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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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UNITED STATES *v.* O'BRIEN ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

No. 08–1569. Argued February 23, 2010—Decided May 24, 2010

Respondents O'Brien and Burgess each carried a firearm during an attempted robbery. Count three of their indictment charged them with using a firearm in furtherance of a crime of violence, which carries a mandatory minimum 5-year prison term. 18 U. S. C. §924(c)(1)(A)(i). Count four alleged use of a machinegun (here, a pistol that authorities believed operated as a fully automatic firearm) in furtherance of that crime, which carries a 30-year mandatory minimum term. §924(c)(1)(B)(ii). The Government moved to dismiss the fourth count on the basis that it could not establish the count beyond a reasonable doubt, but it maintained that §924(c)(1)(B)(ii)'s machinegun provision was a sentencing enhancement to be determined by the District Court upon a conviction on count three. The court dismissed count four and rejected the Government's sentencing-enhancement position. Respondents then pleaded guilty to the remaining counts. The court sentenced O'Brien to a 102-month term and Burgess to an 84-month term for their §924(c) convictions. In affirming the District Court's §924(c)(1)(B)(ii) ruling, the First Circuit looked primarily to *Castillo v. United States*, 530 U. S. 120, which held that the machinegun provision in an earlier version of §924(c) constituted an element of an offense, not a sentencing factor. The court found that *Castillo* was "close to binding," absent clearer or more dramatic changes than those made by Congress' 1998 amendment of §924(c) or a clearer legislative history.

Held: The fact that a firearm was a machinegun is an element to be proved to the jury beyond a reasonable doubt, not a sentencing factor to be proved to the judge at sentencing. Pp. 5–16.

(a) Generally, a fact that "increase[s] the prescribed range of penalties to which a criminal defendant is exposed" is an element of a

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crime, *Apprendi v. New Jersey*, 530 U. S. 466, 490, to be charged in an indictment and proved to a jury beyond a reasonable doubt, *Hamling v. United States*, 418 U. S. 87, 117, rather than proved to a judge at sentencing by a preponderance of the evidence, *McMillan v. Pennsylvania*, 477 U. S. 79, 91–92. Subject to this constitutional constraint, Congress determines whether a factor is an element or a sentencing factor. When Congress is not explicit, courts look to a statute's provisions and framework for guidance. Analysis of the current machinegun provision begins with *Castillo*, where the Court found the bare language of §924's prior version “neutral,” 530 U. S., at 124, but ruled that four factors—(1) language and structure, (2) tradition, (3) risk of unfairness, and (4) severity of the sentence—favored treating the machinegun provision as an element of an offense, *id.*, at 124–131; while a fifth factor—legislative history—did not favor either side, *ibid.* Pp. 5–6.

(b) As relevant here, the 1998 amendment divided what was once a lengthy principal sentence into separate subparagraphs. Thus, with regard to the first *Castillo* factor, the Court's observation that “Congress placed the element ‘uses or carries a firearm’ and the word ‘machinegun’ in a single sentence, not broken up with dashes or separated into subsections,” 530 U. S., at 124–125, no longer holds true. However, the amendment did not affect the second through fifth *Castillo* factors. Each of them, except for legislative history (which remains relatively silent), continues to favor treating the machinegun provision as an element. The amendment's effect on the language and structure factor requires closer examination. Pp. 6–12.

(c) Given the Court's determination in *Castillo* that the machinegun provision in §924's prior version is an element, a substantive change in the statute should not be inferred “[a]bsent a clear indication from Congress of a change in policy,” *Grogan v. Garner*, 498 U. S. 279, 290. Nothing in the 1998 amendment indicates such a change. There are three principal differences between the previous and current §924(c). The first, a substantive change, shifts what were once mandatory 5-year and 30-year sentences to mandatory minimum sentences. The second, also substantive—made in direct response to the holding in *Bailey v. United States*, 516 U. S. 137, that “uses or carries” in §924's preamendment version connotes “more than mere possession,” *id.*, at 143—adds “possesses” to the “uses or carries” language in §924(c)'s principal paragraph and provides sentencing enhancements for brandishing or discharging the firearm, §§924(c)(1)(A)(ii) and (iii), which do state sentencing factors, *Harris v. United States*, 536 U. S. 545, 552–556. Neither of these substantive changes suggests that Congress meant to transform the machinegun provision from an element into a sentencing factor. The third differ-

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ence is the machinegun provision's relocation from the principal paragraph that unmistakably lists offense elements to a separate subsection, §924(c)(1)(B), but this structural or stylistic change provides no "clear indication" that Congress meant to alter its treatment of machineguns as an offense element. A more logical explanation is that the restructuring was intended to break up a lengthy principal paragraph, which exceeded 250 words, into a more readable statute, which is in step with current legislative drafting guidelines. While this Court has recognized that placing factors in separate subsections is one way Congress might signal that it is treating them as sentencing factors rather than elements, *Castillo, supra*, at 124–125, it has rejected the view that such a structural consideration predominates even when other factors point in the other direction, *Harris, supra*, at 553. The current structure of §924(c) is more favorable to treating the machinegun provision as a sentencing factor than was true in *Castillo*, particularly because the machinegun provision is now positioned between the sentencing factors provided in (A)(ii) and (iii) and those in (C)(i) and (ii). This structural point is overcome by the substantial weight of the other *Castillo* factors and the principle that Congress would not enact so significant a change without a clear indication of its purpose to do so. Pp. 12–16.

542 F. 3d 921, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. STEVENS, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in the judgment.