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 OF THE SENTENCING PROJECT AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

FRANK M. DICKERSON III
CHARLES M. WOODWORTH
Mayer Brown LLP
71 S. Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

ALISON SIEGLER
Counsel of Record
University of Chicago Federal Criminal Justice Clinic
1111 E. 60th Street
Chicago, Illinois 60637
(773) 834-1680
alisonsiegler@uchicago.edu

Additional counsel on signature page

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BRIEF OF THE SENTENCING PROJECT AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

This *amicus curiae* brief is submitted on behalf of The Sentencing Project and the American Civil Liberties Union. Each organization has a special interest and expertise in criminal justice matters.

1. **The Sentencing Project** is a national nonprofit organization established in 1986 to engage in public policy research and education on criminal justice reform. The Sentencing Project has produced a broad range of scholarship assessing the effects of mandatory minimums on racial disparities in the American criminal justice system, and members of its staff have been invited to testify before Congress, the United States Sentencing Commission, and professional audiences on the topic. Because mandatory minimums are a primary catalyst for fundamental inequities and flaws in the American federal criminal court system, this case raises questions of fundamental importance to The Sentencing Project and its members.

2. **The American Civil Liberties Union** is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the prin-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

ciples of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU Criminal Law Reform Project is a division of the ACLU, whose goal is to put an end to excessively harsh crime policies that result in mass incarceration and stand in the way of a just and equal society. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*. Because this case calls into question the meaning and scope of the jury trial right, both as a means to protect against arbitrary government action and to preserve public confidence in the criminal justice system, it raises questions of fundamental importance to the ACLU and its members.

SUMMARY OF ARGUMENT

1. *Harris* v. *United States*, 536 U.S. 545 (2002), must be overturned. *Harris*'s logic is impossible to reconcile with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). These irreconcilable differences have resulted in a persistent circuit split in federal drug cases. The courts of appeals are divided over whether drug quantity must be charged in an indictment and proved to a jury beyond a reasonable doubt in order to impose a mandatory minimum sentence under 21 U.S.C. § 841. Seven circuits allow judges to set and increase mandatory minimum sentences after finding drug quantity by a mere preponderance of the evidence. Because such a factual finding raises the statutory maximum, this approach violates *Apprendi*. These courts have evaded this problem by mixing and matching mandatory minimums and statutory maximums, thus disregarding the statutory text.

2. Overturning *Harris* would eliminate the circuit split by requiring that drug quantity be charged in an indictment and proved to a jury beyond a reasonable doubt to set or increase a mandatory minimum.

3. Requiring drug quantity to be charged in an indictment and proved to a jury imposes a minimal burden on the system. A sample of indictments and verdict forms reveals that some United States Attorneys' Offices in all twelve circuits charge drug quantity in their indictments. Prosecutors outside of the sample districts also likely charge drug quantity, because they must do so to request a sentence above the default statutory maximum.

4. Overruling *Harris* is consistent with this Court's precedent, the structure of § 841, and sound sentencing policy. *Harris* was inconsistent with *Apprendi* when decided, and is inconsistent with this Court's subsequent jurisprudence. Treating drug quantity as a sentencing factor is likewise inconsistent with the statute, which sets out independent ranges, not untethered mandatory minimum penalties. Finally, treating drug quantity as a sentencing factor is inconsistent with sound sentencing policy. Mandatory minimum sentences are a significant driver of racial disparity in sentencing. Overruling *Harris* will mean that drug quantity is charged and proved in fewer cases and will thus lead to fewer mandatory minimum sentences. Because a higher percentage of black defendants are subjected to mandatory minimums, fewer mandatory minimum sentences will reduce unwarranted racial disparity in sentencing.

ARGUMENT

I. *HARRIS* AND *APPRENDI* HAVE CREATED AN IMPORTANT AND PERSISTENT CIRCUIT SPLIT OVER MANDATORY MINIMUMS IN DRUG CASES.

A. *Harris* Has Consequences Beyond 18 U.S.C. § 924(c).

Allen Ryan Alleyne petitions this Court to overrule *Harris* v. *United States*, 536 U.S. 545 (2002), by applying the holding of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), to any fact that increases the range—whether the upper *or lower* bound—of punishment to which a criminal defendant is exposed. Although Alleyne's case arose under 18 U.S.C. § 924(c), that is not the only criminal statute that contains mandatory minimums. In 2010, 77% of federal convictions carrying a mandatory minimum were for drug trafficking offenses, and approximately two-thirds of drug offenders were convicted of an offense carrying a mandatory minimum. See U.S. Sentencing Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 122, 153 (2011) (*2011 Report*), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

B. Lower Courts Disagree Over The Application Of *Harris* In Federal Drug Cases.

Overruling *Harris* would resolve a deep circuit split over mandatory minimum sentences in federal drug cases and would resolve that split in a way that

is most consistent with *Apprendi*.[2] On one side of the split, four courts of appeals require drug quantity to be charged in an indictment and proved to a jury beyond a reasonable doubt before a court can impose a mandatory minimum sentence.[3] On the other side of the split, seven courts of appeals interpret *Harris* to mean that when a drug quantity finding sets or increases a mandatory minimum penalty, but the sentence imposed does not exceed the unenhanced statutory maximum, drug quantity may be omitted from an indictment and found by a judge by a preponderance of the evidence.[4]

1. Courts have struggled to understand the constitutional requirements for imposing mandatory minimums in federal drug cases, and have had difficulty squaring *Harris* with *Apprendi* in that context. *Apprendi* held that "any fact that increases the maximum penalty for a crime beyond the prescribed statutory maximum must be" "charged in an indict-

[2] The circuit split implicates drug cases arising under 21 U.S.C. §§ 841, 846, and 960.

[3] See *United States* v. *Gonzalez*, 420 F.3d 111, 123, 120–23 (2d Cir. 2005); *United States* v. *Martinez*, 277 F.3d 517, 528, 530 (4th Cir. 2002); *United States* v. *Velasco-Heredia*, 319 F.3d 1080, 1085–87 (9th Cir. 2003); *United States* v. *Graham*, 317 F.3d 262, 273–75 (D.C. Cir. 2003).

[4] See *United States* v. *Goodine*, 326 F.3d 26, 33 (1st Cir. 2003); *United States* v. *Keith*, 230 F.3d 784, 786–87 (5th Cir. 2000); *United States* v. *Leachman*, 309 F.3d 377, 382–83 (6th Cir. 2002); *United States* v. *Washington*, 558 F.3d 716, 719 (7th Cir. 2009); *United States* v. *Webb*, 545 F.3d 673, 677–78 (8th Cir. 2008); *United States* v. *Ramirez*, 43 F. App'x 358, 360 (10th Cir. 2002); *United States* v. *Clay*, 376 F.3d 1296, 1301 (11th Cir. 2004). One additional court of appeals has never squarely addressed the specific question over which the circuits are split. See *United States* v. *Vazquez*, 271 F.3d 93, 98 (3d Cir. 2001).

ment, submitted to a jury, and proven beyond a reasonable doubt," 530 U.S. at 490, 476 (citations omitted), and that it is "unconstitutional *** to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed," *id.* at 490. "[T]he relevant inquiry is not one of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494.

The *Harris* plurality, however, concluded that "a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum)," 536 U.S. at 557, "need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt," *id.* at 568. *Harris* deemed such a factual finding to be a "sentencing facto[r]" rather than an "elemen[t]." *Id.* at 556. The dissent in *Harris* countered that the *Apprendi* rule extends to facts that set mandatory minimums. "When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is 'by definition [an] 'elemen[t]' of a separate legal offense.'" *Harris*, 536 U.S. at 579 (Thomas, J., dissenting) (quoting *Apprendi*, 530 U.S. at 483 n.10). The dissent reasoned: "Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Id.*

Alleyne's argument that "[a] mandatory minimum sentence changes the range of permissible sentences by increasing the punishment the judge would otherwise have discretion to impose" applies to the drug statute and the gun statute. Brief for Petitioner at 10. The drug statute's structure, however, creates

an additional *Apprendi* problem. A drug quantity that is not charged in an indictment or proved to a jury, but nevertheless sets a mandatory minimum, also raises the statutory maximum to which the defendant is exposed, a circumstance "*Harris* simply does not speak to." *United States* v. *Gonzalez*, 420 F.3d 111, 127 (2d Cir. 2005). The penalty provisions of the drug statute lay out three distinct ranges: 0 to 20 years; 5 to 40 years; and 10 years to life. 21 U.S.C. § 841(b)(1)(C), (B), (A). These penalty ranges correspond to offenses of conviction involving an unquantified amount of drugs, a quantity of drugs above a certain threshold, and a quantity of drugs above a higher threshold, respectively. A drug quantity finding that sets or increases a mandatory minimum therefore raises the punishment ceiling as well as the punishment floor.

Raising either the floor or the ceiling necessarily "*expose[s] the defendant to a greater punishment* than that authorized by the jury's guilty verdict," *Gonzalez*, 420 F.3d at 123 (emphasis added) (quoting *Apprendi*, 530 U.S. at 494), and "*increase*[*s*] *the prescribed range of penalties* to which a criminal defendant is exposed," *id.* at 127 (quoting *Apprendi*, 530 U.S. at 490). Thus, a drug quantity finding that sets a mandatory minimum is an "element" of the offense that must be charged in an indictment and proved to a jury beyond a reasonable doubt. In fact, in a case before this Court, "[t]he Government concede[d] that [an] indictment's failure to allege a fact, drug quantity, that increased the statutory maximum sentence" violated *Apprendi*. *United States* v. *Cotton*, 535 U.S. 625, 632 (2002).

The courts of appeals have split over *Apprendi*'s implications for drug quantity findings. Four courts

require that a drug quantity that sets a mandatory minimum must be pleaded and proved. Other courts invoke *Harris* to allow judges to find the facts that set mandatory minimums, effectively rewriting the drug statute.

2. The Second Circuit and the Ninth Circuit interpret *Apprendi* to require drug quantity to be charged in an indictment and submitted to a jury for a beyond-a-reasonable-doubt finding before a mandatory minimum penalty may be imposed. These circuits focus on the fact that "when drug quantity raises a mandatory minimum sentence under § 841, *it simultaneously raises a corresponding maximum*, thereby increasing a defendant's *authorized* sentencing range above what it would have been if he had been convicted of an identical unquantified drug crime." *Gonzalez*, 420 F.3d at 126 (emphasis added) (Raggi, J., joined by Sack and Sotomayor, JJ.); see also *id.* at 131 ("[M]andatory minimums operate in tandem with increased maximums in *§ 841(b)(1)(A)* and *-(b)(1)(B)* to create sentencing ranges that raise the limit of the possible federal sentence."); *Velasco-Heredia*, 319 F.3d at 1085. These courts conclude that drug quantity "increases the 'prescribed range of penalties to which a criminal defendant is exposed'" in violation of *Apprendi*. *Gonzalez*, 420 F.3d at 127 (quoting *Apprendi*, 530 U.S. at 490); see also *Velasco-Heredia*, 319 F.3d at 1085.

The Second Circuit explicitly rejects the notion that drug quantity can "perform[] as a sentencing factor for purposes of determining the applicable minimum sentence but as an element for purposes of determining the applicable maximum." *Gonzalez*, 420 F.3d at 122. "Nothing in the structure of [§ 841] suggests that *** corresponding minimums and max-

imums *** can be delinked to permit mixing and matching across subsections to create hybrid sentencing ranges not specified by Congress." *Id.* at 121 (prohibiting a judge from creating a de facto range of 5 to 20 or 10 to 20 years); see also *Velasco-Heredia*, 319 F.3d at 1086. Consequently, in the Second and Ninth Circuits, a sentencing court is prohibited from imposing a mandatory minimum penalty if the requisite drug quantity has not been charged in an indictment and proved to a jury beyond a reasonable doubt. *Gonzalez*, 420 F.3d at 131; *Velasco-Heredia*, 319 F.3d at 1086.

3. Two additional courts of appeals—the Fourth Circuit and the D.C. Circuit—hold that setting a mandatory minimum penalty without charging drug quantity in an indictment and submitting it to a jury constitutes *Apprendi* error. In the Fourth Circuit, it is *Apprendi* error for a defendant who pleads guilty to distributing an unquantified amount of drugs under § 841(b)(1)(C) to be subjected to a ten-year mandatory minimum penalty under § 841(b)(1)(A). *United States* v. *Martinez*, 277 F.3d 517, 530 (4th Cir. 2002). But *cf. United States* v. *Graham*, 75 F. App'x 145, 149 (4th Cir. 2003) (unpublished) (noting that if *Harris* permits statutory mixing and matching, it may undermine post-*Apprendi* cases holding that "*no* mandatory minimum sentence [is] applicable in section 841 cases where no drug quantity is alleged in the indictment").

The D.C. Circuit explains that § 841 is "a tripartite statute establishing three separate offenses, with different maximum sentences based on drug quantity, and not a unitary statute with drug quantity as a *sentencing factor*." *United States* v. *Graham*, 317 F.3d 262, 274 (D.C. Cir. 2003) (emphasis added). In

Graham, the court determined that the sentencing court had committed *Apprendi* error by "treat[ing] subparagraphs (A) and (C) of § 841 as mere sentencing factors." 317 F.3d at 275. Specifically, *Graham* held that a sentencing judge violated *Apprendi* by imposing a supervised release term based on a drug quantity that was never charged or proved to the jury. *Id.* The court concluded that the judge "appears to have tracked the mandatory minimum sentencing provisions of § 841, and thus may have applied § 841(b)(1)(A), which increased Graham's supervised release period by two years" above the three-year mandatory minimum term available under § 841(b)(1)(C). *Id.* The court deemed this error, even though the five-year term did not exceed the statutory *maximum* authorized under § 841(b)(1)(C). *Id.*; see also *United States* v. *Mouling*, 557 F.3d 658, 667 (D.C. Cir. 2009) (holding that the sentencing court committed *Apprendi* error in setting a mandatory minimum when the requisite drug quantity had not been proved to the jury, but concluding that this error did not meet the fourth prong of the plain error test).

4. Seven circuits come down on the other side of the split. Most of these circuits rely on *Harris* to hold that the facts that set mandatory minimums in drug cases do not need to be charged or proved to a jury beyond a reasonable doubt, even though those facts raise both the punishment floor and the punishment ceiling. These circuits treat *Harris* as an exception to *Apprendi*, and refuse to find an *Apprendi* violation unless the sentence actually imposed exceeds the statutory maximum. See *United States* v. *Goodine*, 326 F.3d 26, 33 (1st Cir. 2003); *United States* v. *Solis*, 299 F.3d 420, 454 (5th Cir. 2002); *United States* v. *Leachman*, 309 F.3d 377, 382–83 (6th Cir. 2002);

United States v. *Washington*, 558 F.3d 716, 719 (7th Cir. 2009); *United States* v. *Webb*, 545 F.3d 673, 677–78 (8th Cir. 2008); *United States* v. *Clay*, 376 F.3d 1296, 1301 (11th Cir. 2004). The Tenth Circuit, in an unpublished opinion, has cited *Harris* to uphold a mandatory minimum sentence against an *Apprendi* challenge. *United States* v. *Ramirez*, 43 F. App'x 358, 360 (10th Cir. 2002).

These circuits have split with the other four circuits. Instead of recognizing that, under the drug statute, any increase in the mandatory minimum automatically increases the statutory maximum, these courts borrow a statutory maximum from another section of the statute. They hold that sentencing judges may apply a mandatory minimum from § 841(b)(1)(A) or (B) as long as the sentence imposed does not exceed the unquantified statutory maximum from § 841(b)(1)(C). See, *e.g.*, *Washington*, 558 F.3d at 718–20. To sidestep the *Apprendi* violation, these circuits manipulate the statute in a way that is inconsistent with its text and structure.

Consequently, a number of these courts hold—in contrast to the other four circuits—that drug quantity can be a sentencing factor for the purpose of setting or increasing a mandatory minimum and an element for the purpose of exceeding a statutory maximum. The First, Fifth, Eighth, and Eleventh Circuits explicitly hold that drug quantity, typically a sentencing factor that can be proved by a preponderance of the evidence, becomes an element if and only if the defendant actually receives a sentence that exceeds the unquantified statutory maximum. See, *e.g.*, *United States* v. *Stark*, 499 F.3d 72, 80 (1st Cir. 2007); *United States* v. *Keith*, 230 F.3d 784, 786–87 (5th Cir. 2000); *Webb*, 545 F.3d at 678; *Clay*, 376

F.3d at 1301. The Seventh Circuit has, by implication, reached the same conclusion. Compare *Washington*, 558 F.3d at 719), with *United States* v. *Clark*, 538 F.3d 803, 812 (7th Cir. 2008).

The Third Circuit has never squarely addressed the question of how *Harris* applies to *mandatory minimums* under the drug statute. But it held, before *Harris*, that *Apprendi* is not violated when drug quantity is not pleaded and proved as long as the sentence imposed is below the unquantified statutory maximum. See *United States* v. *Vazquez*, 271 F.3d 93, 98 (3d Cir. 2001) (en banc). However, two judges on the Third Circuit disagreed and stated that "drug type and quantity are *always* elements of an offense under § 841, and therefore must *always* be submitted to the jury for proof beyond a reasonable doubt." *Id.* at 108 (Becker, J., concurring, joined by Ambro, J.).

5. One of the circuits that condones mixing and matching has nevertheless questioned *Harris*'s logic. The Seventh Circuit recently noted that "it is difficult to reconcile *McMillan* [v. *Pennsylvania*, 447 U.S. 79 (1986)] with *Apprendi*." *United States* v. *Krieger*, 628 F.3d 857, 869 (7th Cir. 2010). While adhering to circuit precedent, the court observed that "[l]ogically, *** [w]hether labeled an element or a sentencing factor, if a fact triggers a mandatory minimum, the expected punishment will have increased and the government can require the judge to impose a higher punishment than she might have chosen otherwise." *Id.* (citing *Apprendi,* 530 U.S. at 521–22 (Thomas, J., dissenting)); see also *id.* at 871 (concluding reluctantly that a fact resulting in a 20-year mandatory minimum did not need to be pleaded or proved because the sentence did not exceed the 20-year statutory maximum for an unquantified drug offense).

II. OVERRULING *HARRIS* WOULD NECESSARILY RESOLVE THIS CONFLICT WITH MINIMAL EFFECT ON DRUG PROSECUTIONS.

A. A Decision In Favor Of Alleyne Necessarily Resolves The Circuit Split Over Mandatory Minimums In Drug Cases.

1. As demonstrated in Part I, *Harris* has caused a circuit split over how to apply *Apprendi* in drug cases. A decision in favor of Alleyne in this case will necessarily resolve this circuit split. Overruling *Harris* will require drug quantity to be charged in an indictment and proved to a jury beyond a reasonable doubt to establish both the mandatory minimum and the statutory maximum, as currently required by four courts of appeals. This requirement eliminates the dual *Apprendi* problems created when a judge finds uncharged drug quantities under a preponderance-of-the-evidence standard and imposes a mandatory minimum, which in turn raises a defendant's statutory maximum. It would also end the practice of courts mixing and matching statutory minimum and maximum sentences from § 841(b)(1)'s different subparagraphs.

2. Conversely, a decision in favor of the United States will ensure that this deep split persists among the circuits. If this Court continues to hold that the facts establishing mandatory minimum sentences need not be pleaded and proved to a jury beyond a reasonable doubt, the circuit split will remain. Some courts will continue to distinguish *Harris*. Other courts will continue to treat *Harris* as an exception to *Apprendi* and rewrite the drug statute, borrowing

a mandatory minimum sentence from one subparagraph of § 841(b)(1) without applying the corresponding statutory maximum. A decision overruling *Harris* will resolve the split and consequent geographic charging and sentencing disparity.

B. Requiring Drug Quantity To Be Pleaded And Proved To A Jury Poses A Minimal Burden On The System.

1. Although the courts of appeals are divided on *Harris*'s implications in drug cases, federal charging practices demonstrate that prosecutors frequently charge drug quantity and submit it to a jury for a beyond-a-reasonable-doubt finding. A sample of indictments and verdict forms reveals that, in practice, some United States Attorneys' Offices in all twelve circuits charge drug quantity in indictments, and juries are required to find the charged quantity beyond a reasonable doubt.[5] This practice occurs even within

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[5] There is no database regarding how drug quantity is currently charged and proved in each district within the federal system. Counsel therefore searched Westlaw and PACER for drug trafficking cases in all twelve circuits that had gone to trial. Counsel examined indictments, jury verdict forms, and, where possible, jury instructions. Although the cited documents are a limited sample, United States Attorneys' Offices often have standard practices regarding their indictments and jury verdict forms. **First Circuit**: Indictment, *United States* v. *Baez*, No. 1:06-cr-00071-S-PAS (D.R.I. June 7, 2006), ECF No. 6; Verdict Form, *Baez*, ECF No. 50; Jury Instructions (Gov't) at 3, 9, *Baez*, ECF No. 38; Indictment, *United States* v. *Olivo*, No. 1:06-cr-00069-ML-LDA (D.R.I. June 7, 2006), ECF No. 1; Verdict Form, *Olivo*, ECF No. 37; Indictment, *United States* v. *Gonzalez*, No. 1:05-cr-00137-S-LDA (D.R.I. Dec. 14, 2005), ECF No. 7; Verdict Form, *Gonzalez*, ECF No. 78; Jury Instructions (Gov't) at 5, 9, 15, *Gonzalez*, ECF No. 80. **Second Circuit**: Indictment, *United States* v. *Harrison*, No. 5:07-cr-00410-NAM (N.D.N.Y. Sept. 19,

2007), ECF No. 1; Verdict Form, *Harrison*, ECF No. 48; Jury Instructions (Defense) at 16, *Harrison*, ECF No. 30; Indictment, *United States* v. *Geronimo*, No. 1:06-cr-00087-CBA (N.D.N.Y. Feb. 2, 2006), ECF No 18; Verdict Form, *Geronimo*, ECF No. 120. **Third Circuit**: Indictment, *United States* v. *Stearn*, No. 2:07-cr-00323-LDD (E.D. Pa. June 6, 2007), ECF No. 1; Verdict Form, *Stearn*, ECF No. 60; Indictment, *United States* v. *Johnson*, No. 2:07-cr-00075-HB (E.D. Pa. Feb. 14, 2007), ECF No. 31; Verdict Form, *Johnson*, ECF No. 196; Jury Instructions at 53, *Johnson*, ECF No. 185. **Fourth Circuit**: Indictment, *United States* v. *Harris*, No. 3:11-cr-00097-HEH (E.D. Va. Apr. 5, 2011), ECF No. 3; Verdict Form, *Harris*, ECF No. 34; Jury Instructions at 18, 28, *Harris*, ECF No. 21. **Fifth Circuit**: Indictment, *United States* v. *Victor Valles-Velazquez*, No. 5:05-cr-02731 (S.D. Tex. Dec. 20, 2008), ECF No. 58; Verdict Form, *Valles-Velazquez*, ECF No. 104; Jury Instructions at 8–9, *Valles-Velazquez*, ECF No. 98; Indictment, *United States* v. *Rudy Gutierrez, Jr.*, No. 2:06-cr-0038 (S.D. Tex. June 14, 2006), ECF No. 57-2; Verdict Form, *Gutierrez*, ECF No. 195; Jury Instructions at 8–10, *Gutierrez*, ECF No. 194. **Sixth Circuit**: Indictment, *United States* v. *Bonas*, No. 2:07-cr-20309-VAR-RSW (E.D. Mich. June 12, 2007), ECF No. 37; Verdict Form, *Bonas*, ECF No. 172; Jury Instructions at 18, 27, 29, *Bonas*, ECF Nos. 173, 173-2; Indictment, *United States* v. *Powers*, No. 5:05-cr-900021-JCO-DAS (E.D. Mich. June 30, 2005), ECF No. 1; Verdict Form, *Powers*, ECF No. 14; Jury Instructions at 21, *Powers*, ECF No. 12. **Seventh Circuit**: Indictment, *United States* v. *Ousley*, No. 1:10-cr-10044-JES-JAG (C.D. Ill Apr. 7, 2010), ECF No. 7; Verdict Form, *Ousley*, ECF No. 37; Jury Instructions at 29, 32, *Ousley*, ECF No. 42; Indictment, *United States* v. *McSwain*, No. 3:05-cr-50082 (N.D. Ill Feb. 20, 2007), ECF No. 330; Verdict Form, *McSwain*, ECF No. 400; Jury Instructions at 20, *McSwain*, ECF No. 404. **Eighth Circuit**: Indictment, *United States* v. *Longs*, No. 0:07-cr-00189-JRT-JST (D. Minn. Sept. 6, 2007), ECF No. 355; Verdict Form, *Longs*, ECF No. 745; Jury Instructions at 35–36, *Longs*, ECF No. 742; Indictment, *United States* v. *Fenner*, No. 0:06-cr-00211-MJD-AJB (D. Minn. July 13, 2006), ECF No. 26; Verdict Form, *Fenner*, ECF No. 167; Jury Instructions at 41, *Fenner*, ECF Nos. 159, 159-1. **Ninth Circuit**: Indictment, *United States* v. *Holiday*, No. 3:09-033393-BTM (S.D. Cal. Sept. 23, 2009), ECF No. 20; Verdict Form, *Hol-*

the seven circuits that do not require drug quantity to be charged or proved to a jury beyond a reasonable doubt to sentence a defendant to a mandatory minimum. Consequently, overruling *Harris* would not impose an undue burden on prosecutors and courts in these districts.

And a significant percentage of the total federal drug trafficking defendants nationwide are sentenced within federal districts that follow this practice. In 2011, for example, 38% of all drug trafficking sentencings in the country occurred in the Second, Fourth, Ninth, and D.C. Circuits, and an additional 16% of such sentencings occurred within the other

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iday, ECF No. 276; Indictment, *United States* v. *Alfonso*, No. 3:08-02970-BTM (S.D. Cal. Sept. 3, 2008), ECF, No. 7; Verdict Form, *Alfonso*, ECF No. 78; Jury Instructions at 19, 20, *Alfonso*, ECF No. 77. **Tenth Circuit**: Indictment, *United States* v. *Bagby*, No. 4:10-cr-00134-CVE (N.D. Okla. Sept. 7, 2010), ECF No. 11; Verdict Form, *Bagby*, ECF No. 41; Jury Instructions at 32, *Bagby*, ECF No. 39; Indictment, *United States* v. *Sago*, No. 1:08-cr-00251-JLK (D. Colo. June 2, 2008), ECF No. 1; Verdict Form, *Sago*, ECF No. 39; Jury Instructions at 24, *Sago*, ECF No. 29-1. **Eleventh Circuit**: Indictment, *United States* v. *Cooper*, No. 2:06-cr-14029-KMM (S.D. Fla. June 9, 2006), ECF No. 22; Verdict Form, *Cooper*, ECF No. 173; Jury Instructions at 13, 15, *Cooper*, ECF No. 171; Indictment, *United States* v. *Longoria*, No. 2:05-cr-14075-DLG (S.D. Fla. Sept. 27, 2005), ECF No. 12; Verdict Form, *Longoria*, ECF No. 103; Jury Instructions at 14–18, *Longoria*, ECF No. 100; Indictment, *United States* v. *St. Louis*, No. 2:05-cr-14058-JEM (S.D. Fla. July 29, 2005), ECF No. 4; Verdict Form, *St. Louis*, ECF No. 72; Jury Instructions at 13–16, *St. Louis*, ECF No. 68. **D.C. Circuit**: Indictment, *United States* v. *Bigesby*, No. 1:08-cr-00261-RJL (D.D.C. Aug. 19, 2008), ECF No. 8; Verdict Form, *Bigesby*, ECF No. 41; Jury Instructions at 4–5, *Bigesby*, ECF No. 27; Indictment, *United States* v. *Smith*, No. 1:07-cr-00153-TFH (D.D.C. June 12, 2007), ECF No. 1; Verdict Form, *Smith*, ECF No. 497; Jury Instructions at 32, *Smith*, ECF No. 327-3.

federal districts from which the sampling of indictments and verdict forms are drawn.[6] Therefore, at least 54% of all drug trafficking sentencings last year occurred in districts where prosecutors charge drug quantity in an indictment and submit it to a jury.

2. Given *Apprendi*'s requirements, it is possible that even more districts than those from which the sample documents are drawn charge drug quantity and prove it to a jury. In every circuit, prosecutors seeking a sentence above the unquantified statutory maximum in § 841(b)(1)(C) must charge drug quantity and prove it to a jury beyond a reasonable doubt. See *Apprendi*, 530 U.S. at 494; see also *id*. at 498 (Scalia, J., concurring); *Keith*, 230 F.3d at 786–87; *Webb*, 545 F.3d at 678; *Clay*, 376 F.3d at 1301. The *Apprendi* requirement explains why the Seventh Circuit—which does not require drug quantity to be charged and proved to a jury in setting mandatory minimum floors—nevertheless expects prosecutors to charge drug quantity in the indictment in every case. See *Krieger*, 628 F.3d at 867 ("[A] post-*Apprendi* in-

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[6] The Sentencing Commission reports that 9,230 of the total 24,442 defendants sentenced for drug trafficking in fiscal year 2011 were sentenced in the Second, Fourth, Ninth and D.C. Circuits. See U.S. Sentencing Comm'n, *Federal Sentencing Statistics by State, District & Circuit for Fiscal Year 2011*, Second Circuit tbl.1, Fourth Circuit tbl.1, Ninth Circuit tbl.1, D.C. Circuit tbl.1 (2011), available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2011/index.cfm. Within the districts from which the sample indictments and verdict forms are drawn, an additional 4,003 defendants were sentenced for drug trafficking during that same year. See *id.* D. Colo. tbl.1, S.D. Fla. tbl.1, C.D. Ill. tbl.1, N.D. Ill. tbl.1, D. Md. tbl.1, E.D. Mich. tbl.1, D. Minn. tbl.1, N.D. Okla. tbl.1, E.D. Pa. tbl.1, D.RI. tbl.1, S.D. Tex. tbl.1.

dictment should specify, and the trier of fact must be instructed to determine, not only the elements of the offense, which appear in § 841(a), but also the events listed in § 841(b) on which the prosecutor relies to establish the maximum sentence.") (citations omitted). Because *Apprendi* requires these steps if a prosecutor wants the option of requesting a sentence over the unquantified maximum, overruling *Harris* and requiring prosecutors to charge and prove drug quantity to a jury to obtain a mandatory minimum will not impose any significant burden on the system.

3. Even in federal districts where it is not common practice to charge drug quantity and prove it to a jury beyond a reasonable doubt, overruling *Harris* will not impose an undue burden on the system. As one court of appeals observed in the wake of *Apprendi*, "[i]t will not be unduly difficult for juries to determine whether an offense involved a specific threshold drug quantity. *** Juries in state drug-trafficking prosecutions routinely perform this function." *United States* v. *Promise*, 255 F.3d 150, 157 n.6 (4th Cir. 2001). In addition, "[s]ince *Apprendi*, federal district courts have proceeded in this manner, submitting special interrogatories to the jury for determination of drug type and quantity, and many have been operating in this manner since *Jones* v. *United States*, 526 U.S. 227 (1999)." *Vazquez*, 271 F.3d at 114 (Becker, J., concurring).

III. OVERRULING *HARRIS* IS CONSISTENT WITH THIS COURT'S PRECEDENT, THE STATUTORY STRUCTURE OF 21 U.S.C. § 841, AND SOUND SENTENCING POLICY.

A. *Harris* Was Inconsistent With *Apprendi* When Decided, And Is Inconsistent With This Court's Subsequent Jurisprudence.

As Justice Breyer observed in *Harris*, one "cannot easily distinguish *Apprendi* . . . from [*Harris*] in terms of logic." 536 U.S. at 569 (Breyer, J., concurring). *Apprendi* requires that any fact that "increase[s] the prescribed range of penalties to which a criminal defendant is exposed" be proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. The plurality in *Harris* characterized that holding as allowing the judge "to impose any sentence below the maximum" once the jury has found the facts necessary to determine that maximum. 536 U.S. at 565 (plurality opinion). Justice Breyer joined the plurality in *Harris* because of his continuing disagreement with *Apprendi*, *id.* at 569 ("I cannot yet accept its rule."), not because of any agreement with the plurality's line drawing. The resulting 4-1-4 decision has led to 10 years of jurisprudential Twister by this Court and considerable confusion in the lower courts over the relationship between *Apprendi* and *Harris*. See, *e.g.*, *United States* v. *O'Brien*, 130 S. Ct. 2169, 2183 n.5 (2010) (Stevens, J., concurring).

Ten years later, *Apprendi* is the settled law of the land; it has been applied consistently and universally by this Court and the lower courts. See, *e.g.*, *id.* at 2174–75; *United States* v. *Booker*, 543 U.S. 220, 244 (2005). And Justice Breyer appears to have accepted its rule. *O'Brien*, 130 S. Ct. at 2183 n.6 (Stevens, J., concurring) (quoting Justice Breyer's com-

ment during oral argument that "at some point I guess I have to accept *Apprendi*, because it's the law and has been for some time"). With *Apprendi*'s precedential status no longer in doubt, *Harris* is ripe for reconsideration. *Cf. United States* v. *Darby*, 312 U.S. 100, 115–16 (1941) (observing the propriety of reversing a relatively recent opinion by a divided court that is in tension with both prior and subsequent cases); *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 598 (1941) (same).

1. This Court's approach to mandatory sentencing guidelines under *Apprendi* reveals the dissonance created by *Harris*'s holding. As noted above, the subparagraphs of § 841(b)(1) prescribe a series of sentencing ranges based on drug quantity. Moving from one range to another increases both the defendant's statutory maximum and range of exposure. All of this Court's post-*Apprendi* precedents on sentencing regimes that previously allowed judges, acting unilaterally, to increase defendants' sentences looked to the effect that an uncharged, judge-found fact had on the statutory maximum. See *Cunningham* v. *California*, 549 U.S. 270, 288–89 (2007); *Booker*, 543 U.S. at 243–44; *Blakely* v. *Washington*, 542 U.S. 296, 303–04 (2004).

In *Booker*, a jury found the defendant guilty of possession with the intent to distribute 92.5 grams of crack cocaine, which exposed him to a statutory range of 10 years to life under § 841(b)(1)(A)(iii) and a Sentencing Guidelines range of 210 to 262 months. *Booker*, 543 U.S. at 226. At sentencing, a showing that Booker was responsible for an additional 566 grams increased the Guidelines range to 360 months to life. *Id.* Although Booker's sentence was still within the statutory maximum of the offense of conviction

(life), the Guidelines set a different mandatory ceiling that was also constitutionally relevant. *Id.* at 233–34. Defendants may only be sentenced at or beneath the statutory maximum determined "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 232 (quoting *Blakely*, 542 U.S. at 303). This feature of the Guidelines, this Court held, meant that they could not be binding. *Id.* at 245; see also *Cunningham*, 549 U.S. at 293 (holding that when a state's determinate sentencing statute "authorizes the judge, not the jury, to find the facts *permitting* an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent") (emphasis added). The lower bounds of the Guidelines ranges were equally advisory because "Congress would not have authorized a mandatory system in some cases and a non-mandatory system in others, given the administrative complexities that such a system would create." *Booker*, 543 U.S. at 266.

Without requiring that drug quantity be proved to a jury beyond a reasonable doubt, the sentencing range scheme in § 841(b)(1) is just as constitutionally problematic as the sentencing regimes in *Blakely*, *Booker*, and *Cunningham*. As with the sentencing regimes in those cases, drug quantity under § 841 is an aggravating factor that increases a defendant's range of punishment beyond the range authorized by jury-found facts. Regardless of whether drug quantity found by a sentencing judge sets or increases a mandatory minimum, or increases the statutory maximum, the resulting increased range is invalid under *Apprendi*. Additionally, the circuits that have accommodated *Harris* by rewriting the drug statute have created the administrative complexities this Court avoided in *Booker*. See *Booker*, 543 U.S. at

266. Overruling *Harris* and holding that facts establishing increased ranges must be proved to a jury beyond a reasonable doubt is consistent with the constitutionally-required method for increasing sentencing ranges and avoiding unnecessary complexity in sentencing regimes.

2. The tension between *Harris* and *Apprendi*, as recognized by several justices, has been evidenced by the chaos among the circuits. Even at the time that *Harris* was decided, a majority of the justices believed that it was necessarily inconsistent with *Apprendi*. *Harris*, 536 U.S. at 569 (Breyer, J., concurring); *id.* at 572 (Thomas, J., dissenting). The logical and constitutional problems *Harris*'s rule poses in the context of § 924 are equally dramatic in the context of § 841. Compare *Gonzalez*, 420 F.3d at 126–27 (2d Cir.), with *Washington*, 558 F.3d at 719 (7th Cir.).

B. Treating Drug Quantity As An Element For Mandatory Minimum Sentences Is Consistent With § 841(b)(1).

Although this Court has not confronted whether the structure of § 841(b)(1) necessitates pairing mandatory minimums with their corresponding statutory maximums, see *Washington*, 558 F.3d at 720, such confrontation should not be necessary. This Court has consistently paired minimums and maximums. *E.g.*, *Booker*, 543 U.S. at 227. And the courts of appeals that have explicitly considered the question find mixing and matching minimums and maximums incongruous. See *Gonzalez*, 420 F.3d at 121–22; *Velasco-Heredia*, 319 F.3d at 1086; *Graham*, 317 F.3d at 274. The structure of § 841(b)(1) precludes any other conclusion. Yet a number of courts of appeals have mixed and matched statutory provisions

without regard to whether that practice is consistent with the language of the statute. Overruling *Harris* would end that practice and ensure that § 841 is enforced as written.

1. Without squarely addressing the issue, this Court has repeatedly treated paired mandatory minimums and maximums as ranges. When this Court dealt with § 841 itself in *Booker*, it described Clause (b)(1)(A)(iii) as "prescrib[ing] a minimum sentence of ten years in prison and a maximum sentence of life for" the "offense" of possession with intent to distribute at least 50 grams of crack. *Booker*, 543 U.S. at 227. This language recognizes the link between a specific drug quantity finding and both the minimum and the maximum sentences. That correct reading of the statutory language was reinforced in *Kimbrough* v. *United States*, 552 U.S. 85 (2007), where this Court's analysis rested on the connection between particular drug quantities and sentencing "brackets." *Id.* at 102–03. The court observed that § 841 fixes the range of available sentences through the brackets defined by statutory minimums and maximums, but "says nothing about the appropriate sentences within *these brackets*." *Id.* at 103 (emphasis added).

2. When interpreting other sentencing statutes, this Court has held that separate clauses in sentencing provisions should be treated as independent wholes where a fact is paired with a consequence. See *Jones*, 526 U.S. at 233; *Apprendi*, 530 U.S. at 478. In *Jones*, this Court grouped particular facts with particular sentencing consequences when determining that the carjacking statute, 18 U.S.C. § 2119, as it existed at the time, described three crimes, each with its own sentencing range, rather than one crime with three possible sentencing

ranges. *Jones*, 526 U.S. at 232–33, 252. Each subparagraph of § 841(b)(1) also conditions progressively higher sentencing consequences (specific minimum and maximum sentences) on further facts (specific drug quantities). Each clause therefore should be treated as an independent whole. *Graham*, 317 F.3d at 274.

Consider § 841(b)(1)(A): The subparagraph begins, "In the case of a violation of subsection (a) of this section involving—." Eight numbered clauses describing quantities of various types of illegal drugs follow, each separated by a semicolon and the disjunctive "or." Within the *Jones* framework, these clauses regarding drug quantity and type are the facts necessary for the prescribed penalty. Following these clauses, the same sentence from the start of the subparagraph continues with the sentencing consequence, "such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life ***." The language of the statute draws no distinction between the minimum of 10 years and the maximum of life; not even a comma separates them.

The sentences that follow detailing the consequences of additional aggravating facts emphasize the unitary nature of the subparagraph. They speak in terms of "any sentence under this subparagraph" and "any person sentenced under this subparagraph." Not one statement explicitly applies to a person sentenced under the mandatory minimum of one subparagraph but the statutory maximum of another subparagraph. See *Velasco-Heredia*, 319 F.3d at 1086 (holding that linking a minimum from subparagraph (B) with the maximum from former subparagraph

(D) "fails because it distorts the intent by Congress and creates a link where there is not one").

Moreover, to the extent that the consequences of these additional aggravating facts result in sentences that are identical across subparagraphs, they are nonetheless repeated in each subparagraph. Compare § 841(b)(1)(A) ("[I]f death or serious bodily injury results from the use of such substance[, as enumerated in the preceding clauses, the sentence] shall be not less than 20 years or more than life"), with § 841(b)(1)(B) ("[I]f death or serious bodily injury results from the use of such substance[, as enumerated in the preceding clauses, the sentence] shall be not less than 20 years or more than life"). See also *Gonzalez*, 420 F.3d at 121. Nothing in any of the subparagraphs suggests that the statutory minimums and maximums can be disaggregated from each other or from the corresponding drug quantities. See *id.* at 122 ("Much less does the statutory structure of § 841 suggest Congress's intent to cast drug quantity in a dual role: performing as a sentencing factor for purposes of determining the applicable minimum sentence but as an element for purposes of determining the applicable maximum.").

3. The courts of appeals that have chosen to sever § 841's minimums from its maximums have done so while disregarding the violence done to the statute. The Seventh Circuit, for example, acknowledged the statutory construction problem only in hindsight. Compare *Washington*, 558 F.3d at 720, with *Clark*, 538 F.3d at 811–12 (applying, without analysis, a hybrid sentencing range of 10 to 20 years). The First Circuit analyzed the text, structure, and history of the statute at length. See *Goodine*, 326 F.3d at 31–32. It questioned whether the drug quan-

tity provisions were drafted in the same way that sentencing factors are typically drafted, but did not even consider whether the fact that the minimums and maximums were paired in distinct subparagraphs was relevant to its interpretive task. See *id.*

Other circuits, including the Fifth Circuit and the Eighth Circuit, have not considered the structure of the statute at all. See *Keith*, 230 F.3d at 786–87; *United States* v. *Serrano-Lopez*, 366 F.3d 628, 637–39 (8th Cir. 2004). And the Sixth Circuit initially applied *Apprendi* to statutory ranges, see *United States* v. *Flowal*, 234 F.3d 932, 936 n.2 (6th Cir. 2000), but ignored the structure of § 841 entirely after *Harris* and applied *Harris* to mandatory minimums indiscriminately, see *Leachman*, 309 F.3d at 383. Overruling *Harris* will require courts to treat each of the sentencing ranges in the statute as an independent whole, a result that is consistent with the text and structure of the statute.

4. Mixing and matching is not only inconsistent with the statute, but also creates a notice concern and prevents the jury from playing its proper role under the Sixth Amendment. When courts allow mixing and matching, it is "impossible to know until the final, sentencing phase of the litigation that drug quantity was an element of the crime of conviction" that should have been pleaded and proved to the jury beyond a reasonable doubt. *Gonzalez*, 420 F.3d at 124. Long before sentencing, however, an understanding of which facts must be pleaded and proved directly impacts defendants in "decid[ing] whether to challenge the sufficiency of the government's case or pursue plea negotiations," and trial judges in "rul[ing] on the relevancy and sufficiency of evidence, prepar[ing] jury instructions, and ensur[ing] the fac-

tual bases for guilty pleas." *Id.* at 131; see also Fed. R. Crim. P. 11(b)(1)(I) ("Before the court accepts a plea of guilty or nolo contendere, *** the court must inform the defendant of, and determine that the defendant understands *** any mandatory minimum penalty."). In addition, courts that wait until the sentencing phase to determine whether drug quantity is an element strip juries of their "function as a circuit-breaker in the State's machinery of justice" by "relegat[ing them] to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306–307.

C. Treating Drug Quantity As An Element For Mandatory Minimum Sentences Reduces Racial Disparity In Sentencing.

The newest empirical sentencing research shows that mandatory minimum sentences contribute significantly to sentencing disparities between black and white defendants. A disproportionate number of black defendants receive mandatory minimum sentences. See *2011 Report* 148, 154; Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1687 (2012). This sentencing disparity is exacerbated by the fact that *Harris* permits sentencing judges to impose mandatory minimum sentences where facts are not charged or proved to the jury. Recent studies show that mandatory minimum sentences are disproportionately imposed on black offenders, and support the conclusion that overruling *Harris* will reduce unwarranted sentencing disparities between black and white defendants.

1. Two recent studies conclude that mandatory minimums and prosecutorial discretion are signifi-

cant causes of unwarranted racial sentencing disparities. Professors Joshua B. Fischman and Max M. Schanzenbach's latest research indicates while "[t]he disparity between white and black offenders in prison sentences" has increased after *Rita* v. *United States*, 551 U.S. 338 (2007), *Gall* v. *United States*, 552 U.S. 38 (2007), and *Kimbrough*, "this [disparity] is largely a consequence of *** mandatory minimums." Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 752 (2012). The authors conclude that "judicial discretion likely reduces racial disparities" in the current sentencing regime. *Id.* at 730. The data further indicates that "when mandatory minimums are less relevant, sentences fell by the same proportion for whites and blacks." *Id.* at 761.

Another study likewise concludes that "racial disparities in recent years have been mostly driven by the cases in which judges have the least sentencing discretion: those with mandatory minimums." Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in the Criminal Justice Process: Prosecutors, Judges, and the Effects of* United States v. Booker 48 (U. Mich. L. & Econ. Research Paper No. 12-021, 2012), available at http://ssrn.com/abstract=2170148. The authors, Professors Sonja B. Starr and M. Marit Rehavi, examined data that allowed them to control for a number of factors, including arrest offense, criminal history, district, age, the presence of multiple defendants, and county-level poverty, unemployment, income, and crime statistics. *Id.* at 18. After controlling for all of these variables, "black men were still nearly *twice* as likely to be charged with a mandatory minimum offense: 8% of white males faced such a

charge, compared to nearly 16% of otherwise-similar black males." *Id.* at 19. Even after applying additional controls, including controls for arrest offense and criminal history, the data still indicated a 10% disparity in black-white sentencing in non-drug cases. *Id.* Significantly, when drug cases were added, that disparity rose to 14%. *Id.* And yet "*[n]o significant disparity remained after controlling for the mandatory minimum of conviction*" in drug cases. *Id.* (emphasis added). Imposing the same control in non-drug cases had the same result: "[T]he otherwise-unexplained racial disparity in the average sentence disappeared." *Id.* In other words, the mandatory minimum sentences imposed in both kinds of cases caused the disparity. It should be noted that Starr and Rehavi found "no evidence that *Booker* increased racial disparity in the exercise of judicial discretion; if anything it may have reduced it." *Id.* at 40.

Starr and Rehavi also note that "the most common non-drug mandatory minimum in our data, and the one most responsible for driving sentencing disparities, was 18 U.S.C. § 924(c)," *id.* at 19, the statute at the heart of Alleyne's case. That enhancement "hit[s] black men particularly hard both because they are more frequently arrested for gun crimes *and* because of large apparent disparities in prosecutors' exercise of charging discretion." *Id.* at 50.

2. The disproportionate impact on black defendants that these studies identify is consistent with Sentencing Commission data. One report found: "Blacks accounted for 48 percent of the offenders who appeared to qualify for a charge under 18 U.S.C. § 924(c) but represented 56 percent of those who were charged under the statute and 64 percent of those

convicted under it." U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 90 (2004), available at http://www.ussc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/15_year_study_full.pdf. In the drug context, another report indicated that, while black defendants make up only 27% of all drug offenders, they make up 40% of drug offenders subject to mandatory minimum penalties at sentencing. *2011 Report* 154.

3. Overruling *Harris* will mean that prosecutors will only be able to obtain harsh penalties for a higher drug quantity when they have sufficient evidence to prove it to a jury beyond a reasonable doubt, or to convince a defendant to agree to quantity. This will result in fewer mandatory minimums being imposed, or even charged in the first place. This, in turn, will mitigate the harsh effects of mandatory minimums on black defendants and reduce racial disparity in sentencing.

If *Harris* is overruled, Assistant United States Attorneys will be required to charge drug quantity and prove it to a jury beyond a reasonable doubt in order to obtain mandatory minimum penalties. The government will not be able to obtain a defendant's agreement in marginal cases, and will inevitably fail to meet its burden to prove quantity beyond a reasonable doubt in at least some cases. Verdict forms in actual cases demonstrate that juries sometimes acquit defendants of charged drug quantities, leading judges to impose sentences below the charged mandatory minimum. See, *e.g.*, Verdict Form, *United States* v. *Smith*, No. 1:07-cr-00153-TFH (D.D.C. June 12, 2007), ECF No. 497 (determining the government

had "not proven" a quantity sufficient to set any mandatory minimum); Judgment & Commitment Order, *Smith*, *supra*, ECF No. 554 (demonstrating that defendant Brown was "found guilty" of § 841(c)(1)(C), the "[l]esser included offense of Count 1"); Verdict Form, *United States* v. *Olivo*, No. 1:06-cr-00069-ML-LDA (D.R.I. June 7, 2006), ECF No. 37 (finding defendant responsible for a lower drug quantity than that charged in indictment); Judgment & Commitment Order, *Olivo*, *supra*, ECF No. 50 (sentencing defendant below ten-year mandatory minimum that would have applied had jury found charged quantity); Verdict Form, *United States* v. *Longoria*, No. 2:05-cr-14075-DLG (S.D. Fla. Sept. 27, 2005), ECF No. 103 (finding defendant responsible for a lower drug quantity than that charged in indictment); Judgment & Commitment Order, *Longoria*, *supra*, ECF No. 126 (sentencing defendant below ten year mandatory minimum that would have applied had jury found charged quantity).

While many prosecutors already charge drug quantity and submit it to a jury for a beyond-a-reasonable-doubt finding, see Part II.B, *supra*, seven circuits do not require this practice to set or increase a mandatory minimum. The cases at the heart of the split demonstrate that drug quantity is not always pleaded and proved. It is clear that, in at least some cases, prosecutors exercise their discretion not to charge drug quantity. See, *e.g.*, *United States* v. *Wilson*, 244 F.3d 1208, 1214–16 (10th Cir. 2001). If this Court declines to overrule *Harris*, the circuits that allow mixing and matching will continue to "permit the government in the guilt phase of a case to prove beyond a reasonable doubt that only one kilogram of marijuana was involved in the offense, and then at sentencing to prove 101 kilograms by a preponder-

ance of the evidence." *Velasco-Heredia*, 319 F.3d at 1086. Moreover, raising the standard of proof will lead prosecutors to decline to charge a mandatory minimum in marginal cases.

As a consequence of both the higher standard for proving quantity and the reduction in mandatory minimums charged, fewer mandatory minimum sentences will be imposed. Because a higher percentage of black defendants are subjected to mandatory minimums, fewer mandatory minimum sentences across the board will reduce racial disparity in sentencing.

4. Additionally, requiring drug quantity to be proved to the jury will help ensure that defendants' rights are protected. If *Harris* is overruled, defendants may, "as a matter of trial strategy, *** choose between denying the commission of the crime outright" and contesting facts that require mandatory punishment. *Vazquez*, 271 F.3d at 115 n.2 (Becker, J., concurring). The need to make this kind of choice is inherent in any criminal statute where "penalties vary according to different elements." *Id*. Some defendants may also choose to stipulate to such facts before trial, and *Apprendi* gives them the opportunity to make that choice. Allowing prosecutors to prove mandatory minimum facts to a judge at sentencing by a mere preponderance gives prosecutors more power over the outcome than the sentencing judge. As Alleyne's case illustrates, in most cases, a judge honestly following the law will find the fact triggering a mandatory minimum sentence by a preponderance, and once he does, he has no discretion but to impose the mandatory minimum.

5. A decision resulting in fewer mandatory minimum sentences is unlikely to have any adverse con-

sequences for public safety. The Sentencing Commission has concluded that "certain mandatory minimum provisions apply too broadly, are set too high, or both, to warrant the prescribed minimum penalty." *2011 Report* 345. And leading sentencing scholar Michael Tonry has explained: "The evidence is *** clear that mandatory penalties have either no demonstrable marginal deterrent effects or short-term effects that rapidly waste away." MICHAEL TONRY, SENTENCING MATTERS 135 (1996).

CONCLUSION

Harris v. *United States*, 536 U.S. 545 (2002), should be overruled.

Respectfully submitted.

FRANK M. DICKERSON III
CHARLES M. WOODWORTH
Mayer Brown LLP
71 S. Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

STEVEN R. SHAPIRO
EZEKIEL R. EDWARDS
American Civil Liberties Union
125 Broad Street
New York, NY 10004
(212) 549-2500

ALISON SIEGLER
Counsel of Record
University of Chicago Law School
Federal Criminal Justice Clinic
1111 E. 60th Street
Chicago, Illinois 60637
(773) 834-1680
alisonsiegler@uchicago.edu

Counsel for Amici Curiae

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