by § 924(c)(1)(A) are emphatically the "minimum" sentence permitted by the statute—the "not less than" language guarantees that. The fact that the statute indisputably creates a "mandatory minimum" sentence does not, however, require courts to imply a different unbounded maximum sentence. Here, the minimum and maximum have simply converged.

B. The Rule of Lenity Compels the Fixed-Term Interpretation.

Even if the Court concludes that the statute is ambiguous as to the available sentence, the rule of

lenity would direct the adoption of the fixed-term interpretation. The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States* v. *Santos*, 553 U.S. 507, 514 (2008). It applies not only to disputes over the substantive scope of criminal statutes, but also to "questions about the severity of sentencing," *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992), because it is grounded in "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting HENRY J. FRIENDLY, MR. JUSTICE FRANKFURTER AND READING OF STATUTES, IN BENCHMARKS 196, 209 (1967)); *see also R.L.C.*, 503 U.S. at 307-11 (Scalia, J., concurring, joined by Kennedy, J., and Thomas, J.) (agreeing that rule of lenity applies to sentencing statutes).[13]

Under the rule of lenity, "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Simpson* v. *United States*, 435 U.S. 6, 15 (1978) (quoting *Ladner* v. *United States*, 358 U.S. 169, 178 (1978)). Section 924(c)(1)(A) plainly lacks the sort of "clear and definite legislative directive" that the Court requires

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[13] *R.L.C.* is one of numerous cases where the Court has recognized that the lenity rule applies to sentencing questions. *See also Bifulco* v. *United States*, 447 U.S. 381, 387 (1980); *Busic* v. *United States*, 446 U.S. 398, 406 (1980); *United States* v. *Batchelder*, 442 U.S. 114, 121 (1979); *Ladner* v. *United States*, 358 U.S. 169, 178 (1958); *Prince* v. *United States*, 352 U.S. 322, 328 (1957); *Bell* v. *United States*, 349 U.S. 81, 83 (1955).

before it accedes to an interpretation that serves "to increase or multiply punishments." *Simpson*, 435 U.S. at 15-16; *see also Bass*, 404 U.S. at 348 (requiring Congress to speak "plainly and unmistakably" in favor of harsher construction of statute). Indeed, without any express textual indication or legislative history to suggest that Congress intended to increase the maximum available sentence from five years to life, the implied life-term "interpretation can be based on no more than a guess as to what Congress intended," and must be rejected under the rule of lenity. *Simpson*, 435 U.S. at 15.

C. *Stare Decisis* Presents No Obstacle to the Fixed-Term Interpretation.

Because this Court has not directly confronted the question whether § 924(c)(1)(A) creates fixed-term sentences, *stare decisis* presents no obstacle to resolving the instant case on this ground. Where the Court has "never squarely addressed [an] issue," and has "at most assumed" the answer to the issue, it remains "free to address the issue on the merits" notwithstanding principles of *stare decisis*. *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993); *see Monell* v. *Dep't of Social Servs. of City of N.Y.*, 436 U.S. 658, 709 n.6 (1978) (Powell, J., concurring) ("I think we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations."). In particular, "the relevant demands of *stare decisis* do not preclude considering, for the first time thoroughly and in the light of the best available evidence of congressional purpose, a statutory interpretation which started as

an unexamined assumption." *Monroe* v. *Pape*, 365 U.S. 167, 220-21 (1961) (Frankfurter, J., dissenting).

At most, this Court's prior cases concerning § 924(c)(1) advance the "unexamined assumption" that the statute creates sentencing ranges rather than fixed terms—an assumption that does not warrant deference under principles of *stare decisis*. None of the parties in *Harris* v. *United States*, 536 U.S. 545 (2002), nor the lower court, advanced the argument that § 924(c)(1) created fixed terms—or even contemplated that possibility. Rather, the briefs for both parties in *Harris* (and the *amicus* brief filed by the NACDL) simply assumed that the statute authorized sentencing ranges of up to life imprisonment. *See, e.g.*, Brief for Petitioner 29, 31-32; Brief for United States 4, 6, 10-11, 13; Brief for *Amici Curiae* The Cato Institute and NACDL 4, 24. And the question presented in *Harris* explicitly assumed that the seven-year term created by § 924(c)(1)(A)(ii) was a "mandatory minimum" rather than a fixed term.[14]

It is not surprising, then, that the Court in *Harris* operated on the premise that the provisions of § 924(c)(1)(A) "alter only the minimum," and that "the judge may impose a sentence well in excess of seven years," 536 U.S. at 554, or that the dissent similarly assumed that the statute created a sentencing range

[14] The question presented was worded as follows: "Given that a finding of 'brandishing,' as used in 18 U.S.C. § 924(C)(1)(A), results in an increased mandatory minimum sentence, must the fact of 'brandishing' be alleged in the indictment and proved beyond a reasonable doubt?" Brief for Petitioner i, *Harris* v. *United States*, No. 11-1536.

of "five years to life in prison" for the basic offense and "seven years to life imprisonment" for brandishing, *id.* at 575-76 (Thomas, J., dissenting). These were assumptions only; the Court never squarely analyzed whether the statute is better read as creating fixed terms. Thus, these conclusory statements are not eligible for *stare decisis* treatment. *See Brecht*, 507 U.S. at 631.

Nor did the Court squarely decide the fixed-term question in *United States* v. *O'Brien*, 130 S. Ct. 2169 (2010). There again, the question presented assumed that § 924(c)(1) created "a series of escalating mandatory minimum sentences,"[15] and the parties' briefs assumed that the statute could be read to create ranges extending from mandatory minimums up to life imprisonment, *see, e.g.*, Brief for United States 4; Brief for Respondent O'Brien 9, 45; Brief for Respondent Burgess 2. Although several Justices raised the fixed-term issue *sua sponte* from the bench during oral argument, *see supra* 8 & n.7, the *O'Brien* opinion did not address that question, and merely reiterated the parties' mutual assumption that "[t]he

[15] The Government styled the question presented in *O'Brien* as follows: "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." Brief for the United States i.

current statute provides only mandatory minimums." 130 S. Ct. at 2177. In response to the Government's argument that § 924(c)(1)(A) implies a maximum sentence of life imprisonment, the Court observed only that this was "perhaps" correct. *Ibid.* To the extent that any statements in *O'Brien* can be read as weighing against the fixed-term interpretation—and that is debatable—they are hardly the sort of "square[]" decision that triggers *stare decisis*. *Brecht*, 507 U.S. at 631.[16]

The *stare decisis* analysis is not altered by the fact that this is a statutory question. To be sure, "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation." *Hilton* v. *S. Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (internal quotation marks and citation omitted). But before a Court may "stand by decided matters," the matters must be decided. *Stare decisis* has no place when this Court resolves for the first time a statutory question that it has not genuinely examined in prior cases. Moreover, because this Court has never squarely tackled whether § 924(c)(1)(A) creates fixed terms, there is no reason to believe that Congress has

[16] For similar reasons, the Court's passing statement that § 924(e) creates "a mandatory minimum sentence of 15 years and a maximum of life in prison without parole" in *Custis* v. *United States*, 511 U.S. 485, 487 (1994), does not foreclose the fixed-term interpretation. The question before the Court in *Custis* had nothing to do with the proper interpretation of § 924(e). Rather, the Court considered "whether a defendant in a federal sentencing proceeding may collaterally attack the validity of previous state convictions that are used to enhance his sentence under [§ 924(e)]." *Ibid.*

placed any reliance on the statements in *Harris* or *O'Brien* mentioned above.

D. Petitioner's Sentence Violates the Sixth Amendment.

Because § 924(c)(1)(A) creates a fixed sentence of five years for the basic offense of using or carrying a firearm during and in relation to a crime of violence, and a fixed sentence of seven years for brandishing the firearm, petitioner's sentence in this case violates the Sixth Amendment. Whatever the proper reach of the *Apprendi* rule, it is now beyond dispute that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Here, defendant's prescribed statutory sentence was increased from five to seven years based on a factual finding of the trial court, not the jury. The Sixth Amendment required the jury to find that fact beyond a reasonable doubt before petitioner could be subjected to a seven-year sentence.

The Government agrees with this analysis. In opposing the petition for certiorari in *Lucas* v. *United States*, No. 11-1536, the Government acknowledged that if the "fixed-term" construction "were correct, then the 'fixed sentences' in Sections 924(c)(1)(A)(i), (ii), and (iii) would reflect varying statutory maximum sentences, and would plainly be subject to *Apprendi*—resolving the *Alleyne* petitioner's claim that his brandishing should have been proven to a jury beyond a reasonable doubt." Brief for United States in Opposition 10 n.2, *Lucas*.

The fact that the Sixth Amendment issue would not be debatable if § 924(c)(1)(A) were construed to set fixed terms counsels strongly in favor of this construction. It is this Court's "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez* v. *United States*, 490 U.S. 858, 864 (1989). How the Sixth Amendment should apply to § 924(c)(1)(A) if it is construed to create sentencing ranges with mandatory minimums has divided this Court, with two sitting Justices in *Harris* concluding that the *Apprendi* rule does not require the fact of brandishing to be proved to a jury, *see* 536 U.S. at 556-68 (plurality opinion of Kennedy, J. joined by Scalia, J.), two sitting Justices taking the opposite position, *see id.* at 580-83 (Thomas, J., dissenting joined by Ginsburg, J.), and one sitting Justice recently signaling that *Harris* may have been wrongly decided, *see O'Brien*, 130 S. Ct. at 2183 n.6 (Stevens, J., concurring) (quoting statement of Breyer, J.). Because the fixed-term interpretation of § 924(c)(1)(A) is a reasonable one that would avoid this constitutional debate, the canon of constitutional avoidance weighs in favor of its adoption.

E. The Court Should Resolve the Fixed-Term Question That This Case Implicates.

The Court should resolve this case under the fixed-term interpretation because the proper construction of § 924(c)(1)(A) is fairly included within the question presented. Rule 14.1(a) allows this Court to consider the "questions set out in the

petition," as well as all questions "fairly included therein." Here, the question presented was: "Whether this Court's decision in *Harris* v. *United States*, 536 U.S. 545 (2002), should be overruled." *Harris* held that the *Apprendi* rule did not apply to the fact of brandishing in § 924(c)(1)(A). One reason *Harris* was wrongly decided is that *Apprendi* applies to facts that dictate mandatory-minimum sentences. *Contra Harris*, 536 U.S. at 568. Another reason that *Harris* was wrongly decided is that § 924(c)(1)(A) establishes fixed-term sentences—contrary to the *Harris* Court's unexamined assumption that it creates sentencing ranges—and thus a finding of "brandishing" is subject to the *Apprendi* rule because it raises the statutory maximum from five to seven years.[17] Both arguments require *Harris* to be overruled, and both are properly before this Court. *See Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'") (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992)) (alteration omitted).[18]

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[17] *See* Brief for United States in Opposition 8, *Lucas* v. *United States*, No. 11-1536 (describing the *Harris* Court's assumption that § 924(c)(1)(A) created sentencing ranges as "essential to the Court's constitutional holding").

[18] The Court's general reluctance towards addressing an argument not raised below should not give the Court pause here, where the argument relates to a pure question of law that has already been addressed by multiple courts of appeals. And, even if the Court were concerned about addressing the fixed-term interpretation in this case, it could grant one of the two pending petitions for certiorari that raise the same question.

II. The Fixed-Term Interpretation Would Not Disrupt the Criminal Justice System.

The fixed-term construction of § 924(c)(1)(A) that *Amici* urge would not disrupt the criminal justice system. It is unlikely to work any major change in the sentences imposed on offenders who brandished a firearm during a qualifying offense, or to unduly complicate prosecutions for § 924(c)(1)(A) offenses.

A. Sentences for § 924(c)(1)(A) Violations Already Cluster at Five, Seven, and Ten Years.

It is the experience of *Amici* that actual sentences imposed for § 924(c)(1)(A) violations already hew closely to the five-, seven-, and ten-year terms set out in the statute. As Justice Thomas observed in *Harris*, "the sentence imposed when a defendant is found only to have 'carried' a firearm 'in relation to' a drug trafficking offense appears to be, almost uniformly, if not invariably, five years." 536 U.S. at 578 (Thomas, J., dissenting). Likewise, "those found to have brandished a firearm typically, if not always, are sentenced only to 7 years in prison while those found to have discharged a firearm are sentenced only to 10 years. *Ibid.* (citing United States Sentencing Commission, 2001 Datafile, USSCFY01, Table 1).

More recently, in *O'Brien*, the Court saw no evidence of sentences that substantially exceeded the

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See Lucas v. *United States*, No. 11-1536; *Dorsey* v. *United States*, No. 12-6571.

fixed terms specified in the statute. It observed that "[n]either the Government nor any party or *amicus* has identified a single defendant whose conviction under § 924 for possessing or brandishing a non-specific firearm led to a sentence approaching the 30-year sentence that is required when the firearm is a machinegun." 130 S. Ct. at 2177. Rather, the respondents in that case advised the Court, "without refutation, that most courts impose the mandatory minimum of 7 years' imprisonment for brandishing a nonspecific weapon and the longest sentence that has come to the litigants' or the Court's attention is 14 years." *Ibid.*

B. Proving "Brandishing" and "Discharge" to a Jury Would Not Unduly Burden Prosecutors.

Requiring the Government to prove to a jury that a firearm was "brandished" or "discharged" would not significantly complicate § 924(c)(1)(A) prosecutions.

As an initial matter, to convict a defendant of *any* violation of § 924(c)(1)(A), the Government must prove to a jury beyond a reasonable doubt that a firearm was "use[d] or carrie[d]" in connection with the crime of violence or drug trafficking crime. In the mine run of cases, once the Government has put on evidence of this conceded element of the crime, it requires minimal additional effort to prove brandishing or discharge. A jury can find that a defendant carried a firearm under § 924(c) based solely on eyewitness testimony. *See Parker* v. *United States*, 801 F.2d 1382, 1383-86 (D.C. Cir. 1986) (Scalia, J.). To take one example, if a witness

testifies that she saw the defendant carjack a vehicle while carrying a handgun, it only takes a few additional questions to establish whether she also saw the defendant brandish or discharge the handgun during the offense. What is more, even under existing law it is common for prosecutors to put on such evidence as part of the narrative of their case.

In addition, even though it may be unnecessary to do so under *Harris*, it is not uncommon for the Government to charge brandishing or discharge as an element in the indictment, and to seek to prove these facts to the jury beyond a reasonable doubt. *See, e.g.*, *United States* v. *Lindsey*, 634 F.3d 544, 544-45 (9th Cir. 2011) (indictment charged defendant with brandishing a firearm under § 924(c)(1)(A)(ii), and jury found defendant guilty of that count). That is exactly what happened in the instant case: the indictment alleged brandishing, JA 15; the district court instructed the jury on brandishing, JA 21; and the verdict form explicitly asked the jury to determine whether petitioner "[b]randished a firearm in connection with the crime of violence," JA 40. Indeed, publications available on the Department of Justice website titled "Summary of Federal Firearm Laws" and "Fed Facts: The Real Deal" characterize "[b]randishing" a firearm in violation of § 924(c) as a unique "offense."[19]

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[19] *See* http://www.justice.gov/usao/me/docs/Summary%20of%20Federal%20Firearms%20Laws%20-%202010.pdf, at 7-8 (last visited Nov. 19, 2012); http://www.justice.gov/usao/ut/psn/documents/fedfacts%20for%20utah_web.pdf, at 1 (last visited Nov. 19, 2012).

Finally, prosecutors already must prove this type of fact to juries when prosecuting other criminal offenses. Section 924(c)(4) defines "brandish" as "to display all or part of the firearm," and numerous provisions of Title 18 include the "display" of an object as an explicit element of a criminal offense. For example, § 707 creates criminal liability for "[w]hoever, with intent to defraud, wears *or displays* the sign or emblem of the 4-H clubs . . . for the purpose of inducing the belief that he is a member of, associated with, or an agent or representative of the 4-H clubs." 18 U.S.C. § 707 (emphasis added).[20] If prosecutors must prove to a jury that an object has been "display[ed]" to convict a defendant of the relatively trifling offense proscribed by § 707, surely they can prove that a firearm has been displayed in connection with a crime of violence or drug trafficking crime for purposes of § 924(c)(1)(A). Similarly, prosecutors already must prove "discharge" as an element of § 922(q)(3), which makes it a crime for "any person, knowingly or with reckless disregard for the safety of another, to *discharge* or attempt to discharge a firearm . . . at a place that the person knows is a school zone." 18 U.S.C. § 922(q)(3) (emphasis

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[20] *See also* 18 U.S.C. § 706 ("Whoever wears *or displays* the sign of the Red Cross . . . ."); *id.* § 706a ("Whoever wears *or displays* the sign of the Red Crescent . . . ."); *id.* § 709 ("Whoever falsely advertises or represents, or publishes *or displays* any sign, symbol or advertisement reasonably calculated to convey the impression that a nonmember bank, banking association, firm or partnership is a member of the Federal reserve system . . . ."); *id.* § 713(a) ("Whoever knowingly *displays* any printed or other likeness of the great seal of the United States . . . .") (emphasis added throughout).

added).[21] And numerous state statutes treat "brandishing" or "discharge" as elements of independent crimes, which must be proven to a jury. *See* Brief for Petitioner 48-49.

In short, adopting the "fixed-term" interpretation of § 924(c)(1)(A) will not substantially affect the sentences imposed on defendants who have brandished or discharged a firearm, nor will it create significant hurdles for prosecutors in cases where firearms were brandished or discharged. It will, however, ensure that prosecutions under § 924(c)(1)(A) comply with the Sixth Amendment and that criminal defendants are not sentenced to terms beyond those authorized by Congress.

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[21] *See also* 18 U.S.C. § 3559(c)(2)(A) (defining "assault with intent to commit rape" as "an offense that has *as its elements* engaging in physical contact with another person or using *or brandishing* a weapon against another person with intent to commit aggravated sexual abuse or sexual abuse") (emphasis added).

CONCLUSION

For the reasons stated above and in the petitioner's brief, the judgment of the Fourth Circuit should be reversed.

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