ORAL ARGUMENT SCHEDULED JANUARY 30, 2012

No. 06-3070

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRYAN A. BURWELL,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
04-Cr.355-05

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to those persons and entities listed by Appellant, the following listed persons and entities as described in Circuit Rule 29 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL"), a nonprofit corporation, is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct.[1] Founded in 1958, NACDL's mission is to ensure justice and due process for persons accused of crime; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of criminal justice. NACDL is the only national bar association working in the interest of public and private criminal defense attorneys and their clients.

NACDL has more than 10,000 direct members and 90 state, local, and international affiliate organizations, totaling more than 40,000 members. The membership includes private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system. NACDL provides *amicus* assistance on the federal and state level in cases that present issues of importance,

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this *amicus* brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *Amicus Curiae* National Association of Criminal Defense Lawyers hereby certifies that no counsel for a party authored this brief in whole or in part; that no party or counsel for a party contributed money that was intended to fund preparation or submission of this brief; and that no person other than the *amicus curiae*, its members, and its counsel, contributed money that was intended to fund preparation or submission of this brief.

such as the one presented here, to criminal defendants, criminal defense lawyers, the criminal justice system as a whole, and the proper and fair administration of criminal justice.

PRELIMINARY STATEMENT

NACDL agrees with, and will not repeat here, the Statement of Jurisdiction, the Statement of the Issues, and the Statement of the Case in the Brief of Appellant. NACDL also agrees with, and will not repeat here, Appellant's Statement of Relevant Facts and Standard of Review. NACDL will address only one issue on appeal, namely the question of the *mens rea* required by 18 U.S.C. § 924{ TA \l "18 U.S.C. § 924" \s "18 U.S.C. § 924" \c 2 }(c)(1)(B)(ii), which requires a mandatory minimum consecutive 30-year sentence when a firearm possessed by a person convicted under 18 U.S.C. § 924(c) is a machine gun.

SUMMARY OF THE ARGUMENT

Bryan Burwell was convicted of RICO conspiracy, armed bank robbery and conspiracy to commit bank robbery. For these crimes, he received concurrent sentences of 135, 135 and 60 months, respectively. He also was convicted under 18 U.S.C. § 924(c)(1)(B)(ii){ TA \s "18 U.S.C. § 924" } for using or carrying a "machinegun" in connection with a bank robbery. Pursuant to § 924(c)(1)(B)(ii), the trial court imposed a mandatory 30-year sentence, to run consecutively with the 11-1/4 year sentence he received for his other convictions. Thus, the sentence imposed under § 924(c)(1)(B)(ii) nearly *quadrupled* Mr. Burwell's sentence.

Evidence at trial indicated that Mr. Burwell may not, and perhaps could not, have known the weapon was a machine gun within the statutory definition—the

weapon at issue had been acquired by other members of the conspiracy months before Mr. Burwell joined it, Tr. 5/4/06AM at 3489-90; 5/23/06PM at 5479-82, and experts for the government and the defense agreed that no markings on the weapon indicated that it was capable of operation as a "machinegun." Tr. 5/19/05PM at 5122; Tr. 6/15/05AM at 7285-92. However, § 924(c)(1)(B)(ii) is silent on the question whether knowledge of the firearm's capability as a machine gun is a prerequisite for conviction under the statute, and the District Court granted the United States' request that Mr. Burwell's counsel be precluded from arguing to the jury that such knowledge was required. *United States v. Morrow*, No. 04-355CKK, 2005 WL 3163804 (D.D.C. June 20, 2005){ TA \l "*United States v. Morrow*, No. 04-355CKK, 2005 WL 3163804 (D.D.C. June 20, 2005)" \s "Morrow" \c 1 }.

The trial court and the panel relied on *United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992){ TA \l "*United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992)" \s "Harris" \c 1 }, in finding no *scienter* required under § 924(c)'s machine gun provision. *{ TA \l "*United States v. Burwell*, 642 F.3d 1062 (2011)" \s "Burwell" \c 1 }United States v. Burwell*, 642 F.3d 1062, 1070 (2011). However, the *Harris* Court premised its ruling on a view of "the structure of § 924(c) and the function of *scienter* in it" that is no longer viable in light of the Supreme Court's decision in *United States v. O'Brien*, 130 S. Ct. 2169, 2180 (2010){ TA \l "*United States v. O'Brien*, 130 S. Ct.

2169, 2180 (2010)" \s "O'Brien" \c 1 }. Although the *O'Brien* Court expressly declined to reach the specific issue raised here, its rulings require this Court to revisit the analysis conducted in *Harris*. Doing so makes clear that the machine gun provision does not impose strict liability, but instead requires *mens rea.* Although the statute is silent on the issue of *mens rea*, the Court must presume that *mens rea* is required, absent affirmative evidence of congressional intent to create a strict liability crime. Here, the available evidence of congressional intent demonstrates congressional intent *not* to do so.

This case addresses the important question of the level of *scienter* required by § 924(c)(1)(B)(ii), and its resolution is likely to have a significant effect on the interpretation of other federal criminal statutes that contain no explicit *mens rea* requirement.[2] Federal criminal statutes, which already number in the thousands, are being enacted at an ever-increasing rate. Brian W. Walsh & Tiffany M. Joslyn, *Without Intent*, (Heritage Foundation and National Association of Criminal

[2] In its Opposition to Appellant's Petition for Rehearing and Suggestion of Rehearing *en Banc*, the government argued that, "it does not appear that § 924(c)(1)(B)(ii) affects many defendants," because "the Department of Justice's Office of Legislation and Policy advises that, based on data provided by the U.S. Sentencing Commission, the Burwell defendants were the only defendants convicted under the provision in this Circuit between 2000 and 2010." Opp'n to Appellant's Pet. for Reh'g and Suggestion of Reh'g *en Banc* at 13 n.16. The data upon which the government purports to rely, however, is unavailable to Appellant. Moreover, a Westlaw search by counsel for *amicus curiae* reveals more than three dozen reported decisions by district and circuit courts applying § 924(c)(1)(B)(ii) in that period.

Defense Lawyers 2010){ TA \l " Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* (Heritage Foundation and National Association of Criminal Defense Lawyers 2010)" \s "*Without Intent*" \c 3 } at 5-6. These statutes are often drafted without "clarity and specificity" with regard to the *scienter* requirement, leading to "uncertainty as to whether a *mens rea* in a criminal offense applies to all of the elements of the offense or, if not, to which elements it does apply." *Id*{ TA \s "Without Intent" }. at 7. Resolution of this case will help shape the means by which courts determine congressional intent with regard to *mens rea* with regard to the provisions of such statutes.

ARGUMENT

I. THIS COURT'S ANALYSIS IN *UNITED STATES v. HARRIS* IS NO LONGER VIABLE IN LIGHT OF THE SUPREME COURT'S DECISION IN *UNITED STATES v. O'BRIEN*.

Section 924(c) imposes criminal penalties on one who uses a "firearm" in connection with certain predicate offenses. The penalty "skyrockets" when the weapon involved is a "machinegun," as defined in the statute.[3] *Burwell*, 642 F.3d at 1068{ TA \s "Burwell" }. Nearly two decades ago, in *Harris*, this Court held that the machine gun provision of § 924(c) is a sentencing factor, rather than an element of the offense, and that to obtain a conviction under § 924(c), the government was not

[3] The statute defines "machinegun" to include "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 18 U.S.C. § 921(a)(23); 26 U.S.C. § 5845(b).

required to show that the defendant knew the weapon at issue was a "machinegun." Last year, however, in *United States v. O'Brien*{ TA \s "O'Brien" }, 130 S. Ct. 2169 (2010), the Supreme Court held that the machine gun provision is not a sentencing factor, but an element of the offense. *Id.*{ TA \s "O'Brien" } at 2180. Because *O'Brien* negates the premises underlying *Harris*, that decision should be overruled.

A. The Supreme Court's Ruling in *O'Brien* that the Machine Gun Provision of § 924(c)(1)(B)(ii) Is Not a "Sentence Enhancement," But an Element of the Offense, Negates the Foundation on Which *Harris* Is Based.

In concluding that the machine gun provision of § 924(c)(1)(B)(ii) requires no showing of *scienter*, both the trial court and the panel relied on this Court's ruling in *Harris*{ TA \s "Harris" }, 959 F.2d 246 (D.C. Cir. 1992). In *Harris*, appellants were charged, *inter alia*, with violating § 924(c) by possessing or using a machine gun "during and in relation to a drug distribution offense." *Id.*{ TA \s "Harris" } at 249. The jury was instructed that it could convict if it found that appellants "knowingly possessed a weapon and that the weapon was in fact a machine gun." *Id.*{ TA \s "Harris" } at 258. Appellants argued on appeal that this was error, because the government was required to prove not only that they knowingly possessed a weapon, but also that they knew the weapon was a "machinegun" under the statute. *Id.*{ TA \s "Harris"}

The *Harris* Court rejected that argument. The Court recognized that "[i]t is traditional to assume that a criminal statute—unless Congress manifests a contrary

intention—requires the government to show the defendant's *mens rea*," but found "*indicia* . . . namely the structure of section 924(c) and the function of *scienter* in it, [that] suggest[ed] . . . a congressional intent to apply strict liability" to the machine gun provision. 959 F.2d at 258{ TA \s "Harris" }. The *Harris* Court wrote that:

> Consistent with the presumption of mens rea in criminal statutes, we assume that section 924(c) is violated only if the government proves that the defendant engaged in drug trafficking and intentionally used firearms in the commission of a drug trafficking crime. The defendant's knowledge that the objects used to facilitate the crime are "firearms" must be proven and charged to the jury, as it was in this case. *Deliberate culpable conduct is therefore required as to the essential elements of the crime*—the commission of the predicate offense and the use of a firearm in its execution—before the issue of *sentence enhancement* for use of a machinegun arises.

Id.{ TA \s "Harris" *}* at 258-59 (emphasis added). In other words, the *Harris* Court reconciled the "traditional . . . assumption" that *mens rea* is required with its conclusion that no *mens rea* was required with regard to the machine gun provision by finding that the machine gun provision is not an "essential element of the crime," but a "sentence enhancement." *See Jones v. United States*, 526 U.S. 227, 232 (1999){ TA \l "*Jones v. United States*, 526 U.S. 227 (1999)" \s "Jones" \c 1 } ("[m]uch turns on the determination that a fact is an element of the offense rather than a sentencing consideration"). The *Harris* Court made clear that its decision

was premised on the belief that the government was required to prove *mens rea* as to each of the essential elements of the crime.[4]

However, by holding that the machine gun provision of § 924(c)(1)(B)(ii) is an element of the offense rather than a sentencing factor, the Supreme Court's decision in *O'Brien* has dismantled the foundation of *Harris*. The *Harris* Court held that the government must show *mens rea* with regard to each of the "essential elements" of the offense. If, as the Supreme Court held in *O'Brien*, the machine gun provision is an element of the offense, then the basis for the *Harris* Court's decision no longer holds true.

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[4] The panel noted that the *Harris* Court at one point referred to the machine gun provision as an "element of the crime," 959 F.2d at 258{ TA \s "Harris" } (emphasis added), and cited this language to suggest that it is "unclear what impact *O'Brien* has on *Harris*." 642 F.3d at 1070{ TA \s "Burwell" }. However, despite this language, it is clear that the *Harris* Court based its holding on the assumption that the machine gun provision was a "sentence enhancement" rather than an element of the crime. Immediately after referring to the machinegun provision as an "element of the crime," the *Harris* Court distinguished the provision—as a "sentence enhancement"—from the "essential elements" of the crime, and noted that "[d]eliberate culpable conduct" is required as to the "essential elements of the crime," which it described as the predicate offense and the use of a firearm. The *Harris* Court could not have viewed the machinegun provision as an "essential element of the crime" in this sense, because it held that no such conduct was required as to that provision. Moreover, in *United States v. Cassell*, 530 F.3d 1009, 1018 (D.C. Cir. 2008){ TA \l "*United States v. Cassell*, 530 F.3d 1009 (D.C. Cir. 2008)" \s "Cassell" \c 1 }—decided after *Harris* and before *O'Brien*—the Court again made clear that it viewed the machine gun provision as a "sentencing factor[]" rather than an offense element.

B. This Court's Conclusion in *Harris*, that There Is No Difference in *Mens Rea* Between a Defendant Who Uses a "Firearm" and One Who Uses a "Machinegun," Is Inconsistent with *O'Brien*.

In addition to concluding that "the essential elements of the crime"—which the *Harris* Court took to be drug trafficking and use of a firearm—require a showing of *mens rea*, the *Harris* Court also wrote that:

> [T]here does not seem to be a significant difference in *mens rea* between a defendant who commits a drug crime using a pistol and one who commits the same crime using a machinegun; the act is different, but the mental state is equally blameworthy.

959 F.2d at 259{ TA \s "Harris" }. But in *O'Brien*, the Supreme Court made clear that this assumption is incorrect.

In *O'Brien*, respondents pled guilty to using a "firearm" in connection with a crime of violence. At sentencing, the government argued that the machine gun provision was a sentencing factor, and that the Court could impose a heightened sentence for use of a machine gun, even though the provision had not been indicted or tried to the jury. The trial court rejected that argument, finding the machine gun provision to be an element of the crime. 130 S. Ct. at 2173-74{ TA \s "O'Brien" }. The Supreme Court agreed, finding it "not likely that Congress intended to remove the indictment and jury trial protections" from the machine gun provision on the basis of several factors, including the "extreme sentencing increase" attaching to the use of a "machinegun," but also "[t]he immense danger posed by machineguns [and]

the moral depravity in choosing the weapon." *Id.*{ TA \s "O'Brien" } at 2178 (emphasis added).

Thus, the *O'Brien* Court found that § 924(c) creates several distinct crimes, of various seriousness, depending on whether and how a "firearm" is used in commission of a predicate crime, and depending on the character of the "firearm" used. It also held that the varying penalties attaching to those crimes are pegged, *inter alia*, to the defendant's relative moral blameworthiness; *i.e.*, to differing levels of *scienter*. Although the *O'Brien* Court expressly declined to determine whether § 924(c)(1)(B)(ii) requires a showing that the defendant knew that a "firearm" was in fact a "machinegun," it made clear—contrary to the assumption on which the *Harris* Court relied—that a defendant who uses a machine gun in committing a crime is more blameworthy than one who uses a different "firearm."

C. The Trial Court's Interpretation of *Harris* Was Incorrect.

The trial court noted that *Harris* was "arguably undermined" by the Supreme Court's subsequent decision in *Castillo v. United States*, 530 U.S. 120 (2000){ TA \l "*Castillo v. United States*, 530 U.S. 120 (2000)" \s "Castillo" \c 1 }, which held that "the statute used the word 'machinegun' . . . to state an element of a separate, aggravated offense that must be proved beyond a reasonable doubt."[5] *Morrow*{ TA

[5] In *United States v. Brown*, 449 F.3d 154, 158 (D.C. Cir. 2006{ TA \s "Brown" }), decided after the trial court's ruling in this case, this Court wrote that the Supreme Court's holding in *Castillo,*"somewhat undermin[ed] our analysis in *Harris*."

\s "Morrow" }, 2005 WL 3163804, at *3. The trial court wrote that "this ruling might have suggested that the government must prove scienter as to the precise nature of the weapon in order to obtain a 30-year mandatory minimum sentence." *Id.*{ TA \s "Morrow" } However, the trial court held that in 1998, after the events at issue in *Castillo*,[6] Congress "significantly changed the structure" of the statute, by "separating the substantive crime from the penalty provisions [including the machine gun provision] and placing those penalty provisions into different subsections." *Id.*{ TA \s "Morrow" } The trial court noted that since the amendment, "the Circuits have been virtually unanimous in holding that certain factors in the penalty provisions of the new, restructured Section 924(c)(1) [including the character of the weapon] are sentencing factors, and not elements of the crime."[7]

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[6] Although *Castillo* was decided after the 1998 amendment of § 924, it concerned conduct occurring before the amendment.

[7] In the years between *Harris* and *O'Brien*, several Circuits reached the same conclusion as the *Harris* Court; *i.e.*, that § 924(c)(1)'s machinegun provision is a "sentencing enhancement" requiring no *scienter*. *United States v. Ciszkowski*, 492 F.3d 1264, 1268-69 (11th Cir. 2007){ TA \l "*United States v. Ciszkowski*, 492 F.3d 1264 (11th Cir. 2007)" \s "Ciszkowski" \c 1 }; *United States v. Gamboa*, 439 F.3d 796, 812 (8th Cir. 2006){ TA \l "*United States v. Gamboa*, 439 F.3d 796 (8th Cir. 2006)" \s "Gamboa" \c 1 }; *United States v. Nava-Sotelo*{ TA \l "*United States v. Nava-Sotelo*, 354 F.3d 1202 (10th Cir. 2003)" \s "Nava-Sotelo" \c 1 }, 354 F.3d 1202, 1206 (10th Cir. 2003). Other courts assumed, without deciding, that *scienter* is required. *United States v. Franklin*, 321 F.3d 1231{ TA \l "*United States v. Franklin*, 321 F.3d 1231 (9th Cir. 2003)" \s "Franklin" \c 1 }, 1240 (9th Cir. 2003); *United States v. Rodriguez*, 54 F. App'x 739, 747 (3d Cir. 2002){ TA \l "*United States v. Rodriguez*, 54 F. App'x 739 (3d Cir. 2002)" \s "Rodriguez" \c 1 }; *United States v. Dixon*, 273 F.3d 636, 640-41

Id.{ TA \s "Morrow" } As a result, the trial court found that *Harris* was "still good law," and that the machine gun provision carries no *scienter* requirement. *Id.*{ TA \s "Morrow" } at *4.

But in *O'Brien*—decided after Mr. Burwell was convicted—the Supreme Court made clear that, despite the 1998 amendment of § 924, the machine gun provision is not a sentencing factor, but an element of the offense. *O'Brien*{ TA \s "O'Brien" }, 130 S. Ct. 2169 (2010). Thus, *Harris* does not, as the trial court believed, remain "good law" following *O'Brien*.

D. The *En Banc* Court Can, and Should, Overrule *Harris*.

The panel recognized that "*Harris* is potentially inconsistent with *O'Brien* to the extent *Harris* referred to § 924(c)'s machine gun provision as a 'sentence enhancement,'" 642 F.3d at 1070{ TA \s "Burwell" }, but found itself constrained to follow *Harris*.[8] 642 F.3d at 1070-71{ TA \s "Burwell" } ("A panel is bound to abide by [circuit] precedent until it is overturned by the court sitting en banc or by the Supreme Court.") (quoting *Bldg. & Constr. Trades Dep't AFL-CIO v. Allbaugh*,

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(5th Cir. 2001){ TA \l "*United States v. Dixon*, 273 F.3d 636 (5th Cir. 2001)" \s "Dixon" \c 1 }. The First Circuit—in the ruling upheld by the Supreme Court in *O'Brien*—held that *scienter* is required. *United States v. O'Brien*, 542 F.3d 921, 924-26 (1st Cir. 2008); *see also United States v. Rivera-Rivera*, 555 F.3d 277, 291 n.14 (1st Cir. 2009){ TA \l "*United States v. Rivera-Rivera*, 555 F.3d 277 (1st Cir. 2009)" \s "Rivera-Rivera" \c 1 }.

[8] In addition to finding itself bound by *Harris*, the panel suggested that *Harris* remains viable after *O'Brien*. 642 F.3d at 1070-71{ TA \s "Burwell" }. To this extent, the panel erred. *See* Part II, *infra*.

295 F.3d 28, 34 n.* (D.C. Cir. 2002). But the *en banc* Court may, and for the reasons stated herein should, overrule *Harris*.

II. THE PANEL ERRED IN ITS ANALYSIS OF THE *MENS REA* REQUIREMENT.

Strict liability offenses are disfavored, and courts interpreting a criminal provision that is silent on the issue must presume that *mens rea* is required. But the panel wrote that the presumption in favor of *mens rea* is not "trigger[ed]" here because § 924(c) does not risk criminalizing otherwise innocent conduct. This was error. Before a silent statute may be construed to impose strict liability, the court must locate affirmative evidence of congressional intent to dispense with *mens rea*. No such evidence exists here. In fact, the available evidence shows that Congress intended § 924(c)'s machine gun provision to require *mens rea*.

A. Where a Criminal Statute Is Silent, the Court Must Presume that *Mens Rea* Is Required.

Criminal offenses that dispense with a *mens rea* requirement are "disfavored." *Staples v. United States*, 511 U.S. 600, 606 (1994){ TA \l "*Staples v. United States*, 511 U.S. 600 (1994)" \s "Staples" \c 1 }; *see also United States v. United States Gypsum Co.*, 428 U.S. 422, 438 (1978){ TA \l "*United States v. United States Gypsum Co.*, 428 U.S. 422 (1978)" \s "United States Gypsum" \c 1 }. This is because the "background assumption of our criminal law" is that a prohibited act, standing alone, is insufficient to justify punishment, *Liparota v. United States*, 471 U.S.

419, 426 (1985){ TA \l "*Liparota v. United States*, 471 U.S. 419 (1985)" \s "Liparota" \c 1 }; there must also be a "guilty mind." *Staples*, 511 U.S. at 607 n.3{ TA \s "Staples" }. "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence." *United States Gypsum Co.*, 428 U.S. at 436{ TA \s "United States Gypsum" } (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994){ TA \l "*United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994)" \s "X-Citement Video, Inc." \c 1 } (referencing the "background presumption of evil intent" applicable to criminal statutes); *Morissette v. United States*, 342 U.S. 246, 250-51 (1952){ TA \l "*Morissette v. United States*, 342 U.S. 246 (1952)" \s "Morissette" \c 1 } (principle "that an injury can amount to a crime only when inflicted by intention . . . is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil").

Where, as here, a criminal statute is silent on the question of intent, this bedrock principle of our criminal justice system is implemented by means of "an interpretative presumption that mens rea is required." *United States Gypsum*, 438 U.S. at 437{ TA \s "United States Gypsum" } (emphasis added); *see also United States {* TA \l "*United States v. Project on Gov't Oversight*, 616 F.3d 544 (D.C. Cir. 2010)" \s "Project on Gov't Oversight" \c 1 *}v. Project on Gov't Oversight*, 616 F.3d 544, 550 (D.C.

Cir. 2010) ("we must presum[e] that criminal statutes and regulations contain a mens rea element unless otherwise *clearly intimated* in the language or legislative history") (quoting *United States v. Sheehan*, 512 F.3d 621, 629 (D.C. Cir. 2008) (emphasis added)); {TA \l "*United States v. Brown*, 449 F.3d 154 (D.C. Cir. 2006)" \s "Brown" \c 1 }*United States v. Brown*, 449 F.3d 154 (D.C. Cir. 2006) (recognizing a "presumption against strict liability" in criminal statutes). "Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States Gypsum*, 438 U.S. at 438{ TA \s "United States Gypsum" }. Rather, "some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Staples*, 511 U.S. at 606{ TA \s "Staples" }. In sum, the *mens rea* requirement is the default position with regard to a criminal statute that is silent on the issue, and before such a provision can be deemed to impose "strict liability," there must be affirmative "evidence of a contrary legislative intent." *United States v. Nofziger*, 878 F.2d 442, 452 (D.C. Cir. 1989){ TA \l "*United States v. Nofziger*, 878 F.2d 442, 452 (D.C. Cir. 1989)" \s "Nofziger" \c 1 }; *see also Gov't Oversight*, 616 F.3d at 550{ TA \s "Project on Gov't Oversight" }.

The *Harris* Court recognized the "presumption in favor of *mens rea*," and applied it to what it took to be the "essential elements of the crime"—"the commission of the predicate offense and the use a firearm in its execution." 959

F.2d at 258{ TA \s "Harris" }. However, after finding *mens rea* with regard to what it considered the statute's "essential elements," the Court held that the machine gun provision was a "sentence enhancement" requiring no showing of *mens rea*.

The Supreme Court's ruling last year in *O'Brien* makes clear that the basis for the *Harris* Court's ruling—its understanding of the "structure of section 924(c) and the function of scienter in it"—was incorrect. The machine gun provision is not a "sentence enhancement," but an element of the crime, and the presumption in favor of *mens rea* applied by the *Harris* Court with regard to what it took to be the elements of the crime also applies to the machine gun provision.

The panel in this case recognized that *Harris* is "potentially inconsistent" with *O'Brien*, and acknowledged the presumption in favor of *mens rea*, but found the presumption in favor of *mens rea* not "trigger[ed]" with regard to the machine gun provision because the presumption "applies with the most force to 'statutory elements that criminalize otherwise innocent conduct,'" and "924(c) does not pose any danger of ensnaring 'an altar boy [who made] an innocent mistake.'" *Harris*, 642 F.3d at 1071{ TA \s "Harris" }. But even if the presumption applies with less force to § 924(c)(1)(B)(ii), the presumption nevertheless applies, and it was error for the panel to ignore that presumption absent affirmative evidence that Congress intended no *scienter* requirement.

The presumption in favor of *mens rea* applies even where *mens rea* is not

required to ensure that otherwise lawful conduct is not criminalized. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1242 (D.C. Cir. 2008){ TA \l "*United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008)" \s "Villanueva-Sotelo" \c 1 } (although the Supreme Court "has found it 'particularly appropriate' to extend a *mens rea* requirement when failure to do so would result in a statute criminalizing nonculpable conduct, . . . [it] has never held that avoiding such a result is the only reason to do so"). For example, in *Morissette*, the Court interpreted a statute making it a crime to "knowingly convert[ ] . . . property of the United States" to require proof not only that the defendant intended to "convert" property, but also that he knew it was property of the United States. 342 U.S. at 271{ TA \s "Morissette" }. And in *Flores-Figueroa v. United States*, 556 U.S. 646, 129 S. Ct. 1886 (2009){ TA \l "*Flores-Figueroa v. United States*, 556 U.S. 646, 129 S. Ct. 1886 (2009)" \s "Flores-*Figueroa*" \c 1 }, the Court considered the crime of aggravated identity theft under 18 U.S.C. § 1028A{ TA \l "18 U.S.C. § 1028A" \s "18 U.S.C. § 1028A" \c 2 }. That statute imposes a mandatory consecutive two-year prison term upon individuals convicted of certain predicate crimes if, during or in relation to the commission of those other crimes, the offender "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. § 1028A{ TA \s "18 U.S.C. § 1028A" }(a)(1). The question before the *Flores-Figueroa* Court was whether the statute required the

government to show that the defendant knew that the "means of identification" he or she unlawfully transferred, possessed, or used, in fact belonged to "another person" (as opposed to being a group of numbers that did not correspond to any real Social Security number). The Court unanimously concluded that it did, even though a defendant facing conviction under the statute necessarily has been convicted of a predicate crime, and even though the defendant's conduct—providing a false social security number—is not otherwise lawful. 129 S. Ct. at 1888{ TA \s "Flores-Figueroa" }; *see also Villanueva-Sotelo{* TA \s "Villanueva-Sotelo" *}*, 515 F.3d at 1243.

Justice Alito wrote separately, to stress the importance of context in interpreting such statutes:

> [T]he Government's interpretation leads to exceedingly odd results. Under that interpretation, if a defendant uses a made-up Social Security number without having any reason to know whether it belongs to a real person, the defendant's liability under § 1028A(a)(1) depends on chance: If it turns out that the number belongs to a real person, two years will be added to the defendant's sentence, but if the defendant is lucky and the number does not belong to another person, the statute is not violated.

Id. at 1896{ TA \s "Flores-Figueroa" }{ TA \s "Flores-Figueroa" } (Alito, J., concurring). Section § 924(c)(1)(B)(ii) is analogous—but with much higher stakes for the defendant. Under the government's framework, a defendant's liability would also depend on chance: Where a defendant has no knowledge of the weapon's character, and did not make the more "moral[ly] deprav[ed]" choice to use a

machine gun (as opposed to another type of "firearm"), his actions would be the same and he would be equally blameworthy whether the firearm is capable of automatic fire or not. But even though there would be no difference in his actions or mental state, his sentence would be increased exponentially in the former case. Justice Alito found two additional years too much to leave to chance in this way. The 25 additional years the government seeks here is clearly far too much.

B. The Available Evidence of Congressional Intent Shows that *Mens Rea* Is Required.

Before concluding that the machine gun provision carries strict liability, the panel was required to locate "some indication of congressional intent, express or implied," that this be the case. *Staples*{ TA \s "Staples" }, 511 U.S. at 606. Having failed to identify any such indication, the panel erred in concluding that that the presumption in favor of *mens rea* does not apply, and that § 924(c)(1)(B)(ii) creates strict liability. In fact, the indicia of congressional intent normally considered by courts attempting to determine whether a silent provision requires intent suggest that in fact, Congress *did not* intend to make § 924(c)(1)(B)(ii) a strict liability offense.

Strict liability "public welfare" statutes are recognized in "limited circumstances," *Staples*, 511 U.S. at 607{ TA \s "Staples" }, but they are "disfavored." *Id.* at 606 (citing *Liparota*, 471 U.S. at 426). Moreover, strict liability offenses "almost uniformly involve[] statutes that provide[] for only light penalties such as

fines or short jail sentences, not imprisonment." *Staples*{ TA \s "Staples" }, 511 U.S. at 616; *see also Castillo*{ TA \s "Castillo" }, 530 U.S. at 127 (2000) (considering severity of punishment in determining whether intent is required); *X-Citement Video*, 513 U.S. at 71{ TA \s "X-Citement Video, Inc." } ("harsh penalties attaching to violations" of a statute are a "significant consideration in determining whether the statute should be construed as dispensing with *mens rea*"); *United States v. Figueroa*, 165 F.3d 111, 115 n.3 (2d Cir. 1998){ TA \l "*United States v. Figueroa,* 165 F.3d 111 (2d Cir. 1998)" \s "Figueroa" \c 1 } (Congress may create strict liability crimes "[i]n some limited circumstances, when the penalties attached to a violation are low and the reputational effects of a conviction are minimal"); *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996){ TA \l "*United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996)" \s "Ahmad" \c 1 } (citing *Staples*, 511 U.S. at 516) ("public welfare offenses have virtually always been crimes punishable by relatively light penalties such as fines or short jail sentences, rather than substantial terms of imprisonment. Serious felonies, in contrast, should not fall within the exception 'absent a clear statement from Congress that *mens rea* is not required.'"); *United States v. O'Brien*, 686 F.2d 850, 853 (10th Cir. 1982){ TA \l "*United States v. O'Brien*, 686 F.2d 850, 853 (10th Cir. 1982)" \s "United States v. O'Brien" \c 1 } ("as a general rule, criminal statutes are interpreted as requiring criminal intent, and this is particularly true in situations in which the offense involved is a felony"); { TA \l "*United States v. Anton*, 683 F.2d

1011 (7th Cir. 1982)" \s "Anton" \c 1 }*United States v. Anton*, 683 F.2d 1011, 1016-17 (7th Cir. 1982) ("[s]trict liability is generally inappropriate when the offense is punishable by imprisonment or other severe sanctions").{ TA \s "Anton" }[9] Section 924(c)(1)(B)(ii) imposes a mandatory, *consecutive* 30-year sentence, an increase of 500% over the penalty authorized by § 924(c)(1)(A)(i) for using or possessing a "firearm" that is not a machine gun in relation to a predicate crime, and which nearly *quadrupled* the sentence Mr. Burwell otherwise would have received. In *Staples*, the Court explained that "the potentially harsh penalty" attached to violation of § 5861(d)—up to 10 years' imprisonment—confirmed its interpretation that the statute required *mens rea*. *Staples*{ TA \s "Staples" }, 511 U.S. at 616. Similarly, in concluding that a provision of a child pornography statute required *mens rea*, the Court in *X-Citement Video* cited "*Staples*' concern with harsh penalties," and the fact that violations of the statute were punishable by "up to 10 years in prison as well as substantial fines and forfeiture." 513 U.S. at 72{ TA \s "X-Citement Video, Inc." } (citing 18 U.S.C. §§ 2252(b), 2253, 2254).

Against the ten-year sentences that the *Staples* and *X-Citement Video* Courts called "harsh," § 924(c)(1)(B)(ii)'s mandatory penalty of a consecutive 30 years to life can only be described as draconian. *See O'Brien*{ TA \s "O'Brien" }, 130 S. Ct. at 2177 (referencing § 924(c)(1)(B)(ii)'s "drastic, sixfold increase" in penalty).

[9] The *Anton* court noted that the Model Penal Code "provides that *no* strict liability offense should carry a sentence of imprisonment." 683 F.2d at 1017{ TA \s "Anton" }.

Imposing such a penalty without regard to a defendant's intent simply does not square with the holdings in *Staples* or *X-Citement Video*, where the Supreme Court found that much lesser penalties were indicative of congressional intent to require *mens rea*. Absent some affirmative evidence that Congress did, in fact, intend to take the extraordinary step of creating a strict liability offense, this factor (particularly in light of the "drastic" increase in penalty attached to the offense), and the presumption in favor of *mens rea*, must carry the day.

C. The Government's Analogy to the Felony Murder Rule Is Inapposite.

In its Opposition to Appellant's Petition for Rehearing and Suggestion of Rehearing *en Banc*, the government argued that "[s]everal federal statutes impose severe penalties without requiring *mens rea* for every offense element," citing, *inter alia*, the felony murder statute, 18 U.S.C. § 1111{ TA \l "18 U.S.C. § 1111" \s "18 U.S.C. § 1111" \c 2 }, under which a defendant may be convicted of murder "even though the homicide is 'unintended.'" Appellee's Opp'n at 9 n.11. But the government draws a false parallel.

In order to obtain a conviction for felony murder, the government must "prove all the positive elements of the underlying felony beyond a reasonable doubt." *United States v. Greene*, 834 F.2d 1067, 1068 (D.C. Cir. 1987){ TA \l "*United States v. Greene*, 834 F.2d 1067 (D.C. Cir. 1987)" \s "Greene" \c 1 }. But under the felony murder rule, the murder and the underlying felony "merge[]," *id*{ TA \s

"Greene"}, and a defendant therefore may not be convicted of and sentenced for both on the basis of a single act. *Whalen v. United States*, 445 U.S. 684, 694 (1980){ TA \l "*Whalen v. United States*, 445 U.S. 684 (1980)" \s "Whalen" \c 1 }. And even though the defendant may be convicted of felony murder where the murder is "unintended," the homicide is "deemed committed with malice," as a result of a "transfer" of the *mens rea* related to the underlying felony to the homicide. *United States v. Pearson*, 159 F.3d 480, 485 (10th Cir. 1998){ TA \l "*United States v. Pearson*. 159 F.3d 480 (10th Cir.1998)" \s "Pearson" \c 1 } (quoting 2 Charles E. Torcia, Wharton's Criminal Law § 147, at 296-97 (15th ed. 1994) (emphasis added); s*ee also United States v. Nichols*, 169 F.3d 1255, 1272 (10th Cir. 1999){ TA \l "*United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999)" \s "Nichols" \c 1 } (citing *Pearson*); *Fauntleroy v. Artuz*, No. 00-CV-2209, 2005 WL 1899498, at *8 (E.D. N.Y. July 18, 2005){ TA \l "*Fauntleroy v. Artuz*, No. 00-CV-2209, 2005 WL 1899498 (E.D.N.Y. July 18, 2005)" \s "Fauntleroy v. Artuz" \c 1 } ("[w]here a person is charged with felony murder, the underlying 'felony' 'is not so much an element of the crime but instead functions as a replacement for the *mens rea* or intent necessary for common-law murder'") (quoting *People v. Berzups*, 49 N.Y.2d 417 (1980). Thus, although a defendant may be convicted of felony murder without intending a homicide, it is not correct, as the government suggests, that felony murder requires no showing of *mens rea*. *See Whalen*{ TA \s "Whalen" }, 445 U.S. at 713 ("while the

underlying felony is an element of felony murder it serves a more important function as an intent-divining mechanism") (quoting *Whalen v. United States*, 379 A.2d 1152, 1160 (D.C. 1977)); *Schad v. Arizona*, 501 U.S. 624, 641 (1991){ TA \l "*Schad v. Arizona*, 501 U.S. 624 (1991)" \s "Schad v. Arizona" \c 1 } (most state felony murder statutes "retained premeditated murder and some form of felony murder . . . as alternative means of satisfying the mental state that first-degree murder presupposes").

By contrast, § 924(c) and the predicate offense are entirely separate offenses. And—as occurred here—a single act by the defendant may support separate convictions, and sentences, for either or both offenses, depending on the evidence with regard to each separate statute's distinct elements. The unique "transfer" of *mens rea* that occurs in the case of felony murder is simply inapposite here.

More importantly, Congress enacted the felony murder statute against the backdrop of a long tradition, beginning with the common law, of punishing "unintended" homicides committed during particular felonies as though the homicides were intended. *See Schad v. Arizona*, 501 U.S. at 640{ TA \s "Schad v. Arizona" } ("At common law, murder was defined as the unlawful killing of another human being with 'malice aforethought.' The intent to kill and the intent to commit a felony were alternative aspects of the single concept of 'malice aforethought.'") (citing 3 J. Stephen, History of the Criminal Law of England 21-

22 (1883)); *see also United States v. Heinlein*, 490 F.2d 725, 736 (D.C. Cir. 1973){ TA \l "*United States v. Heinlein*, 490 F.2d 725 (D.C. 1973)" \s "Heinlein" \c 1 } (noting "the persistence of the common law concept of felony-murder"); Wayne R. LaFave & Austin W. Scott, Jr., Handbook on Criminal Law § 71 (West 1972){ TA \l "Wayne R. LaFave & Austin W. Scott, Jr., Handbook on Criminal Law § 71 (West 1972)" \s "Handbook on Criminal Law" \c 3 } ("[a]t the early common law one whose conduct brought about an unintended death in the commission or attempted commission of a felony was guilty of murder"). In enacting the federal felony murder statute, Congress was certainly aware of this tradition, and the "persistence" of that tradition provides affirmative evidence of congressional intent not to require a showing of *mens rea*—separate from that required for the underlying felony—to support a felony murder conviction. No such tradition exists with regard to § 924(c)(1)(B)(ii).

CONCLUSION

This Court's holding in *Harris*, that 18 U.S.C. § 924(c)(1)(B)(ii) requires no showing of *mens rea*, was premised on assumptions that no longer hold true in light of the Supreme Court's decision in *O'Brien*. *Harris* should therefore be overruled. And because the available evidence of congressional intent suggests that Congress did not intend the statute to impose strict liability, the Court should apply the presumption in favor of *mens rea* to § 924(c)(1)(B)(ii), and require,

before the mandatory minimum 30-year consecutive sentence may be imposed, proof that the defendant knew the weapon at issue was a "machinegun" within the statutory definition.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 5,573 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of November, 2011, I caused this Brief of National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Appellant to be filed via the CM/ECF filing system, which will then send notification of such filing to all counsel of record.

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