Nos. 04-104 & 04-105

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDDIE J. BOOKER,
Respondent.

and

UNITED STATES OF AMERICA,
Petitioner,

v.

DUCAN FANFAN,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the First Circuit

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF")[1] is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and filing *amicus curiae* briefs in this and other federal courts, endorsing a limited and accountable government, promoting separation of powers, and opposing abusive civil and criminal enforcement actions by regulatory agencies and the Department of Justice.

Since the U.S. Sentencing Commission's establishment over seventeen years ago, WLF has submitted comments to and has testified before the Commission on several occasions regarding the promulgation and application of various guidelines.[2] In particular, WLF has been critical of the Guidelines and their application because they mandate excessively harsh prison sentences, particularly with respect to minor regulatory infractions. *See, e.g.*, *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 1406 (2004) (97-month prison sentence for importing frozen lobster tails in clear plastic bags instead of cardboard boxes in violation of obscure Honduran regulation that the

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[1] Pursuant to S. Ct. R. 37.6, *amici* hereby affirm that no counsel for either party authored any part of this brief, and that no person or entity other than WLF and its counsel provided financial support for preparation or submission of this brief. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

[2] WLF has also taken the Commission and its advisory committees to task and to court for failing to operate in a transparent manner in the formulation of Commission policy. *See Washington Legal Found. v. United States Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996); *Washington Legal Found. v. United States Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1994).

Honduran government admitted was invalid); *see also* Tony Mauro, *Lawyers Seeing Red Over Lobster Case*, Legal Times (Feb. 16, 2004). WLF has also urged this Court to grant a pending petition for writ of certiorari in *Thurston v. United States*, 72 U.S.L.W. 3769 (U.S. June 16, 2004) (No. 03-1670), a case in which the Guidelines mandate disparity of the grossest sort between similarly situated co-defendants, namely, a five-year statutory maximum sentence for Mr. Thurston and probation for his more culpable co-defendant.

The Allied Educational Foundation ("AEF") is a non-profit public policy organization based in Englewood, New Jersey. Founded in 1964, AEF promotes diverse areas of study in public policy issues and has appeared as *amicus curiae* along with WLF in numerous cases, including *Thurston*.

Amici believe that the Guidelines are constitutionally flawed, eliminate the exercise of the sound discretion of the sentencing judge, and effectively mandate unduly harsh and draconian sentences. Such sentences do not serve the fundamental principles of justice, and conflict with the congressional mandate that judges "*shall* impose a sentence sufficient, *but not greater than necessary*" to serve the purposes of punishment. 18 U.S.C. § 3553(a) (emphasis added).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Blakely v. Washington*, 124 S. Ct. 2531 (2004), this Court held that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to punishment." *Id.* at 2540. In determining whether a judge has "inflict[ed] punishment that the jury's verdict alone does not allow," the "relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id.* at 2537. As this Court

explained, "[t]he Framers would not have thought it too much to demand that, before depriving a man of . . . his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' . . . rather than a lone employee of the State." *Id.* at 2543. Under these principles, the Sixth Amendment is violated when a federal judge, acting under the binding strictures of the federal Sentencing Guidelines, finds facts at the sentencing stage of a criminal case and inflicts punishment that would not have been legally permissible the judge had considered only the facts found by the jury. *Id.* at 2537.

In attempting to escape from this ineluctable conclusion, the government places tremendous weight on *Blakely*'s use of the term "statutory maximum," contending that the federal Guidelines are distinguishable from the unconstitutional Washington guidelines because the latter were "statutory" while the former are not. But this argument is doubly flawed. First, although the Guidelines are not enshrined in the United States Code, they are controlled directly by Congress and are statutory in all but name. Second, and more importantly, the distinction between statutory and non-statutory maximums is a distinction without a difference so far as the Sixth Amendment principle enunciated in *Blakely* is concerned. As *Blakely* clearly explains, the crucial question in determining the division of labor between judge and jury is whether the Guidelines establish a "legal right" – and the binding Guidelines plainly do so, despite judges' nominal departure power. Thus, particularly in the wake of the discretion-limiting Feeney Amendment, Congress has created an essentially determinate sentencing system for which it lacks legislative accountability and pursuant to which judicial fact-finding often increases defendants' sentences exponentially. This disproportionality characterizes not only drug cases such as *Booker* and *Fanfan*

themselves, but also cases involving minor regulatory infractions and other non-violent crimes. Such a flawed and unfair sentencing regime violates the Sixth Amendment.

Despite warnings that the sky is falling, this result does not threaten the workings of the federal criminal justice system. Congress has already considered a number of proposals for sentencing reform that protect defendants' Sixth Amendment rights and serve the original goals of the Sentencing Reform Act of 1984 ("SRA"). Indeed, given the intolerable flaws of the harsh Guidelines, against which federal judges have chafed for decades, a ruling that some or all of the Guidelines are invalid would present Congress with a rare opportunity to enact broad reforms that would reduce unwarranted sentencing disparities and result in fairer treatment of all defendants.

ARGUMENT

I. *BLAKELY* APPLIES TO THE UNITED STATES SENTENCING GUIDELINES.

A. The Guidelines Are Effectively Statutory for Purposes of a *Blakely* Analysis

As an initial matter, it is plain that the Guidelines are quasi-statutory – and fully statutory in every sense that matters under this Court's decision in *Blakely*. "[T]he relevant inquiry is one not of form, but of effect." *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). It is true that the SRA describes the United States Sentencing Commission, which promulgates the Guidelines, as an "independent commission in the judicial branch of the United States." 28 U.S.C. § 991(a). But the Commission "is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch." *Mistretta v. United States*, 488 U.S. 361, 393 (1989); *see also* Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, Cato Policy Analysis, Nov. 1, 2002, at 8 ("[A] number of

scholars have shown that the commission simply became another political body, influenced by interest groups and susceptible to many of the pressures placed on lawmakers."). In the wake of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 ("PROTECT Act"), no more than three of the Commission's members may be judges, ensuring that judges are in the minority. *See* PROTECT Act, Pub. L. No. 108-21, § 401(n)(1), 117 Stat. 650 (2003) (amending 28 U.S.C. § 991(a), which previously required "[a]t least three" members to be federal judges). And every sentencing guideline promulgated by the Commission must be ratified by Congress, which "can revoke or amend any or all of the Guidelines as it sees fit." *Mistretta*, 488 U.S. at 393-94 (Scalia, J., dissenting); *see also* 28 U.S.C. § 994(p) (giving Congress 180 days to examine guidelines promulgated by the commission and to "modif[y] or disapprove[]" them).

Congress's power to reject proposed Guidelines and to revoke or amend existing Guidelines is not a purely theoretical one. Congress has rejected guidelines promulgated by the Commission on a number of occasions, most notably rebuffing the Commission's repeated attempts to equalize the penalties for crimes involving crack cocaine and crimes involving powder cocaine at the level applicable to powder cocaine. *See* Federal Sentencing Guidelines, Amendments, Disapproval, Pub. L. No. 104-38, 109 Stat. 334 (1995); Special Report to Congress: Cocaine and Federal Sentencing Policy, 10 Fed. Sent. Rep. 184 (1998); American Bar Ass'n, Justice Kennedy Comm'n, *Report with Recommendations to the ABA House of Delegates* 39 & n.104 (Aug. 2004) (hereinafter "*Kennedy Comm'n Report*"). Congress has also expressly directed the Commission to make particular changes to the Guidelines. For instance, in 1994 Congress directed the Commission to promulgate a terrorism guideline with specific intent as an "appropriate

enhancement." *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796; *Kennedy Comm'n Report*, *supra*, at 42 ("Congress has increasingly controlled the agenda of the Commission through imposition of directives. On May 1, 2003, the Sentencing Commission submitted to Congress amendments in nine major subject areas. Five of the nine were directly responsive to statutory mandates, and the Commission's 2003-2004 agenda is also heavily weighted toward responding to Congress."). And, most strikingly of all, in the 2003 PROTECT Act Congress directly amended guidelines regarding child pornography, curbed judicial discretion to depart downward, and decreed that appellate courts would henceforth review criminal sentences de novo. *See* PROTECT Act § 401(b), (g), (I); Stephanos Bibas, Blakely*'s Federal Aftermath* 5 (2004), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/bibas_blakelys_federal_aftermath.pdf.

Not surprisingly, then, the Guidelines are binding on federal judges in exactly the same way that a statute is binding. *See Stinson v. United States*, 508 U.S. 36, 42 (1993) (holding that the Guidelines have the force of law); 18 U.S.C. § 3553(b) (requiring district court to "impose a sentence of the kind, and within the range" set by the Guidelines). Thus, as was true in the Washington system, judges who disregard the Guidelines face reversal by appellate courts. *See Blakely v. Washington*, 124 S. Ct. 2531, 2538 (2004) ("Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed."); *see also, e.g., United States v. Kinter*, 235 F.3d 192, 200 (4th Cir. 2000).

For all of these reasons, the government's claim that the Guidelines' absence from the U.S. Code meaningfully distinguishes them from the Washington guidelines is a spurious one. *See generally* Bibas, *supra*, at 5 ("Any . . .

distinction [based on this Court's use of the term 'statutory'] would be illogical, as it would suggest that Congress may delegate to a commission power that it may not exercise itself."); *United States v. Croxford*, 324 F. Supp. 2d 1255, 1263-65 (D. Utah 2004); *United States v. Green,* No. CR. A. 02-10054-WGY, 2004 WL 1381101, at *24 n.233 (D. Mass. June 18, 2004) (explaining that the Guidelines can be viewed as defining "the maximum punishment permitted under all statutes affecting the punishment, including those that delegate lawmaking power").

B. Regardless of Whether the Guidelines Are Considered "Statutory," They Establish "Legal Right[s]" and Therefore Create Jury Rights

In any event, the government's claim that the upper end of a Guidelines range is not quite a "statutory maximum" is an irrelevant one. *Blakely* is focused not on the relationship between judiciary and legislature, but on the relationship between judge and jury that is at the heart of the Sixth Amendment. *See Blakely*, 124 S. Ct. at 2540 ("[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power.").[3] Accordingly, the

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[3] *See generally Blakely*, 124 S. Ct. at 2549 (O'Connor, J., dissenting) ("The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the [*Blakely*] majority's reasoning."); *United States v. Hammoud*, No. 03-4253, 2004 WL 2005622, at *37-42 (4th Cir. Sept. 8, 2004) (Motz, J., dissenting) (stating that "[c]lose examination of *Blakely* quickly reveals that the Supreme Court never relied on the . . . assertedly dispositive fact" that the Washington guideline was a statute); *United States v. Marrero*, 325 F. Supp. 2d 453, 456 (S.D.N.Y. 2004) ("[W]hile [prior to the Feeney Amendment] the Sentencing Guidelines have been technically viewed as emanating from the Judicial Branch rather than from Congress, . . . this is irrelevant from the

relevant question as defined by *Blakely* is whether there is a *legal right* to a particular sentence – whether, as a matter of public policy (and not simply of case-by-case judicial discretion), a sentence explicitly turns on particular facts. *See id.* (explaining that in an indeterminate sentencing system the facts relied upon "do not pertain to whether the defendant has a legal *right* to a lesser sentence – and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned"); *see also* Vikram David Amar, *When – If Ever – Can Facts Found By Judges Lengthen Criminal Sentences?* (Sept. 7, 2004), *at* http://writ.news.findlaw.com/amar/20040907.html. In such a circumstance, the defendant has the basic constitutional right to a jury determination of the relevant facts. The Sentencing Guidelines most certainly do constrain judicial decisionmaking so as to create just such legal rights – and the results of adjudication of those rights by judges rather than juries are often unjust, as numerous members of the federal judiciary have long insisted.

1. *Judicial fact-finding under the Guidelines increases sentences tremendously*. As an initial matter, it is worth remembering that the *Blakely* problem in the federal context is not an academic one: the finding of facts by judges under the Guidelines makes an enormous difference to defendants, who obviously care far more about the length of their imprisonment than they do about the labeling of the crime of which they have been convicted. One study of the Guidelines "found that half of all sentences had been increased – sometimes doubled or tripled – by uncharged conduct," which is attributed to defendants under a preponderance of the evidence standard without any of the standard criminal procedural protections. Rachel E. Barkow,

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standpoint of *Blakely,* which focuses on the manner in which the Constitution confides to the jury certain prerogatives that no other body . . . can override.").

Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33, 94 (2003); *see also Green*, 2004 WL 1381101, at *10 (noting that determinations made by the judge at sentencing "may theoretically double or triple the sentence [the defendant] receives upon the offense of conviction"). Sentencing under the current "real offense" approach is thus not very far removed from the "absurd" hypotheticals posited in *Blakely* to illustrate why every defendant must have "the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 124 S. Ct. at 2543; *see also id.* at 2539 (explaining that permitting judge-determined sentencing factors "would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene"); *United States v. Smiley*, 997 F.2d 475, 483 (8th Cir. 1993) (Bright, J., dissenting) (suggesting that Guidelines sentencing, where no rules of evidence apply and where sentencing judges often summarily approve probation officer recommendations, is reminiscent of Alice in Wonderland).

The impact of judicial factfinding is perhaps most obvious in drug cases such as the two cases at hand. *See, e.g.*, *United States v. Fanfan*, No. 03-47-P-H (D. Me. June 28, 2004) (refusing to find post-conviction facts raising guideline range from 63-78 months to 188-235 months); *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004).[4] But

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[4] *See also, e.g.*, *Green,* 2004 WL 1381101, at *41 ("[C]onsideration of the [uncharged] conduct here would result in a Guideline range increase from approximately six to eight years, to approximately twenty-four to thirty years. Such an increase is enormous . . . . The 'relevant conduct' here represents more than an 'enhancement'; it is the conduct for which Green would be sentenced." (footnote omitted)); *United States v. Pineiro*, 377 F.3d

the impact is also felt in cases involving regulatory infractions and the like, in which the post-conviction focus on the quantity of money involved in the "real offense" often results in sentences many times greater than what was possible under the original charge. *See* David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 451-52 (1993) ("For crimes like larceny [and] fraud . . . the quantity or value involved drives the sentence, a fact that is often beyond the defendant's control or expectations. The effect of these amounts is magnified because alleged related-offenses, in which the defendant may not have participated personally, are aggregated and the amounts count as much for relatively minor participants in the offense as they do for more culpable individuals. This irrationality, combined with widespread plea bargaining manipulation and evasion, results in Guideline ranges that may not reflect anything near the defendant's true culpability." (footnote omitted)).

For example, in *United States v. Thurston*, 358 F.3d 51 (1st Cir. 2004), *petition for cert. filed*, 72 U.S.L.W. 3769 (U.S. June 16, 2004) (No. 03-1670), the district judge's fact-

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464, 466-67 (5th Cir. 2004) (upholding sentence in case in which jury found defendant guilty of conspiring to distribute less than 50 kilograms of marijuana and 50 grams or less of cocaine, but sentence was based on findings by judge of much higher quantities of drugs); *United States v. Rodriguez*, 73 F.3d 161, 162-63 (7th Cir. 1996) (Posner, J., dissenting from denial of rehearing en banc) (noting increase from a range of 18-24 months, based on 10 ounces of marijuana proved at trial, to life in prison without the possibility of parole, based on evidence at sentencing of more than 1,000 kilos of marijuana); *United States v. Colon*, 961 F.2d 41, 41-43 (2d Cir. 1992) (affirming approximate tripling of the applicable sentencing range based on judge-found facts about the same course of conduct as the offenses of conviction); *United States v. Ebbole*, 917 F.2d 1495, 1495-96 (7th Cir. 1990) (increase for sentencing purposes from one gram of cocaine to 1.7 kilograms).

finding as to the amount of loss involved in a non-violent crime resulted in a far more severe punishment than that to which the defendant would otherwise have been subject. Thurston was convicted of one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, and his base offense level under the Guidelines was six. Because the judge determined at sentencing that the intended loss was high (and found various other aggravating facts), the offense level was increased to twenty-six, and the applicable Guidelines range went from 0-6 months up to 63-78 months, which exceeded the statutory maximum of five years. *See United States v. Thurston* Mot. to Amend Pet. for a Writ of Cert. at 2-3. Because Thurston's more culpable co-defendant pled nolo contendere and received probation (with the agreement of the government), the district court departed from the Guidelines and imposed a reasonable three-month prison sentence on Thurston. The Government appealed, and the court of appeals reversed, holding that the "guidelines bind us and they bind the district court. The downward departure based on disparity in sentences among co-defendants was impermissible." *Thurston*, 358 F.3d at 54-55, 78.

Judge-found facts result in similar increases in punishment in many similar non-violent cases. *See, e.g.*, http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/martha_is_getti.html (discussing case of Jamie Olis, a mid-level executive who was sentenced to 24 years in prison based on finding that the company's fraud involved a huge financial loss, although Olis himself realized no personal gain).[5]

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[5] To fully appreciate the draconian nature of sentences meted out today under the Guidelines, one must consider that under the pre-Guidelines system, defendants sentenced to prison for more than one year were generally eligible for parole after serving one third

2. *The Guidelines create a determinate, rather than an indeterminate, sentencing system, and thus create "legal right[s]" within the meaning of* Blakely. In mandating these results, the Guidelines do not – as the government repeatedly insists – simply "channel" judicial discretion that would otherwise exist under an indeterminate sentencing system. Rather, they create legal rights under a determinate sentencing system. As discussed above, judges are bound by the Guidelines, which they must adhere to on pain of reversal. As a district judge in Texas recently explained:

> [I]t would . . . take a legal fiction of the highest order embracing the proposition that the existing Guidelines, which bind a sentencing court to procedures on peril of reversal, are no more than a court rule guiding a judge through sentencing and therefore constitute a form of agreement with the Commission by which discretion is

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of the sentence imposed. *See* 18 U.S.C. § 4205(a) (1976) (repealed 1984). Thus, under the pre-Guidelines system, if a first offender had been sentenced to prison for the statutory maximum of five years for conspiracy as the Guidelines call for in *Thurston*, or for the eight years imposed for importing frozen lobster tails in the wrong package as in *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003) – extraordinary sentences in their own right – that offender would have been eligible for and likely would have received parole after serving one third of the sentence imposed (and, in some cases, even earlier). Defendants convicted of certain minor environmental violations and sentenced to prison in the pre-Guidelines era would have been eligible for parole after serving only 0 to 10 months of their sentence. *See* 28 C.F.R. § 2.20, Chapter Eleven, Subch. H – Environmental Offenses, 1172(d); B. Sharp & L. Shen, *The (Mis)Application of Sentencing Guidelines to Environmental Crimes*, BNA Toxics L. Rpt'r 189 (July 11, 1990). Thus, the post-Guidelines sentences of five years for Thurston and eight years for the McNab defendants are in some sense equivalent to staggering pre-Guideline prison sentences of 15 and 24 years, respectively.

> ceded in exchange for predictability. Only such a fabrication would explain why an offender has rights under statutory guidelines and lacks the same rights under a regulatory guideline.

United States v. Chaparro, No. Crim. EP-92-CR-283KC, 2004 WL 1946454, at *10 (W.D. Tex. Sept. 1, 2004). And federal judges have repeatedly complained that the Guidelines' "wholly mechanical sentence computation" reduces the judiciary to "automaton[s]," "rubber-stamp bureaucrat[s]," or "accountant[s]." Luna, *Misguided Guidelines*, *supra*, at 28 n.87 (collecting cases and other sources); *see also Green,* 2004 WL 1381101, at *10 ("To call our present federal sentencing structure a 'guidelines' system suggests that the district judge still plays a central role. She does not. Other than determining the controlling sentencing factors . . . , the district judge's role is purely mechanistic, applying arithmetically the sentencing factors . . . ."); Remarks of Hon. Morris E. Lasker before the Symposium on Sentencing Guidelines, Sept. 9, 1997, *available at* www.november.org/dissentingopinions /Lasker.html.[6] Notably, the federal Guidelines are far more

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[6] Indeed, the importance of fact-finding at the sentencing stage actually shifts a great deal of power away from judges and into the hands of prosecutors. Prosecutors may pick and choose which facts to present to the judge at sentencing, and may thus evade rules of evidence, discovery rules, and the like. *See Green*, 2004 WL 1381101, at *4, 10 ("[T]he concept of 'real offense' sentencing as practiced under the Guidelines not only affects where – within the permissible range – an offender ought be sentenced, it frequently adjusts that range upward considerably. . . . While there may still be judicial limits on the outer boundaries of a prosecutor's assertion of relevant conduct . . . , none prevents a prosecutor from turning a blind eye on conduct otherwise relevant . . . . So it is that the phenomenon known as 'fact bargaining' has come to flourish as never before in

comprehensive and inflexible than were Washington's sentencing laws. *See Blakely,* 124 S. Ct. at 2549-50 (O'Connor, J., dissenting) (noting "hard constraints" of federal Guidelines as compared to soft constraints of Washington system); Bibas, *supra*, at 5.

The government nevertheless suggests that the Guidelines are closely akin to a purely indeterminate sentencing system under which certain channeling rules – stricter sentences within a drug crime statutory range for use of a firearm, for example – could develop over time and be enshrined in judicial precedent. *See* Gov't Br. at 23-24. But such a system of precedent would be a very different kind of constraint, and would establish very different kinds of legal expectations for defendants, than the Guidelines. By definition, the judicial precedent that the government hypothesizes would operate on a case-by-case basis, with judges constantly creating exceptions, distinguishing prior case law, and overruling existing precedent. Sentencing discretion would still exist, and the "rules," such as they were, would bend appropriately for each defendant based on his own particular circumstances. The Guidelines, directly controlled by Congress, do not bend in this fashion; individual cases must be shoe-horned into them, and binding legal rights and expectations are thus created.

In addition, unlike an indeterminate sentencing system, the Guidelines include no "structural democratic constraints" in fixing the proper range of punishment for particular crimes. *Apprendi*, 530 U.S. at 490 n.16; *see also* Gov't Br. at 26. In an indeterminate system, the legislature has a responsibility to come up with a sentencing range that is

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the federal courts. . . . The rules of evidence by their express terms do not apply to sentencing hearings. Instead, courts today must base their conclusions on a mishmash of data including blatantly self-serving hearsay largely served up by the Department.").

truly proportional to the crime, because there is a real possibility that defendants will receive sentences anywhere within the range chosen – and the legislature can be held accountable for its choices. But because under the Guidelines system the real work of sentencing happens in a Commission that the government insists is independent from the legislative branch, Congress is free to pass statutes that prescribe a sentence between 0 and 100 years for minor and major crimes alike – and juries, the democratic constraint within the judicial system, have no opportunity to decide the facts that actually determine whether a sentence is 0 years, 100 years, or somewhere in between.[7] As *Blakely* explained, a bright-line rule that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to punishment," *Blakely*, 124 S. Ct. at 2543, is far preferable to an attempt to decide in each case whether the tail of the sentence wags the dog of the crime. *See McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986) (discussing possibility that a "sentencing factor" may be a "tail which wags the dog of the substantive offense").

3. *The determinacy of the Guidelines is not altered by the existence of judicial authority to depart*. The *amicus* brief filed by a group of former federal judges acknowledges that the applicability of *Blakely* turns on the degree to which the Guidelines are determinate – the extent to which they truly create legal rights for defendants by binding judges

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[7] *See Hammoud*, 2004 WL 2005622, at *37-42 (Motz, J., dissenting) (explaining that if *Blakely* does not apply to federal guidelines, "Congress can choose *not* to criminalize conduct yet still *require* the Sentencing Commission to develop guidelines mandating punishment of that very conduct upon a judicial finding by a mere preponderance of the evidence"); Note, *The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court's "Elements" Jurisprudence*, 117 Harv. L. Rev. 1236, 1253 (2004).

rather than simply guiding them. *See* Br. of *Amici Curiae* An Ad Hoc Group of Former Federal Judges at 9 (hereinafter "Former Judges' *Amicus* Br.") ("[I]n evaluating the constitutional soundness of the Sentencing Guidelines under *Blakely*, this Court must consider whether the Sentencing Reform Act of 1984 established the type of determinate statutory sentencing scheme at issue in *Blakely*, or rather, whether the Guidelines represent a sentencing regime more analogous to the traditional indeterminate scheme . . . ."). But the judges assert that the Guidelines are more indeterminate than determinate because, among other things, "as this Court recognized in *Koon*, judges retain substantial discretion to depart from the Guideline-calculated sentencing range." *Id.* at 10; *see also* Br. *Amicus Curiae* the U.S. Sentencing Comm'n at 4 n.3 (highlighting "judges' discretion to depart from a prescribed guideline in a particular case").

This assertion ignores the realities of the current sentencing regime, under which judges' ability to depart from the Guidelines is severely constrained. A district judge must justify a departure by reference to factors specified in the Guidelines themselves or by determining "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); *see also* U.S.S.G. § 5K2.0. Thus, a judge confronting a sentence that is unduly harsh precisely *because* a certain circumstance – such as amount of monetary loss or drug quantity – has been given great weight in the Guidelines has little or no recourse. *See, e.g.*, *United States v. Weinberger*, 91 F.3d 642, 644 (4th Cir. 1996). Sitting federal judges have repeatedly expressed their frustration with this state of affairs and their sense of constraint. *See, e.g.*, Luna, *Misguided Guidelines*, *supra*, at 28 n.87

(collecting cases and other sources).

It is thus not surprising that, once departures requested by the government (as a reward for "substantial assistance," for example) are discounted, the rate of departure has been very low. The very statistics cited by the former judges demonstrate that the majority of federal circuits had a departure rate under 10% in fiscal year 2002. *See* http://www.ussc.gov/ANNRPT/2002/table26.pdf. Similarly, "[i]n 2001, the Sentencing Commission estimated the rate of non-substantial assistance departures not initiated by the government to be 10.9%." *Kennedy Comm'n Report*, *supra*, at 40 (citing U.S. Sentencing Comm'n, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 64, fig. 16 (2003)).

And judges' ability to depart has recently been restricted yet further by the enactment of the 2003 Feeney Amendment, a development that the former judges attempt to dismiss in the course of a brief footnote. *See* Former Judges' *Amicus* Br. at 3 n.2. The Feeney Amendment legislatively overruled this Court's decision in *Koon v. United States*, 518 U.S. 81 (1996), and provided for de novo review (rather than review for abuse of discretion) of district court departure decisions. Congress also instructed the Commission to amend the guidelines in order to "substantially reduce" the rate of judicially initiated departures. *See* PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003). In addition, Congress limited the availability of combination-of-factors departures and, in cases involving sexual offenses against children, limited the permissible bases for departure to those factors expressly identified explicitly in the Guidelines. *See id.*; *see also Green*, 2004 WL 1381101, at *12-15.

The impact of this amendment has been substantial. For example, in the *Thurston* case discussed above, the district

court judge attempted to depart downward on the ground that Thurston's sentence was immensely harsher than the sentence of his more culpable co-defendant, who had pled nolo contendre and received just three years probation and a small fine. *See Thurston*, 358 F.3d at 53-54, 60-61; *Green*, 2004 WL 1381101, at *4 & n.26. But the Court of Appeals, applying the non-deferential standard mandated by the PROTECT Act, reversed this departure, finding that the disparity was not a permissible ground for reducing Thurston's sentence. *See Thurston*, 358 F.3d at 71-79. There are many additional cases in which the Guidelines have bound judges despite shocking sentence disparities. *See, e.g.*, Sentencing Hearing, *United States v. Angelos*, 02-CR-708-ALL (D. Utah Sept. 14, 2004) (Cassell, J.) (questioning by judge of rationality of federal law requiring sentence of 63 years for first-time marijuana dealer who possessed a gun where Guidelines require substantially lesser sentences for child rapists and terrorists who explode bombs in public places); http://sentencing.typepad.com /sentencing_law_and_policy/booker_and_fanfan_commentary/ (discussing *Angelos* case).

II. APPLICATION OF *BLAKELY* TO THE GUIDELINES WILL RESULT IN SENTENCING REFORM THAT FULFILLS THE GOALS OF THE SRA AND RESPECTS DEFENDANTS' SIXTH AMENDMENT RIGHTS.

Amici do not address the issue of whether, as a matter of severability analysis, the Guidelines as a whole must fall because portions of the Guidelines violate the Sixth Amendment by requiring courts to find sentence-enhancing facts. But it is clear that invalidation of the Guidelines by this Court – whether in whole or in part – will not create chaos in the federal criminal justice system, as the government has previously suggested. *See, e.g.*, Br.. for the U.S. as *Amicus Curiae* Supporting Respondent in *Blakely v.*

Washington, No. 02-1632, 2004 WL 177025, at *30-31 (U.S. filed Jan. 23, 2004). In those circuits that have ruled over the last several months that *Blakely* applies to the Guidelines, the lower courts and the U.S. Attorney's Office have already taken concrete steps to address the resulting practical issues. In addition, there are a number of viable options for broader sentencing reform, many of which are already under consideration by Congress, that would honor the crucially important Sixth Amendment rights described in *Blakely* while at the same time fulfilling the original goals of the SRA. *See generally, e.g.*, Blakely v. Washington *and the Future of the Federal Sentencing Guidelines: Hearings Before the Senate Comm. on the Judiciary*, 108th Cong. (July 13, 2004) (hereinafter "Senate *Blakely* Hearings") (testimony of The Honorable John Steer, Vice Chair and Commissioner, United States Sentencing Comm'n) ("Even if *Blakely* is found to apply to the federal guidelines, the waters are not as choppy as some would make them out to be."), *available at* http://judiciary.senate.gov/hearing.cfm?id=1260. These reform efforts present an opportunity to replace the harsh and irrational Guidelines with more humane and even-handed sentencing policies and procedures.

In *Mistretta v. United States*, 488 U.S. 361 (1989), this Court described the SRA as a response to two problems. First, the Act addressed the "uncertainty as to the time the offender would spend in prison" that was the result of the operation of the parole system. *Id.* at 366; *see also* 18 U.S.C. § 3553(a). Second, and more centrally, the Act attempted to reduce what was thought to be "the great variation among sentences imposed by different judges on similarly situated offenders."[8] *Mistretta*, 488 U.S. at 366; S. Rep. No. 98-225,

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[8] In fact, sentencing disparities that existed in the federal system before the passage of the Guidelines apparently were minor or statistically insignificant and not based on impermissible factors

at 1, 39 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3222. Nothing in *Blakely* "impugns these salutary objectives" – the only question is how they can be realized in a constitutionally permissible manner. *Blakely*, 124 S. Ct. at 2540 ("This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment.").

In the wake of *Blakely*, Congress immediately held hearings on this question, and now stands poised to act once the Court issues its ruling in the instant case. *See* Senate *Blakely* Hearings, *supra*; *see also* S. Con. Res. 130, 108th Cong. (July 22, 2004) (discussing *Blakely* issues and seeking resolution by this Court of constitutionality of Guidelines); Memorandum from James Felman to U.S. Sentencing Comm'n, Legislative Solutions to *Blakely* (Sept. 16, 2004), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/felman_blakely_proposal.rtf. Congress has considered a variety of different proposals for carrying out the goals of the SRA while ensuring that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to punishment." *Blakely*, 124 S. Ct. at 2543. These proposals include mandating that sentencing ranges be determined by factors charged in the indictment and found by the jury; making the current Guidelines advisory, rather than mandatory, while permitting judges to

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such as race and ethnicity. *See* Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 105-42 (1998). "It bears emphasizing . . . that an examination of . . . early studies and other data from the pre-Guidelines period belies the notion that sentencing in the federal courts was 'shameful,' 'lawless,' or 'arbitrary.'" *Id*. at 111. Indeed, an empirical study of pre- and post-Guideline sentences conducted by the Department of Justice's Bureau of Justice Statistics suggests that disparities in sentencing of different racial or ethnic groups may have *increased* under the Guidelines. *Id*. at 124.

exercise sentencing discretion; and bringing the Guidelines sentencing ranges into better alignment with the ranges set forth in the statutes criminalizing underlying offenses. *See* Senate *Blakely* Hearings, *supra*; *see also generally* Note, *The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court's "Elements" Jurisprudence*, 117 Harv. L. Rev. 1236, 1253 (2004).

The first of these options was noted with approval by the majority in *Blakely*, which discussed the aftermath of a decision by the Kansas Supreme Court that applied *Apprendi* to hold that aggravating facts under the Kansas sentencing guidelines must be found by juries rather than judges. *See Blakely*, 124 S. Ct. at 2541 (citing *State v. Gould*, 271 Kan. 394, 404-14 (2001)). The Kansas legislature complied with the decision by setting up a bifurcated proceeding in which juries are asked at the sentencing stage to assess aggravating facts under a reasonable doubt standard. *See id.* ("When the Kansas Supreme Court found *Apprendi* infirmities in that State's determinate sentencing regime . . . , the legislature responded not by reestablishing indeterminate sentencing but by applying *Apprendi*'s requirements to its current regime"). This approach could readily be adapted for the federal context – and doing so might have the salutary effect of simplifying the sentencing process considerably. *See* Senate *Blakely* Hearings, *supra* (testimony of Prof. Rachel Barkow); Letter from Jon M. Sands, Chair, Sentencing Guidelines Comm. of the Federal and Community Defenders, to United States Sentencing Comm'n (July 9, 2004) (attaching a recommendation to Congress to amend 18 U.S.C. § 3553 that is modeled on the legislative action taken in Kansas); *see also Harris v. United States*, 536 U.S. 545, 581-82 (2002) (Thomas, J., dissenting) ("The United States concedes . . . that it can charge facts upon which a mandatory minimum sentence is based in the indictment and prove them to a jury."). This legislative approach would also protect

defendants' jury rights and promote certainty of punishment and uniformity, as all offenders would be granted the same protections and would serve out their full sentences as based on the jury-found facts of their cases.[9]

Adopting this or one of the other proposals under consideration will not require Congress to reinvent the wheel. Of course, the Sixth Amendment must be vindicated in the imposition of punishment on federal criminal defendants, regardless of the level of cost or difficulty involved in changing the current system. *See Blakely*, 124 S. Ct. at 2543 (noting that the issue is not "whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice"). But meaningful reform within the bounds of the Constitution is eminently possible without major disruption and without rewriting the thousands and thousands of pages that comprise the current Guidelines. Rather, Congress can build upon its existing "considered legislative effort." Br. for Hon. Orrin G. Hatch, Hon. Edward M. Kennedy, and Hon. Dianne Feinstein as *Amici Curiae* at 6.

At the same time, however, the partial or complete invalidation of the current federal sentencing scheme on *Blakely* grounds would give Congress the broader opportunity to address the many fundamental flaws and unfairnesses in the harsh federal Guidelines. These various problems have been well described by the federal judges responsible for imposing the sentences that the Guidelines mandate. *See, e.g.*, Judge John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. Times, June 24, 2003, at A31 (explaining that he was retiring because he could no longer in good

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[9] Creation of new procedures that base Guidelines calculations on jury findings, while obviously within the competence of the legislature, also fall within the inherent powers of the federal courts.

conscience sentence under the Guidelines regime); Luna, *Misguided Guidelines*, *supra*, at 3 (citing federal judges' descriptions of the guidelines as a "dismal failure," "a farce," "out of whack," "a dark, sinister, and cynical crime management program" with "a certain Kafkaesque aura about it," and "the greatest travesty of justice in our legal system this century," as well as polls finding that large numbers of federal judges are opposed to the operation of the guidelines); *see also generally Kennedy Comm'n Report*, *supra*, at 34-46; ALI Report, *Model Penal Code: Sentencing* 124 (Apr. 11, 2003) ("One of the most profound and controversial effects of the federal sentencing guidelines has been to increase the average severity of penalties in the federal system . . . markedly overall."); Michael Tonry, *Sentencing Matters* 72 (1996) ("[T]he guidelines developed by the U.S. Sentencing Commission . . . are the most controversial and disliked sentencing reform in U.S. history.").

In particular, as discussed above, the Guidelines in their current form have failed dismally in their attempt to reduce disparities between similarly situated offenders, and have thus opened a wide gulf between the "real offense" and real punishment. Indeed, if anything, the Guidelines have resulted in far more irrational and unjust distinctions than the prior indeterminate sentencing system, driven in part by a shift in power from judges to prosecutors and in part by a myopic focus on certain types of facts. *See* Luna, *Misguided Guidelines*, *supra*, at 15 ("By privileging certain facts, particularly quantifiable details such as monetary loss or drug quantity, while ignoring morally relevant factors about the offender and his life, federal sentencing creates the illusion of eliminating unwanted disparities."); James A. McLaughlin, *Reducing Unjustified Sentencing Disparity*, 107 Yale L.J. 2345, 2348 (1998) ("Commentators have identified numerous sources of disparity in Guidelines sentencing . . . .

Moreover, judges appear to have grown frustrated by the Guidelines' inability to resolve these problems."); *Green*, 2004 WL 1381101, at *2 (describing a system that "has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen").

Congress now has an opportunity to correct these intolerable problems while at the same time crafting Sixth Amendment protections. For instance, in implementing a Kansas-like solution, which itself reduces prosecutors' power to engage in forbidden fact bargaining, Congress could choose to deemphasize in sentencing the monetary amount involved in financial crimes, or to reintroduce factors such as family circumstances and community service that the current Guidelines discount. In undertaking such changes, Congress has two decades of Guidelines experience and data on which to draw – and can also consider the lessons learned in the "laborator[ies]" of the states, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), many of which have adopted well-regarded sentencing guideline regimes that rely much less heavily on "real offense" fact-finding by judges than does the current federal system. *See, e.g.*, *Kennedy Comm'n Report*, *supra*, at 35 ("The wide-spread criticism of the federal guideline system stands in sharp contrast with the general acceptance and high regard in which the state guideline systems are held.").

Application of *Blakely* to the Guidelines should thus be viewed not as an invitation to disaster, but rather as an invitation for legislative innovation and improvement. *See, e.g.*, Senate *Blakely* Hearings, *supra* (testimony of The Honorable Paul Cassell, United States District Court Judge, District of Utah) ("[W]hile *Blakely* may be viewed as a short term problem requiring an immediate solution, perhaps with longer perspective it can viewed as spur for discussion and

improvement."). "In short, it is time for a second look." *Kennedy Comm'n Report*, *supra*, at 37 ("We conclude that it is time for Congress to revisit the federal guidelines and to examine carefully the reasons why there has been so much negative reaction to and criticism of them . . . .").

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to apply the Sixth Amendment principles set forth in *Blakely* to the federal Guidelines.

Respectfully submitted,

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