No. 04-105

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

DUCAN FANFAN,
Respondent.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

2. Whether, in a case in which the Guidelines would require the judge to find a sentence-enhancing fact, the Guidelines as a whole would be inapplicable, as a matter of severability analysis, or instead may be severed or reinterpreted in a manner consistent with the intent of the enacting Congress.

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STATEMENT OF THE CASE

On June 11, 2003, a grand jury sitting in the District of Maine charged Ducan Fanfan in a one-count indictment with conspiracy to distribute 500 grams or more of cocaine hydrochloride in violation of 21 U.S.C. § 846. Pet. App. 14a.

At trial, the prosecution presented the testimony of Donovan Thomas, a cooperating co-defendant.[1] Thomas testified that he had purchased cocaine hydrochloride in the past from Fanfan. Thomas also testified that he had attempted to purchase cocaine hydrochloride and cocaine base ("crack") from Fanfan after agreeing to cooperate with the prosecution, even though Judge Hornby earlier had ruled that any conspiracy would have ended when Thomas began to cooperate. Fanfan was not charged with this alleged sale. The jury also heard testimony that Fanfan had been in possession of cocaine hydrochloride and cocaine base at the time of his arrest. On October 9, 2003, the jury returned a guilty verdict on the single charge of conspiracy to distribute more than 500 grams of cocaine hydrochloride. Pet. App. 15a.

A sentencing hearing followed, during which the prosecution argued that Fanfan should be sentenced for the possession and sale of crack cocaine that was, pursuant to the judge's earlier ruling, outside the scope of the charged conspiracy. The prosecution presented testimony regarding cocaine base, including hearsay evidence that Fanfan had sold cocaine base to Thomas in the past. Sent. Tr. 23-26. The prosecution sought a substantial increase in Fanfan's sentence on the basis of that evidence.[2] *Id.* at 50-52, 55-57.

[1] Federal agents arrested Thomas after he attempted to collect money from another cooperating co-defendant. After his arrest, Thomas agreed to cooperate with the prosecution.

[2] Under the Controlled Substances Act, "cocaine base" is a different "substance" from "cocaine," and offenses involving cocaine base are subject to significantly different penalties. *Compare, e.g.*, 21 U.S.C. § 841(b)(1)(B)(ii), *with id.* § 841(b)(1)(B)(iii). The Guidelines, on the

Fanfan objected that, under this Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), if the prosecution sought the harsher punishment for a cocaine base crime, it should have charged such a crime in the indictment and proven it to the jury beyond a reasonable doubt. Pet. App. 5a-6a, 14a. The judge agreed that *Blakely* precluded it from increasing Fanfan's sentence based on any facts other than those found by the jury. Accordingly, the judge concluded that no aspect of the sentence could be premised on the allegation that Fanfan had possessed cocaine base: "The jury verdict does not permit us to reach a conclusion about crack cocaine. Crack cocaine was not even charged in the indictment." *Id.* at 6a. Nor could the sentence be increased for any amount of cocaine hydrochloride over 500 grams, or on account of any leadership role that Fanfan allegedly played in the conspiracy: "The verdict from the jury permits no conclusion as to how much above the 500 grams the conspiracy involved…. [T]he verdict does not permit us any conclusion as to this defendant's leadership role in the conspiracy." *Id.*

The judge declared that "without those jury findings …, I may not increase the sentence above the 63 to 78 month range to the guideline range I found earlier." Pet. App. 7a.[3]

SUMMARY OF ARGUMENT

1. "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to punishment,' and the judge

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other hand, draw a dividing line between the particular form of cocaine base known as crack, and all other forms of cocaine, treating crack much more harshly. *See* USSG § 2D1.1(c), note (D) (2003).

[3] The judge also made alternate findings as if the Guidelines applied. He found a drug quantity in excess of the 500 grams of cocaine charged in the indictment, resulting in a hypothetical base offense level of 34 under USSG § 2D1.1(c)(3). He then imposed a two-level upward adjustment for defendant's role under § 3B1.1(c). Finally, he found that Fanfan's criminal history category was I under §§ 4A1.1 and 5A. The ultimate hypothetical sentencing range was 188-235 months. Pet. App. 2a.

exceeds his proper authority." *Blakely*, 124 S. Ct. at 2537, (quoting 1 J. Bishop, *Criminal Procedure* § 87, at 55 (2d ed. 1872)). In this case, controlling rules of law allowed the judge to impose a prison sentence of no more than 78 months based on facts found in "the jury's verdict alone." *Id.*; Pet. App. 7a-8a. If, however, the judge were permitted to rely on his own factual findings, a maximum sentence of 235 months would have been lawful. *Id.* at 2a. This four-fold increase in Fanfan's sentence would have resulted from a finding of drug quantities, beyond that found by the jury, that were allegedly part of the same course of conduct, Sent. Tr. 80, and a further finding that Fanfan's role was that of a recruiter, organizer and leader of criminal activity involving five or more people, *id.* at 81-84. However, the judge below correctly understood that any additional punishment above 78 months would amount to "punishment that the jury's verdict alone does not allow," *Blakely*, 124 S. Ct. at 2537, and he therefore imposed a sentence of 78 months in prison. Sent. Tr. 107-09.

Petitioner claims that because the Guidelines are not "statutes," there is no Sixth Amendment bar to judicial factfinding, pursuant to the Guidelines, that increases the lawful punishment the judge may impose. But, as this Court has repeatedly noted, for Sixth Amendment purposes "[t]he dispositive question … 'is one not of form, but of effect.'" *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002) (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466, 494 (2000)). The "effect" here could not be more plain: Fanfan's legally authorized sentence would increase by 157 months—more than 13 years—solely on the basis of factual allegations that the prosecution never pled at the outset of the case and never asked the jury to find. Indeed, the "effect" here is *precisely* the same as the "effect" on the defendants' sentences in *Blakely*, *Ring* and *Apprendi*, all of which this Court held violated the Sixth Amendment.

The United States and its *amici* assert that there is a constitutionally significant difference between the Guidelines (which they characterize as judge-made rules) and a statutory

system that equally constrains the judge's authority to impose a sentence based solely upon facts found by the jury. But they offer no *reason* to support that distinction, other than that this Court's prior cases—*Blakely*, *Ring*, and *Apprendi*—involved statutory enhancements. They ignore the numerous occasions on which this Court stated the operative principle broadly, and did not specifically link it to the fact that those cases involved statutes. They never tie the purported statutory/judge-made distinction to the values the jury right protects. In short, the statutory/judge-made distinction is unsustainable under any rule that gives the Sixth Amendment jury right "intelligible content." *Blakely*, 124 S. Ct. at 2538.

Even if the statutory/judge-made distinction mattered, and it does not, the Sixth Amendment nevertheless applies to the Guidelines. This Court has never understood the Guidelines to be mere judicial self-guidance. "[T]he [Sentencing] 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). Congress has delegated to the Commission "nonadjudicatory functions," *id.* at 388, and as a result the Guidelines "are the equivalent of legislative rules adopted by federal agencies." *Stinson* v. *United States*, 508 U.S. 36, 45 (1993). That these agency-adopted legislative rules do not violate the non-delegation doctrine, *Mistretta*, 488 U.S. at 376-80, tells us nothing about whether they violate the Fifth and Sixth Amendments. Further, changes to the rules concerning the composition of the Commission, and the recently increased role Congress has taken in shaping the content of the Guidelines, render entirely untenable any suggestion that the Guidelines are the equivalent of judicial self-guidance.

Finally, petitioner also claims that applying *Blakely* to the Guidelines would require overruling four pre-*Apprendi* cases. That is wrong. This is the first time this Court will consider whether the Sixth Amendment invalidates the Guidelines to the extent they authorize a judge to impose a sentence greater

than he or she would be bound to impose on the exclusive basis of factual findings made by the jury. In two cases, the Court concluded that the Guidelines do not violate the Double Jeopardy Clause. In one other case, the Court held that the Guidelines do not violate the defendant's right to testify in his own behalf. And in the last of petitioner's cases, the Court expressly refused to consider a Sixth Amendment challenge to the Guidelines. That the Guidelines survived the challenges reflected in these cases does not foreclose consideration of whether they violate the right to a jury trial. This Court therefore should resolve the question based on the rule of the *Blakely*, *Ring*, and *Apprendi* line of cases.

2. Contrary to petitioner's sweeping inseverability argument, a holding that the Sixth Amendment applies to the Guidelines would not require that the Guidelines be jettisoned in their entirety. As an initial matter, petitioner does not actually advocate inseverability, despite its claims to the contrary; to render the Guidelines advisory, as petitioner urges, would itself entail severing numerous statutory and Guidelines provisions. The question, then, is what form of severance best sustains legislative intent. Congress's paramount concern in crafting the Guidelines was to eliminate sentencing disparities among similarly situated defendants. Preserving both the mandatory Guidelines system and the substance of all its sentence-adjusting provisions—while permitting district courts to adopt procedural changes to the way in which some of those still-universally applicable provisions are triggered, *Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2523-24 (2004)—is entirely consistent with Congress's intent.

Given Congress's palpable focus on eliminating sentencing disparities (and conspicuous silence on the supposed virtues of judicial factfinding), it defies reason to suggest that a return to unfettered discretionary sentencing, with all of its wild variations, is more in keeping with the purpose of the Sentencing Reform Act ("SRA") than a mandatory Guidelines system in which sentence-enhancing facts are supported by

jury findings. As the advocate of inseverability and "advisory" Guidelines, petitioner bears the burden of proving that nearly inconceivable set of legislative preferences. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 n.7 (1987). This it cannot do. While petitioner points out that provisions of the SRA and the Guidelines define procedures for judicial determination of sentencing facts, it never shows that such provisions were so central to Congress's or the Commission's overall aims that they would have thrown up their hands and walked away from the sentencing reform enterprise if forced to proceed without them.

Petitioner's laundry list of objections to Guidelines sentences supported by jury findings fares no better than its failed attempt to divine Congress's intent. The suggestion that jurors are not suited to making the requisite factual findings is refuted by this Court's repeated expressions of confidence in juries' capabilities, *e.g.*, *Ring*, 536 U.S. at 599, and rendered beside the point by the Constitution's explicit preference for decisionmaking by jurors rather than judicial inquisitors, *Blakely*, 124 S. Ct. at 2543. Similarly, petitioner's procedural concerns with juror factfinding fail to account for district judges' broad reservoir of experience with bifurcation, special interrogatories, and other familiar means of channeling juror decisionmaking and safeguarding criminal defendants' constitutional rights. There is no reason to believe that such use of judges' inherent power to impose Guidelines sentences consistent with the Sixth Amendment is inconsistent with judicial experience or jurors' capabilities. Nor would it have struck Congress as odd that prosecutors would prove facts increasing a defendant's sentence to a jury beyond a reasonable doubt, but that a defendant attempting to demonstrate facts in mitigation of his sentence would convince a judge by a lesser standard. Such "asymmetry" is a familiar part of our criminal justice system: It provides the defendant with the tools necessary to defend himself when the powerful machinery of the state seeks to deprive him of his liberty.

Finally, a mandatory Guidelines system based on jury-found, sentence-enhancing facts presents no separation of powers or non-delegation concerns. This Court in *Mistretta* held that it did not offend the separation of powers for the Sentencing Commission to issue guidelines mandating punishment upon a finding of Commission-prescribed facts. Petitioner offers no good reason why the identity of the decisionmaker charged with finding those facts, or the precise nature of the required burden of proof, would be relevant to the separation of powers. That this Court has used the word "element" as rhetorical shorthand for a sentence-enhancing fact in the context of the Sixth Amendment in no way alters *Mistretta*'s account of the Sentencing Commission's work for purposes of unrelated constitutional provisions.

* * * *

The Guidelines are unconstitutional to the extent they permit judges to find facts that "'the law makes essential to the punishment.'" *Blakely*, 124 S. Ct. at 2537. The Guidelines need not be struck down in their entirety, however, because severing or reinterpreting them to permit jury factfinding—rather than rendering them advisory or striking them altogether—would best promote congressional intent. But because the government failed to indict sentence-enhancing facts in this case, did not seek to present such facts to a jury, has failed to request that relief here—and, in fact, concedes that such relief is unavailable to it, Pet. Br. 68-69—the judgment of the district court should simply be affirmed.

ARGUMENT

I. *BLAKELY* APPLIES TO THE FEDERAL SENTENCING GUIDELINES.

The Guidelines establish the limits on the lawful range of punishment a judge may impose on a defendant convicted of a crime. As this case dramatically illustrates, judicial factfinding under the Guidelines permits the judge to impose one

sentence based solely upon the facts as found by the jury beyond a reasonable doubt, and another, often substantially greater, sentence based on those facts plus others that the judge finds to be true by a preponderance of the evidence.[4] *Blakely* squarely holds that the Sixth Amendment forecloses such a system. 124 S. Ct. at 2537-38. Petitioner's efforts to extract the Guidelines from the clear scope of the Sixth Amendment depend upon elevating the Guidelines' form over their effects, and an exaggerated account of the Guidelines as judge-made rules.

Petitioner candidly admits that its reading of *Blakely* is not compelled. Pet. Br. 19 ("[t]here is language in *Blakely* that could be read to suggest a broader rule"); *id.* at 39 (noting that Justice O'Connor, writing for all four dissenting Justices, understood the majority to adopt a broad rule that requires a waivable right to a jury finding with respect to "'any fact that increases the upper bound on a judge's sentencing discretion'"). And it tacitly acknowledges that the broader reading is the more natural one, when it takes the extraordinary step of urging the Court to overrule a decision on which the ink is barely dry. *Id.* at 39 (asking the Court to "reconsider[] and reject[]" *Blakely*). But *Blakely* was neither a mistake nor a shot from the dark. It was a clear reaffirmation of the principle that first received voice in *Jones* v. *United States*, 526 U.S. 227 (1999), was first enforced in *Apprendi*, and was applied again in *Ring*. See *Blakely*, 124 S. Ct. at 2551 (Breyer, J., dissenting) ("[t]he Court makes clear that it means what it said in *Apprendi*"). That principle is essential to protect the core values of the right to a jury trial. Accordingly, this Court should adhere to the holding of *Blakely*—that a criminal defendant has the right to insist that every fact which, under the

[4] Throughout this brief, references to the "jury right," "facts as found by the jury," and "jury factfinding" are intended to include not only a defendant's right to have a jury instead of a judge serve as the factfinder, but also to the higher burden of proof—beyond a reasonable doubt instead of preponderance of the evidence—that applies to jury factfinding.

controlling law, authorizes a judge to impose an increased punishment, must be found by a jury beyond a reasonable doubt—and apply it to the Guidelines.

A. The Sixth Amendment Establishes A Defendant's Right To Insist That Any Fact That Increases The Maximum Sentence A Judge Is Legally Authorized To Impose Be Proved To A Jury Beyond A Reasonable Doubt.

1. Petitioner's principal argument in defense of the Guidelines is that this Court has used the phrase "statutory maximum" to describe the outer limit of a judge's sentencing authority. Pet. Br. 15-19, 39 (arguing that application of *Blakely* to the Guidelines depends on "'redefin[ing] "statutory maximum" to omit the word "statutory"'" (citation omitted)). To be sure, in *Blakely*, *Ring*, and *Apprendi*, the source of law that authorized a judge to impose a sentence based on facts not found by the jury (or admitted by the defendant) was a statute. *Blakely*, 124 S. Ct. at 2535 (describing Washington Sentencing Reform Act); *Ring*, 536 U.S. at 592-93 (Arizona first-degree murder statute); *Apprendi* v. *New Jersey*, 530 U.S. 466, 468-69 (2000) (New Jersey unlawful firearm possession and hate crime statutes). It is, therefore, hardly surprising that the Court at times has described the failing of the sentences imposed in those cases as exceeding the "statutory maximum" authorized by the jury's verdict. *Blakely*, 124 S. Ct. at 2537; *Apprendi*, 530 U.S. at 490; see also *Ring*, 536 U.S. at 604 (noting that Arizona's first-degree murder statute "explicitly cross-references [a] *statutory* provision" (emphasis added)). But there is no indication that the use of the word "statutory" in these cases described the governing principle, rather than the simple fact that the cases involved statutes.

Indeed, the Sixth Amendment rule is indifferent to the source of law—statutory or otherwise—that underlies the judge's sentencing authority. Simply put, "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. This Court has repeatedly stated the rule in just these terms, beginning with *Jones*, the first case to articulate the relevant principle, 526 U.S. at 223 n.6 ("any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt"), and continuing through *Apprendi*, *Ring* and *Blakely*.[5] What has always mattered is the judge's authority, however constrained, to impose a sentence based solely upon the facts found by the jury. What matters is what "the law" permits, not the source of "the law"; what matters is the scope of the "judicial power" to sentence, not the source of the limitation on that power.

The Guidelines, no less than a statute, constrain a judge's authority to impose a sentence.[6] The Guidelines are binding

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[5] *Blakely*, 124 S. Ct. at 2537 ("[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to punishment' and the judge exceeds his proper authority" (internal citation omitted)); *id.* at 2538 (what matters is that imposition of the longer sentence on the basis of the jury's factual findings alone would have resulted in the sentence being "reversed"); *id.* at 2543 ("every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment"); *Ring*, 536 U.S. at 588-89 (characterizing *Apprendi*'s holding: "the Sixth Amendment does not permit a defendant to be 'expose[d] … to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone'"); *id.* at 602 ("[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the state labels it—must be found by a jury beyond a reasonable doubt"); *Apprendi*, 530 U.S. at 482-83 (discussing the "consistent limitation on judges' discretion to operate within the limits of the legal penalties provided"); *id.* at 486 (the Constitution is implicated by "a state scheme that keeps from the jury facts that 'expos[e] [defendants] to greater or additional punishment'"); *see Harris* v. *United States*, 536 U.S. 545, 567 (2002) (Kennedy, J.) (*Apprendi* means "that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for purposes of the constitutional analysis").

[6] For this reason, petitioner misreads this Court's statement in *Apprendi* that it is not "'impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in

on sentencing judges. *Stinson*, 508 U.S. at 42; *Mistretta*, 488 U.S. at 391. If a judge imposes a sentence in excess of the Guidelines-determined range, the defendant is entitled to have an appellate court vacate the sentence. 18 U.S.C. § 3742.[7] Because the Guidelines constrain the judge's legal authority to impose a sentence, and because the Sixth Amendment requires the actual sentence imposed to remain at or below the maximum amount legally authorized based solely upon the facts found by the jury, every time a judge enhances a sentence under the Guidelines beyond that permitted by the jury-found facts, the Sixth Amendment is violated.

2. Petitioner's reading of *Blakely* as concerning only "statutes" that limit a judge's sentencing authority fails for reasons beyond the breadth of the language used by this Court in stating the relevant legal principle. When it comes to determining the scope of the Sixth Amendment jury right, "[t]he dispositive question … 'is one not of form, but of effect.'" *Ring*, 536 U.S. at 602 (quoting *Apprendi*, 530 U.S. at 494);

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imposing a judgment *within the range* provided by statute.'" Pet. Br. 16 (quoting *Apprendi*, 530 U.S. at 481). That passage expressly refers to the judge's traditional sentencing *discretion* and says nothing about a system, like the Guidelines, that constrains the judge's discretion to move within a statute's range.

[7] A group of former federal judges essentially denies that the Guidelines are mandatory and claims that, because sentencing judges have authority under the Guidelines to depart (both upward and downward) from the sentencing range mandated by the Guidelines, the Guidelines survive Sixth Amendment scrutiny. *See* Ad Hoc Group of Former Federal Judges Br. 6 ("federal judges possess th[e] substantial ability to depart from a Guideline range"). Petitioner does not advance this argument, and with good reason, for the argument entirely misses the point of *Blakely*. To justify a departure—up or down—a judge must find some fact that the Guidelines do not otherwise instruct him to consider. 18 U.S.C. § 3553(a), (b). But if that fact was not found by the jury, it cannot justify an upward departure. *Blakely*, 124 S. Ct. at 2538 n.8 ("Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence."). Furthermore, this argument presupposes a level of judicial discretion that, even if it once existed, certainly does not any longer. *See infra* at 23-25.

Mullaney v. *Wilbur*, 421 U.S. 684, 699 (1975) (the jury right "is concerned with substance rather than … formalism"). To accept petitioner's (and the Sentencing Commission's) argument that statutes are different for Sixth Amendment purposes would ignore substance in favor of form. What matters is what the rules constraining judicial power do, not how those rules are labeled. *In re Winship*, 397 U.S. 358, 365-66 (1970) ("civil labels and good intentions do not themselves obviate the need for criminal due process safeguards"). And in every relevant respect, the Guidelines constrain judicial power *exactly* as did the provisions of the Washington Sentencing Reform Act that were held in *Blakely* to violate the Sixth Amendment. If anything, the Washington system was *more* Sixth Amendment compliant than the Federal Guidelines.

Washington's sentencing system relied on three kinds of "facts" to produce the sentence in *Blakely*. The sentencing court began with the facts that make up the offense of conviction—in *Blakely*, second degree kidnapping, Wash. Rev. Code § 9A.40.030(1). 124 S. Ct. at 2534. Because that offense is a "Class B" felony, Wash. Rev. Code § 9A.40.030(3)(a), the maximum prison term was 10 years, *id.* § 9A.20.021(1)(b). The second "fact" related to a "special verdict" provision that allows the government to require *the jury*, if it finds the defendant guilty of the charged offense, to make a special finding whether a deadly weapon was used in the commission of the crime. *Id.* § 9.94A.602. Blakely admitted the elements of both second degree kidnapping and the deadly weapon (firearm) allegation. 124 S. Ct. at 2534-35.

Under the Washington Guidelines, if the judge had considered *only* the facts related to the offense of conviction, and Blakely's criminal history, then Blakely would have received a sentence of 13 to 17 months. *Id.* at 2535. Because Blakely admitted the firearm allegation as well, his sentence more than doubled under the Guidelines. *Id.* (noting 36-month firearm enhancement under Wash. Rev. Code § 9.94A.310(3)(b)). Blakely had the right to insist that this

fact be proved to the jury beyond a reasonable doubt, even though it was not an element of the offense of conviction. *State* v. *Tongate*, 613 P.2d 121, 122 (Wash. 1980). The Sixth Amendment was not violated, however, because Blakely admitted this fact in his plea.

Blakely's sentence was constitutionally infirm *only* because the judge increased his sentence beyond what the Washington Guidelines authorized based on the facts Blakely admitted. The judge found that Blakely had acted with "'deliberate cruelty'" in committing the crime, and imposed an "exceptional sentence" that added 37 months to the sentence otherwise authorized by the Guidelines. 124 S. Ct. at 2535. Thus, the Washington system enhanced Blakely's sentence by 36 months in a way compliant with the Sixth Amendment (the firearm enhancement) and by 37 months in a way that was noncompliant (the deliberate cruelty enhancement).

The Federal Guidelines lack the Sixth Amendment-compliant part of the Washington system, and mimic the noncompliant part. As petitioner admitted in *Blakely*, in the federal system there is one maximum punishment "that would be permitted under the Guidelines if one could consider only those facts constituting the elements of a particular offense (and the defendant's criminal history)." U.S. Br. as *Amicus Curiae* at 30, *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632). That is what the sentencing judge considered here in imposing a sentence of 78 months. Pet. App. 5a-7a. From the Sixth Amendment perspective, respondent Fanfan's sentence is the equivalent of the 13-to-17-month range the Washington Guidelines produced for Blakely's charged offense after considering his criminal history. But whereas Washington began enhancing that sentence in a way consistent with the Sixth Amendment (the firearm enhancement), *all* of the federal enhancements here are like Blakely's unlawful deliberate cruelty enhancement: the defendant has no right to insist that the facts authorizing the enhancement be proved to a jury beyond a reasonable doubt. In Fanfan's case, up to

157 additional months of imprisonment would have been based exclusively upon judge-found facts. In *United States* v. *Hammoud*, No. 03-4253, 2004 WL 2005622, at *35 (4th Cir. Sept. 8, 2004) (Motz, J., dissenting), exclusively judge-found facts enhanced the sentence by *150 years*.

To be sure, the Federal Guidelines are more complex than the Washington Guidelines. Pet. Br. 29-32. The Federal Guidelines do not, as an initial matter, produce a "standard range" based upon criminal history and the offense of conviction. Instead, they require the judge to consider all "'relevant conduct'" attendant to the offense (which includes, but is not limited to, the facts found by the jury), to determine a "base offense level[]." *Id.* at 29-31. As a result, whereas the offense of conviction in Washington is closely related to the "'standard sentenc[ing] range,'" under the Federal Guidelines the offense of conviction is not meaningfully related to any Guidelines sentencing range. *Id.* at 31. In addition, a finding of a particular offense characteristic under the Federal Guidelines is not necessarily tied to any particular increase in the sentence imposed. *Id.* at 32.

But these differences only serve to conceal the Sixth Amendment violation, not cure it. The constitutional defect in the Washington system was plain because the lawful steps in the sentencing process relied on facts found by the jury or admitted by the defendant. Washington's system violated the Sixth Amendment only when it deviated from these lawful considerations and increased the sentence the judge could impose as the result of judge-found facts. That aspect of the Washington system, held unconstitutional in *Blakely*, pervades the federal regime, which does not even ask the judge to perform the lawful first steps of the Washington system. Commingling jury-found facts with judge-found facts at the core of the sentence-calculation process, as the Federal Guidelines do, simply merges into a single step the multiple steps of the Washington system.

The relevant distinction, under the Sixth Amendment, is

between judge-found facts and those the defendant has a right to insist be proved to a jury. Washington tried to obliterate that distinction in *Blakely* by diverting this Court's attention away from the legally binding significance of the facts that the defendant could insist be proved to a jury. To Washington, that its Sentencing Reform Act prohibited the 90-month sentence without judge-made findings was irrelevant because some other law—the Class B felony sentencing provision capping punishment at 10 years—would have permitted the judge to impose the longer sentence. *Blakely*, 124 S. Ct. at 2537. Petitioner tries the same diversion. To petitioner, that the Guidelines do not allow the judge to impose a 235-month sentence without judge-made findings is irrelevant because another source of law—21 U.S.C. § 841(b)(1)(B)—would permit the judge to impose a longer sentence (40 years).

This Court should reject petitioner's argument just as it rejected Washington's. The Federal Guidelines and the Washington Guidelines *function* exactly the same; they both *do* the same thing, even if one is nominally a "statute" and the other is not. Each fully constrains the lawful power of the judge to impose a sentence. Because, as this Court has repeatedly emphasized, form is not to be elevated over substance, this Court should treat the two systems the same. The Sixth Amendment invalidates both to the extent they increase the punishment the judge is legally authorized to impose as the result of judge-found facts.

3. There is a third reason that the Federal Guidelines should be treated just like the Washington Guidelines for Sixth Amendment purposes: The values protected by the Sixth Amendment jury right are offended equally by binding *regulatory* restraints as they are by *statutory* restraints.

The jury right is a "fundamental reservation of power in our constitutional structure … [so as to] ensure[] the people's ultimate control … in the judiciary." *Blakely*, 124 S. Ct. at 2538-39. By requiring a jury to find all facts essential to authorize punishment of a certain severity, juries "check[]"

the power of judges to impose severe sentences by issuing "what today we would call verdicts of guilty to lesser included offenses." *Jones*, 526 U.S. at 245 (citing 4 Blackstone, *Commentaries* 238-39 (1769)). A jury has a distinct advantage over judges in dispensing the merciful sense of the community, and not only because the jury is more representative of community sentiment. A jury "does not need to give any reason for an acquittal, and it faces no review by a court or legislature. It therefore has a greater opportunity than a judge to check the state['s] … punitive laws." Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 61 (2003). As demonstrated in *Jones* by this Court's exhaustive review of the history of the jury right, any shift from jury to judge of the power to make findings of fact that bear upon the judge's authority to impose an increased sentence would have struck the Founding generation as an intrusion on a basic bulwark of liberty. *Jones*, 526 U.S. at 246-48 ("the finding of facts was simply too sacred a jury prerogative to be trifled with"; quoting 4 Blackstone, *Commentaries* at 342-44 (warning against "'new and arbitrary methods of trial,'" not by juries, which are tempting because they appear "'*convenient*,'" but ultimately erode the liberty-protecting function of the jury), and *A [New Hampshire] Farmer, No. 3, June 6, 1788*, *in The Complete Bill of Rights* 477 (N. Cogan ed. 1997) (same)). The notion that the Commission would be free to depart from these values when Congress may not does serious violence to the principles that animate the Sixth Amendment.

The evil to be avoided is a system in which the prosecutor triggers the right to punish on the basis of relatively minor misconduct found by a jury, and then proceeds to a "judicial inquisition into the [more serious] facts of the crime the State *actually* seeks to punish." *Blakely*, 124 S. Ct. at 2539. "If a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink

from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping…." *Jones*, 526 U.S. at 243-44. This is *exactly* the system that the Guidelines create—as vividly demonstrated by the sentence in *Hammoud*, in which jury findings authorized a sentence of less than five years, and judge-found facts increased that sentence by 150 years. 2004 WL 2005622, at *35 (Motz, J., dissenting). As one commentator has observed,

> federal criminal defendants are subject to a regime that (1) defines crimes narrowly, thereby effectively reducing the number of facts that a jury must find beyond a reasonable doubt to find the defendant guilty; and (2) authorizes punishment for those narrowly-defined crimes based upon factors determined not by the jury beyond a reasonable doubt, but by the presiding judge under a lesser burden of proof.

Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 Seton Hall L. Rev. 459, 460 (1993).[8] Indeed, one study of the Guidelines "found that half of all sentences had been increased—sometimes doubled or tripled—by uncharged conduct." Barkow, *supra*, at 94. This is not a system that gives meaningful weight—much less controlling authority—to the jury's factual findings, as mandated by the Sixth Amendment's fundamental protections.

Nowhere does petitioner or the Sentencing Commission explain why the Sixth Amendment would approve a non-statutory system that treats the jury's findings as a relatively

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[8] *See also* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161, 210-11 (1991) ("[u]nder the guidelines ... a defendant's 'relevant conduct' is the backbone of the sentencing system"); Robert H. Joost, *Viewing the Guidelines as a Product of the Federal Criminal Code Effort*, 7 Fed. Sent. Rep. 118 (1994), *available at* 1994 WL 780782, at *3 ("The guidelines effectively override the multiplicity of criminal statutes by making irrelevant, for sentencing purposes, the offense for which the defendant was convicted.").

trivial part of the defendant's overall sentence, but at the same time strike down a statutory system that yielded the same result. See *United States* v. *Booker*, 375 F.3d 508, 512 (7th Cir. 2004) (noting that to accept the government's argument would "have saved Washington's sentencing guidelines, unless an administrative agency is to be deemed a more responsible, a more authoritative, fount of criminal law than a legislature"). Likewise, neither petitioner nor the Sentencing Commission has explained why a statutory system that allowed a sentence to be increased on the basis of a fact determined only under the preponderance standard violates the Sixth Amendment, while a regulatory rule that produces the same result would not. *People* v. *Reese*, 179 N.E. 305, 308 (N.Y. 1932) (Cardozo, J.) ("The genius of our criminal law is violated when punishment is enhanced in the face of reasonable doubt as to the facts leading to the enhancement."). Whether the system is statutory or non-statutory, the Sixth Amendment requires this Court to protect the jury's role, applying the reasonable doubt standard, to check the power of the state to impose punishment.

Petitioner and the Sentencing Commission rely heavily on *Mistretta*, claiming that the Guidelines do not reflect a shift in power away from the jury and toward judges because the Guidelines merely perform the precise function that judges, not juries, historically performed. Pet. Br. 20-22 (citing *Mistretta*, 488 U.S. at 391, 395); U.S.S.C. Br. 21-22. To be sure, in the pre-Guidelines system, judges determined what facts were relevant to sentencing and how much weight to give those facts (within the range provided by the statute of conviction). *Williams* v. *New York*, 337 U.S. 241, 250-51 (1949). Under the Guidelines regime, petitioner argues, the Sentencing Commission now makes those determinations instead of individual judges, but that shift has no effect on the power of the jury. Pet. Br. 22-23.

The notion that the Guidelines merely "channel judicial discretion" is indefensible. *Id.* at 22. The Guidelines all but

foreclose judicial discretion. Cf. *Miller* v. *Florida*, 482 U.S. 423, 434-35 (1987) (rejecting contention that Florida sentencing guidelines "'merely guide and channel' the sentencing judge's discretion"). They are mandatory with respect to both *which* facts matter for sentencing purposes, and *how much* those facts matter. Accordingly, the Guidelines have created a *right* to a sentence at or below the Guidelines maximum based on the facts found by the jury. 18 U.S.C. § 3742 (right to appeal and vacate erroneous application of Guidelines); Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 84 (1998) ("The sentencing proceeding itself has been recast from a discretionary into a formal adjudicatory process, in which the court makes findings of fact that translate into sentencing requirements under the Guidelines."). And that *right* makes all the difference for purposes of the Sixth Amendment.

As noted above, the Sixth Amendment is concerned with maintaining the legal significance of the jury in our criminal system. If the controlling law gives a defendant the *right* to a sentence at or below the level authorized by jury-found facts, the judge must be constrained to impose only that sentence and no more. Allowing a judge to add findings that authorize a greater sentence diminishes the significance of the jury, and thereby undermines the Sixth Amendment. The Sixth Amendment permits a system that gives judges broad discretion to impose sentences based upon jury findings *only* if no controlling rule of law entitles a defendant to a lesser sentence based on the jury's findings. Because the Guidelines create a right to a maximum sentence based upon the jury's findings, when the Guidelines permit the judge to increase that maximum based upon his or her own findings, the Guidelines violate the Sixth Amendment.

The Guidelines were designed for laudable purposes: to reduce the "great variation among sentences imposed by different judges upon similarly situated offenders," and "the uncertainty as to the time the offender would spend in prison."

Mistretta, 488 U.S. at 366; see S. Rep. No. 98-225, at 38, 65 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221, 3248. Petitioner concedes that the Guidelines have not changed what the jury does during a criminal trial—it evaluates the evidence to determine whether the facts necessary to support a conviction are proven beyond a reasonable doubt. But what has changed, and what implicates the Sixth Amendment, is the *legal significance* of what the jury does. This Court should restore the controlling legal significance of the jury's findings—only the jury's findings can increase the maximum sentence authorized by law.

* * * *

Just a few months ago, petitioner recognized that if this Court adopted Blakely's argument that the maximum permissible sentence "for purposes of *Apprendi* is the punishment that would be imposed without any findings other than the facts reflected in the jury verdict alone … [then s]uch a rule would have profound consequences for the federal Guidelines." U.S. Br. as *Amicus Curiae* at 25-26, *Blakely* v. *Washington*. Blakely won. This Court adopted precisely the rule petitioner then opposed. And now petitioner argues that the very rule that it thought just months ago "would have profound consequences for the Guidelines," in fact has no consequences at all. Petitioner was right in what it feared in *Blakely*; the rule of *Apprendi* and *Blakely* renders the Guidelines unconstitutional to the extent they permit judicial fact-finding of sentence-enhancing facts.

B. Even If There Is An Exception To The Sixth Amendment For Judge-Made Rules That Enhance Sentences, The Guidelines Are Not Judge-Made Rules.

For all the reasons stated above, no matter what the source of law, any rule that increases the sentence a judge is permitted to impose based on facts not proved to a jury or admitted by the defendant is unconstitutional. But even if this Court

were to elevate form over substance and conclude that there is an exception to the Sixth Amendment for judge-made rules, the Guidelines would still be unlawful.

1. Petitioner argues that the Sentencing Commission, when promulgating guidelines, is not "like an agent of the legislature [but rather] like a vehicle for distilling the collective practices of sentencing judges as a whole and rationalizing and harmonizing those practices in light of the defined purposes of sentencing." Pet. Br. 25-26. Petitioner endorses Judge Easterbrook's dissent in *Booker*, in which he argued that the Sentencing Commission is doing no more than what courts might have done over time through the common law process. *Id.* at 24 (citing 04-104 Pet. App. 21a (Easterbrook, J., dissenting)). In short, petitioner seeks an exception to the Sixth Amendment for judge-made rules that authorize increased sentences based on facts not found by the jury. But the Guidelines have never been conceived of as judge-made rules. And it is especially hard now, given Congress's continuing and substantial role in developing and amending the Guidelines, to conceive of the Guidelines as would petitioner.

As early as this Court's first encounter with the Guidelines, it recognized that the Commission "is not a court and does not exercise judicial power." *Mistretta*, 488 U.S. at 384-85. The Commission's membership precludes the possibility that it is exercising the "judicial power of the United States." U.S. Const. art. III, § 1. Its members are appointed for a fixed term, do not serve during good behavior, and can be removed by the President for good cause. 28 U.S.C. §§ 991(a), 992(a). These conditions may not be imposed on office-holders exercising the judicial power. *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982). It is true that the Court recognized that sentencing is a traditionally judicial function, *Mistretta*, 488 U.S. at 390-91, but the Court likewise emphasized that "Congress may delegate to the Judicial Branch *nonadjudicatory functions* that do not trench upon the prerogatives of another Branch," *id.* at 388 (emphasis added).

If there were any question that the Commission's role in promulgating the Guidelines was not judicial, it was put to rest in *Stinson*: The Guidelines "are the equivalent of legislative rules adopted by agencies." 508 U.S. at 45.

Petitioner's view that the Guidelines are judge-made rules appears newly minted for this case. The United States has admitted on more than one occasion that the Guidelines are the equivalent of "legislative" rules. Just last Term, in its *amicus* brief in *Blakely*, the United States observed that "the Guidelines are binding legislative rules." U.S. Br. as *Amicus Curiae* at 30, *Blakely* v. *Washington*. And more than 15 years ago, the United States acknowledged that this Court's decision in *Miller* v. *Florida*, 482 U.S. 423 (1987)—which held that the Ex Post Facto Clause should be applied to Florida's statutory Sentencing Guidelines—would apply to the Federal Guidelines. DOJ Criminal Div., *Prosecutors Handbook on Sentencing Guidelines and Other Provisions of the Sentencing Reform Act of 1984*, at 74 (1987). Petitioner now contends that the Ex Post Facto Clause does not apply to judicial decisionmaking, Pet. Br. 25 (citing *Rogers* v. *Tennessee*, 532 U.S. 451, 462 (2001)), which can only mean that the Guidelines are "'legislative'" for purposes of the Ex Post Facto Clause. *Id.*

2. Not only do these concessions make clear that the Guidelines are not judge-made rules, they also demonstrate that this Court's holding in *Mistretta*—that Congress, in creating the Commission, did not violate the rarely-invoked nondelegation doctrine, 488 U.S. at 376-80—tells us nothing about whether Guidelines are judge-made rules that do not violate the Sixth Amendment. In answering that question, this Court writes on a clean slate.

As the Court observed in *Jones*, the Sixth Amendment was enacted in part in response to Parliamentary efforts to bar the right to jury trial when "defining new, statutory offenses." *Jones*, 526 U.S. at 245. In considering whether the Guidelines are judge-made rules, then, it makes sense to consider

whether they serve such a jury-avoiding function—*i.e.*, whether they serve to impose congressional judgments about the severity of punishment that should attach to certain conduct while avoiding the burden of proving those facts to a jury beyond a reasonable doubt.

Congress has always played some role in the formulation of the Guidelines. In *Mistretta*, the Court noted that Congress "legislated a full hierarchy of punishment—from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives—and stipulated the most important offense and offender characteristics to place defendants within these categories." 488 U.S. at 377; see 28 U.S.C. § 994(c), (d). Congress's powers of oversight are substantial. It retains the authority to "revoke or amend" any provision of the Guidelines "at any time," *Mistretta*, 488 U.S. at 393-94, and for that reason, new Guidelines do not take effect for 180 days so that Congress may review and modify or disapprove them. 28 U.S.C. § 994(p).

Congress has not let its authority atrophy. See Steven L. Chanenson, *Hoist with Their Own Petard?*, 17 Fed. Sent. Rep. (forthcoming Oct. 2004), *at* http://papers.ssrn.com/sol3/papers.cfm?abstractid=586782, draft at 15 (cataloging congressional actions directly affecting content of Guidelines). Most dramatically, Congress recently drafted Guidelines text. See Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. No. 108-21, § 401(b), (g), (i), 117 Stat. 650, 668, 671-73. Not surprisingly, each of these amendments further cabined the judiciary's sentencing discretion by either restricting a judge's authority to grant downward departures and adjustments, *id.* § 401 (b), (g), 117 Stat. at 668, 671-72, or establishing a new aggravated offense to increase a defendant's offense level, *id.* § 401 (i), 117 Stat. at 672-73. The PROTECT Act further consolidated congressional control over the Sentencing Commission with its placement of a two-year moratorium on any amendment that either affects the con-

gressionally enacted Guidelines or "adds any new grounds of downward departure." *Id.* § 401(j)(2), 117 Stat. at 673. Finally, the PROTECT Act signaled Congress's ongoing, direct control by amending the sentence-reporting requirements to require judges to include "the reason for any departure from the otherwise applicable guideline range." *Id.* § 401(h), 117 Stat. at 672. Congress has also rejected the Commission's effort to modify the 100-to-1 ratio of sentencing for crack compared to powder cocaine. Pub. L. No. 104-38, 109 Stat. 334 (1995).

Even accepting that Congress initially envisioned that the Guidelines would be controlled by the independent Sentencing Commission, a body of experts supposedly immune from the pull of politics, these recent congressional assertions of control demonstrate that "Congress has abandoned its original conception of the Sentencing Commission." David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. Rev. 211, 232 (2004). There is no longer a meaningful basis for arguing that the Guidelines reflect purely judicial self-regulation immune from the political judgments of Congress.

Congress's shift in thinking about the Commission is also reflected in changes to its structure. Congress never intended even a majority of members of the Commission, much less all members, to be federal judges. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 254-55 (1993). Still, until recently, it was *possible* that the Commission might be made up of a majority of judges. No more. Recent amendments to the Sentencing Reform Act have limited judges to no more than three members. In fact, what petitioner today justifies as a "judicial body" exercising traditional judicial power, may, under current law, include *no* judges whatsoever. See 28 U.S.C. § 991(a); PROTECT Act, Pub. L. No. 108-21, § 401(n)(1), 117 Stat. at 675-76.

In sum, the Guidelines have never been understood to be a set of judge-made rules through which the judiciary regulated itself. And whatever basis there was to imagine the Guidelines as such in the past has vanished in light of Congress's direct influence over the substance of the Guidelines. Thus, even were this Court to conclude that there is a Sixth Amendment exception for judge-made rules that amount to judicial self-regulation, the Guidelines still could not survive to the extent they require judicial factfinding of sentence-enhancing facts.

C. Holding The Guidelines Unconstitutional On Sixth Amendment Grounds Would Not Require This Court To Overrule Any Cases.

Finally, petitioner tries to escape *Blakely* by highlighting four pre-*Apprendi* cases whose "'vision,'" it asserts, "is fundamentally at odds with the view that *Apprendi* or *Blakely* applies to the Guidelines." Pet. Br. 33. Petitioner reads far too much into these cases.

It is sufficient to note that *none* of these cases considered whether judicial factfinding under the Guidelines violates the Sixth Amendment. In fact, these cases hardly even mentioned the Sixth Amendment right to a jury trial, much less considered and ruled upon the scope of that right. *United States* v. *Dunnigan*, 507 U.S. 87 (1993) (enhancement for perjury does not violate accused's right to testify on own behalf); *Witte* v. *United States*, 515 U.S. 389 (1995) (Double Jeopardy Clause does not bar a subsequent prosecution for conduct that was included as relevant conduct in calculating a sentence for an earlier prosecution); *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam) (Double Jeopardy Clause did not prohibit consideration of previously acquitted conduct in the "relevant conduct" calculation under the Guidelines); *Edwards* v. *United States*, 523 U.S. 511 (1998) (refusing to consider petitioner's Sixth Amendment challenge to the Guidelines). It is axiomatic that issues not presented to, or specifically left unconsidered by, this Court remain open for

consideration on their merits and are accorded no *stare decisis* effect. See *Alden* v. *Maine*, 527 U.S. 706, 735-36 (1999) ("isolated statements in some of our cases suggesting" a certain constitutional rule "do not decide the question [once squarely] presented" to the Court); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) ("this Court does not decide important questions of law by cursory dicta inserted in unrelated cases"). This Court has on more than one occasion considered a question *on the assumption* that some necessary predicate proposition of law was true, only later to consider and reject the predicate. See, *e.g.*, *Brecht* v. *Abrahamson*, 507 U.S. 619, 630-31 (1993); *Edelman* v. *Jordan*, 415 U.S. 651, 670-71 (1974). These cases are no different. They merely reflect the internal logic of the Guidelines. They do not even inform the question of whether the foundation of that logic is sound.

* * * *

In the end, there is no basis in law or in the constitutional values embodied in the Sixth Amendment to allow the Federal Sentencing Guidelines to increase a defendant's lawful maximum punishment based on judge-found facts. What Washington could not do by statute, the United States cannot do by Guideline. No decision of this Court remotely precludes such a result, and *Apprendi*, *Ring*, and *Blakely* compel it.

II. THE GUIDELINES NEED NOT BE STRUCK DOWN IN THEIR ENTIRETY.

Because the Sixth Amendment rule applied in *Blakely* and its precursors applies to the Sentencing Guidelines, the Guidelines are unconstitutional to the extent they provide for judicial factfinding of sentence-enhancing facts. Accordingly, this Court must determine how the Guidelines may be severed or reinterpreted in order best to effectuate congressional intent. Petitioner argues that this Court should simply render the Guidelines advisory. Pet. Br. 67. This proposal should be rejected, for it would altogether thwart the primary

purpose of the Guidelines—to mandate uniformity in sentencing—both by striking the mandatory controls that are essential to uniformity and by causing the creation of two separate, parallel sentencing regimes. See *infra* Section II.B. Instead, the unconstitutional aspects of the Guidelines—those requiring sentencing increases based solely upon judicial factfinding by a preponderance of the evidence—should be severed. In any future case in which sentence-enhancing facts have been properly indicted, such sentencing enhancements could be based on factual findings made by the jury. Here, however, the government did not plead such facts in its indictment, failed to try those facts before the jury, has not requested the opportunity to do so on remand, and appears to concede that such relief is unavailable. Accordingly, the appropriate disposition is simply to affirm the judgment.

A. The Portions Of The Sentencing Reform Act And The Guidelines That Require Judicial Factfinding Should Be Severed.

The Court should sever those portions of the SRA and the Guidelines that are understood to require judicial factfinding of sentence-enhancing facts. Such a result best comports with Congress's stated purposes when it enacted the SRA and the Guidelines and, as a practical matter, provides the best interim system while Congress and the Sentencing Commission consider whether legislative responses to this Court's decision are warranted.

1. The Purposes Of The SRA And The Guidelines Are Best Served By Mandatory Guidelines That Incorporate Jury Factfinding.

a. "The inquiry into whether a statute is severable is essentially an inquiry into legislative intent." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). That inquiry operates against a strong presumption in favor of severability, *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality); the party urging inseverability must "prove[] 'that

Congress would have preferred no … provision at all to the existing provisions *sans* the [unconstitutional] provision.'" *Alaska Airlines*, 480 U.S. at 685 n.7. Accordingly, "'whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.'" *Regan*, 468 U.S. at 652; see also *INS* v. *Chadha*, 462 U.S. 919, 934 (1983); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("[t]he cardinal principle of statutory construction is to save and not to destroy"); *Champlin Ref. Co.* v. *Corp. Comm'n*, 286 U.S. 210, 234 (1932) (severability is appropriate "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not").

Of particular pertinence here, severance is the appropriate course unless the unconstitutional provision is "*essential* to the statutory program as a whole," *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971) (emphasis added), or "the balance of the legislation is *incapable* of functioning independently," *Alaska Airlines*, 480 U.S. at 684 (emphasis added).[9]

b. Congress enacted the Guidelines with three purposes in mind:

> Congress first sought *honesty* in sentencing. It sought to avoid the confusion and implicit deception that arose out of … an indeterminate sentence [that] usually [was] substantial[ly] reduc[ed] [in most cases by 'good time' credits]….

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[9] These basic principles of severability demonstrate why *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952), and *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), are inapposite. Pet. Br. 46-47. Those cases simply stand for the truism that severability does not permit a court to substitute its judgment for an agency's. Here, there is no substitution of judgment; the very reason to sever provisions that mandate judicial fact-finding is to preserve, within the bounds of the Sixth Amendment, the legislative and regulatory policy behind the Guidelines.

> Second, Congress sought *uniformity* in sentencing by narrowing the wide disparity in sentences imposed for similar criminal conduct by similar offenders. Third, Congress sought *proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

USSG § 1A1.1, hist. note 3 (emphasis added); see also S. Con. Res. No. 108-130 (2004); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 4-6 (1988).

The major impetus for the Guidelines' creation was—as petitioner and its supporting *amici* concede—the "crisis" created by a sentencing scheme that produced sentencing disparities "'terrifying and intolerable for a society that professes devotion to the rule of law.'" Senators' Br. 9-10 (quoting M. Frankel, *Criminal Sentences: Law Without Order* 5 (1972)); Pet. Br. 3. The lack of meaningful guideposts for sentencing judges produced an "astounding" amount of variation in sentences for identical conduct, S. Rep. No. 98-225, at 41, *reprinted in* 1984 U.S.C.C.A.N. at 3224, thus creating "great variation among sentences imposed by different judges upon similarly situated offenders," *Mistretta*, 488 U.S. at 366. In short, the scheme was "unfair both to offenders and to the public." S. Rep. No. 98-225, at 45, *reprinted in* 1984 U.S.C.C.A.N. at 3228.

None of the three goals identified in § 1A1.1 is undermined by jury factfinding beyond a reasonable doubt, because none of them depends upon the identity of the factfinder or the burden of persuasion. The goal of honesty in sentencing depends on the abolition of parole, which jury factfinding in no way affects. And the goals of uniformity and proportionality are effectuated by having (a) a mandatory system that (b) "balance[s] the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance,

minimize[s] the discretionary powers of the sentencing court." USSG § 1A1.1 hist. note 3.

A sentence that is based upon jury-determined facts is subject to the same system of "categorization" and "constraints" as a sentence based upon judge-determined facts:

> The Sentencing Guidelines seek to achieve these Congressional objectives because they contemplate similar sentences once a given set of facts are found to exist. Although severance would change how those facts are determined, and by whom, severance would have no effect on the Congressional goal of achieving consistency of sentences in cases that involve similar offense conduct.

United States v. *Ameline*, 376 F.3d 967, 981-82 (9th Cir. 2004). Jury factfinding permits the Guidelines to function "sensibly," *MD/DC/DE Broadcasters Ass'n* v. *FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001), and satisfies the primary legislative intent. *Ameline*, 376 F.3d at 981-82; *United States* v. *Khan*, 325 F. Supp. 2d 218, 224 (E.D.N.Y. 2004) (Weinstein, J.).[10]

A waivable right to jury factfinding is the *only* approach that upholds the predominant purpose of the SRA and the Guidelines—namely, to eliminate unwarranted disparities in sentencing. Striking the Guidelines as a whole would necessarily return the criminal justice system to a world of disuniformity and sentencing disparity. And, as discussed below, see *infra* Section II.B., rendering the Guidelines purely advisory, as Petitioner proposes, would return the sentencing process to a *status quo ante* that Congress deemed intolerable.

Basing Guidelines sentencing on facts found by a jury is, furthermore, perfectly consistent with the Sixth Amendment. As *Blakely* recognized, the question "is not about whether

[10] For this same reason, petitioner's argument that the SRA was enacted to resolve problems occasioned by "*judicial* sentencing," Pet. Br. 47, is largely beside the point; that fact in no way compels the conclusion that the resulting procedure must itself encompass judicial factfinding.

determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." 124 S. Ct. at 2540. All that the Sixth Amendment forecloses is "tak[ing] away from the defendant the right to demand that the [sentence-enhancing fact] be determined by the jury rather than by the judge, and on the basis of proof beyond a reasonable doubt." *Booker*, 375 F.3d at 511. On this understanding, "much of what Congress was trying to accomplish in the Sentencing Reform Act of 1984 is untouched by *Blakely*." Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 Fed. Sent. Rep. 316, 319 (2004). Only those portions of the Guidelines that "*require* the sentencing judge to make findings of fact (and to do so under the wrong standard of proof)" would run afoul of the Sixth Amendment. *Booker*, 375 F.3d at 511. For that reason, the Guidelines can easily be squared with the Sixth Amendment in this manner.[11]

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[11] Alternatively, this Court could simply interpret the relevant provisions of the SRA and the Guidelines to require jury factfinding of sentence-enhancing facts unless the defendant waives the right. Petitioner points to USSG §§ 1B1.2 and 6A1.3, and 28 U.S.C. § 994 as mandating judicial factfinding. Pet. Br. 49. But these provisions simply state that "the court" or the "sentencing court" shall make certain determinations. In some contexts, of course, the term "the court" means "the judge." However, "the word 'court' …. has a broad[] meaning, which includes both judge and jury." *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 356 (1998) (Scalia, J., concurring in judgment); *see also Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978) (statutory provision authorizing "the court" to grant relief interpreted to create a right to jury trial). To be sure, judges have understood the SRA and the Guidelines to authorize judicial factfinding. But the question has never been squarely presented to this Court, and the vague language in § 994 must now be interpreted in light of the constitutional constraints imposed by the Sixth Amendment. So long as the jury-right reading is "'fairly possible,'" *Feltner*, 340 U.S. at 358-59 (Scalia, J.), the rule encouraging courts to provide a saving construction to a statute counsels in its favor. *INS* v. *St. Cyr*, 533 U.S. 289, 300 n.12 (2001) (""'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality'"").

This is precisely how the courts of appeals treated the statute criminalizing drug possession, 21 U.S.C. § 841, following *Apprendi*. Before *Ap-*

c. Jury factfinding is fully consistent with the notion that the Guidelines should be applied as a single, unitary system. It is of course true that the Guidelines apply in their entirety to any given defendant. See USSG § 1B1.11(b)(2) ("The Guidelines Manual in effect on a particular date shall be applied in its entirety."). Provisions from one version of the Manual are not to be applied selectively with provisions from another version. *Id.* And the sentencing of any given defendant must be conducted on the basis of "an interlocking system of calculations and adjustments that are part of a single sentencing equation," Senators' Br. 21; see also Pet. Br. 50—namely, all of the adjustments, both upward and downward, that are encompassed in the Guidelines. USSG § 1B1.1. Nothing about jury factfinding would change these aspects of the Guidelines system, for the sentence in every case would still "account for both mitigating and aggravating factors in determining each defendant's sentence." Pet. Br. 50.

Petitioner and its *amici*, however, seek to extrapolate these basic provisions into a more general principle that *everything* about the Guidelines is a single "cohesive whole." *E.g.*, Pet. Br. 50; Senators' Br. 21. They assert that any change in the current regime caused by jury factfinding runs counter to this principle of cohesiveness. Leaving aside for the moment that petitioner's own proposed solution is itself a form of severance, see *infra* at 44-45,[12] this argument fails because it is nothing more than a backdoor attempt to read an inseverabil-

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prendi, the courts read that statute to permit judicial factfinding of drug quantity. *United States* v. *Buckland*, 289 F.3d 558, 564 n.2 (9th Cir.) (listing cases), *cert. denied*, 535 U.S. 1105 (2002); *United States* v. *Buckland*, 259 F.3d 1157, 1164-65 (9th Cir. 2001) (tracing legislative history), *rev'd*, 289 F.3d 558 (9th Cir. 2002) (en banc). After *Apprendi*, however, every court of appeals concluded that the prudent solution was simply to reinterpret the statute to permit jury factfinding. *United States* v. *Outen*, 286 F.3d 622, 634 (2d Cir. 2002) (listing cases).

[12] The government wields the cohesiveness argument selectively. In its own brief, the government concedes that the unconstitutional portions of the SRA can be severed. Pet. Br. 67.

ity provision into the SRA and the Guidelines where none exists. "In the absence of a severability clause, however, Congress' silence is just that—silence—and does not raise a presumption against severability." *Alaska Airlines*, 480 U.S. at 686. To the contrary, "the presumption is in favor of severability." *Regan*, 468 U.S. at 653. And where, as here, the severed statute would continue to "function in a manner consistent with the intent of Congress,"[13] *Alaska Airlines*, 480 U.S. at 685 (emphasis omitted), severability is the rule.

Nowhere does petitioner explain why the situation here is different; it does not explain why Congress's supposed preference for judicial factfinding is so essential to the Guidelines that "'the whole act will fall.'" *Field* v. *Clark*, 143 U.S. 649, 696 (1892). Nor does it explain how the use of juries to determine sentence-enhancing facts would undermine the Guidelines' goals of honesty, uniformity, and proportionality in sentencing.

On the contrary, jury factfinding is a familiar, workable system that would better effectuate Congress's goal of uniformity than a wholly advisory set of Guidelines. It would, moreover, establish an equilibrium point that would enable effective and sensible sentencing procedures in the present, to which Congress and the Commission could react, if needed,

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[13] Petitioner turns this phrase on its head, suggesting that severance is foreclosed if it would somehow change the mechanics of the statute. Pet. Br. 68. The phrase means just the opposite:

> [T]he test for severability is not, as the government seems to suggest, whether the statute will function identically to the way it operated before the objectionable provisions were severed. If this actually were the test for severance, severance would never be appropriate. Rather, the test is "whether the statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685.

Ameline, 376 F.3d at 982. In *Alaska Airlines* itself, the Court held that the invalidation of a legislative veto provision in a statute was severable because the remaining provisions in the statute could nonetheless "stand on their own," 480 U.S. at 689, despite procedural changes that would result.

in the future. See *Blakely*, 124 S. Ct. at 2550-51 (Kennedy, J., concurring) (encouraging "collaborative process" between courts and Congress); see also Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 50 (1961) (recognizing the need for the Court to engage in "Socratic dialogue" with other institutions).

2. A System Of Jury Factfinding Is Practicable.

There is nothing unworkable about a system of jury factfinding. The Guidelines, severed in the fashion urged here, "will function in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685.

a. As an initial matter, this Court has long rejected the notion that factfinding is too "complex," Pet. Br. 54, 55, for juries to handle. "Our Constitution and the common-law traditions it entrenches … do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury." *Blakely*, 124 S. Ct. at 2543; *Summerlin*, 124 S. Ct. at 2525 (noting "common-law authorities [that] praise[e] the jury's factfinding ability"); *United States* v. *O'Daniel*, 328 F. Supp. 2d 1168, 1182 (N.D. Okla. 2004) ("There is nothing in this Court's experience with juries that would suggest that a jury cannot make very sophisticated sentencing decisions with proper guidance and instruction by the Court."). It is for these same reasons that juries are presumed to follow their instructions faithfully and accurately. See *Richardson* v. *Marsh*, 481 U.S. 200, 206-07 (1987) (collecting cases).

Both current and historical practice confirm the constitutional, democratic understanding that juries are fully equipped to handle complicated factfinding. Juries must determine whether aggravating circumstances exist sufficient to impose a death sentence. *Ring*, 536 U.S. at 609. Simply put, "[n]o federal sentencing is as complex as a capital sentencing hearing, where juries deal with fact-finding beyond a reason-

able doubt routinely and in accordance with constitutional requirements." Federal Public Defender Letter to U.S. Sent. Comm'n, *reprinted in* 16 Fed. Sent. Rep. 361, 361 (2004).[14]

Indeed, juries since *Apprendi* have engaged in factfinding for the purpose of sentencing. Jury factfinding was instituted in the State of Kansas after *Apprendi*, and has proven a success. *Blakely*, 124 S. Ct. at 2541; Br. of Kansas Appellate Defender Office as *Amicus Curiae* in Support of Pet'r at 7, *Blakely* v. *Washington*, *available at* 2003 WL 22970598 ("[a]fter *Apprendi* and *Gould*, both the standard sentencing ranges found in the KSGA and the legislative intent to promote uniformity and standardize sentences, while allowing for exceptional cases, remain intact"). In federal courts after *Apprendi*, juries have been charged with finding facts triggering the complex graduated sentencing scheme for drug offenses. *United States* v. *Montgomery*, 324 F. Supp. 2d 1266, 1272 (D. Utah. 2004). And since *Blakely*, some courts have already begun to present sentencing facts to the jury, with no apparent difficulty. *E.g.*, *United States* v. *Harris*, No. Cr. 03-354 (JBS), 2004 WL 1853920, at *10-*11 (D.N.J. Aug. 18, 2004); see also *United States* v. *Johns*, No. 1:03-CR-0250-16, 2004 WL 2053275, at *13-*14 (M.D. Pa. Sept. 15, 2004).[15]

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[14] Petitioner's concern that jury factfinding will result in prejudice to defendants, Pet. Br. 57, is misplaced. First, the right to jury factfinding is waivable, which means that any defendant who believes he or she will be prejudiced may forego jury factfinding. Further, any unduly prejudicial evidence appropriate for sentencing can always be withheld from the jury until a separate sentencing phase, as is done in capital cases. *Monge* v. *California*, 524 U.S. 721, 739 n.1 (1998) (Scalia, J., dissenting); *see* Fed. R. Crim. P. 14(a) (authorizing severance "or … any other relief that justice requires" to prevent prejudice).

[15] Petitioner presents a laundry list of guidelines factors, taken from *United States* v. *Croxford*, 324 F. Supp. 2d 1230 (D. Utah 2004), to argue that jury factfinding is too complex. Pet. Br. 54. Even a cursory review of those nine facts, however, reveals those most of them would likely be presented to the jury in the course of the trial anyway—for instance, what type of bank was robbed, or whether a gun was used. *See also Harris*, 2004 WL 1853920, at *8 (recognizing, in a case at trial when *Blakely* was

As an historical matter, too, juries have long had a role in rendering verdicts on both factual and legal matters that affect sentencing. As the Court noted in *Ring*:

> "*[T]he jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.* Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned."

536 U.S. at 599 (quoting *Walton* v. *Arizona*, 497 U.S. 639, 710-11 (1990) (Stevens, J., dissenting)).

These examples, both present and past, demonstrate that the Guidelines are compatible with jury factfinding. King & Klein, *supra*, at 319. To be sure, the necessity of submitting a greater volume of facts to jurors would lead to some greater complexity than simply asking them to determine whether a defendant is guilty of a narrowly-defined crime. Rosenberg, *supra*, at 460. But in light of the jury system's proven ability to handle such factfinding, it would be extraordinary to presume that this process is so unworkable as to overcome the heavy presumption in favor of severability.

b. Nothing about a rule requiring jury factfinding would require, as petitioner asserts, "'a complex and completely novel procedure.'" Pet. Br. 61 (quoting *United States* v. *Jackson*, 390 U.S. 570, 580 (1968)).[16] As a threshold matter,

decided, that the indictment had already charged a factual basis for five out of six sentence-enhancing factors).

[16] *United States* v. *Jackson*, 390 U.S. 570 (1968), which refused to interpret the Federal Kidnaping Act to require sentencing juries is inapposite. The Court was concerned that capital sentences were involved, *id.* at 580, which they are not here. It was concerned that the sentencing juries would be "thrust … upon unwilling defendants" for the purpose of putting them to death, *id.*; there is no such risk here for defendants. But perhaps

such an objection was no obstacle to this Court's rulings in *Apprendi*, *Ring* and *Blakely*, all of which required some amount of procedural adjustment.

But more fundamentally, "district court judges are well experienced in implementing" the supposedly "novel" and "complex" procedures about which petitioner warns. *O'Daniel*, 328 F. Supp. 2d at 1181. Familiar devices of bifurcated trials or special jury interrogatories plainly are available. *Id.* at 1182 ("in most cases, requiring the jury to find each fact … beyond a reasonable doubt is neither novel nor onerous"; recognizing courts' experience with jury interrogatories and bifurcated trials); *accord Booker*, 375 F.3d at 514 (finding "no novelty" in separate trials or hearings before a jury on sentencing issues); *Ameline*, 376 F.3d at 983 (approving sentencing juries); *Khan*, 325 F. Supp. 2d at 224 ("Experience with juries suggests that use of a jury in sentencing, even after a plea of guilty or in a second phase of a trial on the merits, is feasible."); *Harris*, 2004 WL 1853920 (describing post-*Blakely* jury factfinding); *Johns*, 2004 WL 2053275, at *13-*14 (same); King & Klein, *supra*, at 319 n.68 ("[a]fter *Apprendi*, judges had no trouble submitting drug types and quantities to juries, despite no new legislation permitting this").[17]

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most critical of all, as petitioner itself recognizes, Pet. Br. 61, that case would have required the courts to determine what rules of evidence would apply, what each side would have to show, and what standard of proof would apply, for capital punishment to be imposed, 390 U.S. at 578-79. Here, by contrast, it is clear that the Guidelines would provide the proof requirements, and the Due Process Clause, the standard of proof.

[17] Courts routinely make use of such devices. For example, federal courts bifurcate criminal RICO trials, *see, e.g.*, *United States* v. *Dinome*, 86 F.3d 277, 278 (2d Cir. 1996); *United States* v. *Jenkins*, 902 F.2d 459, 461 (6th Cir. 1990), notwithstanding the lack of any express authority under the Federal Rules of Criminal Procedure to do so. Likewise, the California state courts' general authority to control the conduct of a trial, Cal. Penal Code § 1044, authorizes them to bifurcate proceedings when a defendant's prior offenses are at issue, *see People* v. *Calderon*, 885 P.2d

For these same reasons, petitioner is mistaken to assert that jury factfinding would amount to "substitut[ing] the Court's judgment on matters of policy for the agency's." Pet. Br. 46-47. The requirement that factual findings necessary to enhance criminal sentences be made by a jury is not a "policy" decision by this Court, but a requirement of the Sixth Amendment. And basing Guidelines calculations on jury findings falls well within the federal courts' inherent powers. See *United States* v. *Hasting*, 461 U.S. 499, 505 (1983) ("'[G]uided by considerations of justice,' … and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress."). The question before this Court is not one of "policy" but of practicality: whether there is a method of severing the statute that leaves it faithful to legislative intent. That is precisely what jury factfinding would accomplish.

c. Petitioner objects that there would be "serious constitutional problems" with requiring juries to make the findings necessary to support a Guidelines sentence in excess of a sentence based only on the facts of conviction. Pet. Br. 63. Specifically, it contends such a system would effectively treat the pronouncements by the Commission as "elements" of offenses. *Id.* at 64-65. Petitioner thus urges this Court to reject the remedial option that does the least violence to the Guidelines—maintaining the Guidelines structure while granting defendants the waivable right to insist that a jury find all the facts that authorize an increased sentence under the Guidelines—in order to avoid the supposedly substantial nondelegation question. *Id.* at 66.

Jury factfinding is not constitutionally doubtful. The nondelegation doctrine is not concerned with whether a fact is effectively an "element" for Fifth and Sixth Amendment purposes. In all respects material to the nondelegation question,

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83, 87-88 (Cal. 1994). *See also* Fed. R. Crim. P. 32.2 (permitting bifurcation of criminal forfeiture trials).

the jury factfinding option is exactly the same as the Guidelines system upheld against a nondelegation attack in *Mistretta*. There, the Court acknowledged that the SRA delegated to the Commission the authority to determine facts that should be considered in calculating a sentence, and how much weight those facts merit at sentencing. 488 U.S. at 377 ("the Commission enjoys considerable discretion in formulating guidelines"). The same remains true if those sentence-relevant facts are found by a jury. As *Mistretta* further acknowledged, the Guidelines bound a sentencing judge to impose a sentence within the range produced by the Guidelines based on the relevant facts found to be true. *Id.* at 367 ("the Sentencing Commission's guidelines [are] binding on the courts"). The same is true of a Guidelines sentence based on jury factfinding. The only difference between jury factfinding and the Guidelines system upheld against a separation-of-powers challenge in *Mistretta* is who—judge or jury—determines whether any alleged fact is true in a particular case, and what standard—reasonable doubt or preponderance of the evidence—the factfinder must employ. *Mistretta* did not even mention, much less turn upon, who the factfinder is, and what standard must be satisfied, when it rejected the nondelegation challenge. *Id.* at 371-79. These procedural questions have nothing to do with the nondelegation doctrine.

Petitioner's constitutional doubt argument is, therefore, exceedingly peculiar. The supposedly "doubtful" question that should be avoided is one that this Court answered definitively 15 years ago; namely, that Congress constitutionally could delegate to the Commission the identification of sentence-enhancing facts. Only by overruling *Mistretta* would jury factfinding fall under the nondelegation doctrine. Never has this Court applied the doctrine of constitutional avoidance, which requires a "grave and doubtful constitutional question[]," *Jones*, 526 U.S. at 239, to a situation where the supposed constitutional infirmity vanishes if this Court simply adheres to its prior precedent.

In the end, this case is about the procedural requirements of the Sixth Amendment. Cf. *Summerlin*, 124 S. Ct. at 2523 ("Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules, a conclusion we have reached in numerous other contexts."). Those requirements apply regardless of how this Court resolved the nondelegation question in *Mistretta*. Whether Congress must define which facts authorize a judge to impose an increased sentence, or whether Congress can delegate that task to a Commission, does not matter here. Either way, the defendant has a right to insist that those facts be proved to a jury beyond a reasonable doubt.

d. Petitioner and its *amici* contend that jury factfinding would invite "asymmetry" into the sentencing process. The premise of this argument is that, in a world of jury factfinding, it would be easier for a defendant to have his sentence reduced than for the prosecutor to have it enhanced, Pet. Br. 50; Senators' Br. 22, and the implication is that this would somehow distort the system. From the presumption of innocence to the right to a jury trial to the requirement of proof beyond a reasonable doubt, however, our Constitution provides the criminal defendant with unique protections—meant to provide him a fair opportunity to withstand the awesome prosecutorial power of the state—that the state does not share.

This understanding of the Constitution's protections for criminal defendants has led this Court "often [to] recognize[]" the "distinction ... between facts in aggravation of punishment and facts in mitigation." *Apprendi*, 530 U.S. at 491 n.16. As the Court has explained, "[c]ore concerns animating the jury and burden-of-proof requirements are ... absent" from a scheme in which a defendant may not receive punishment greater than that authorized by a jury's verdict beyond a reasonable doubt, but may have his sentence reduced by proving a mitigating factor to a judge by a preponderance of the evidence. *Id.*; see also *McKoy* v. *North Carolina*, 494 U.S. 433, 443 (1990) ("reject[ing] the State's contention that requiring

[juror] unanimity on mitigating circumstances is constitutional because the State also requires unanimity on aggravating circumstances"). Given this longstanding distinction, it is not surprising that there is *nothing* in the Guidelines, the SRA, or the legislative history of the SRA to suggest that Congress embraced "symmetry" between sentence-enhancing and sentence-reducing facts, or that Congress would jettison the Guidelines *in toto* to promote such symmetry.

Indeed, assuming (as is necessary for purposes of the severability argument) that the Sixth Amendment as interpreted in *Blakely* applies to the Guidelines, there is every reason to think that Congress would *not* favor this kind of "symmetry." Because *Blakely* requires that all sentence-enhancing factors be presented to a jury and proved beyond a reasonable doubt, "symmetry" would require that all mitigating factors likewise be presented to a jury, and proved *by the defendant beyond a reasonable doubt*. It would be truly novel for defendants to be put to such a heavy burden to disprove the basis for their sentences. As this intuition would predict, in the wake of this Court's decision in *Ring*, the Arizona legislature instituted jury factfinding for both aggravating and mitigating factors in capital cases, but imposed different standards of proof—proof beyond a reasonable doubt for aggravating factors, but preponderance of the evidence for mitigators. *State* v. *Ring*, 65 P.3d 915, 926 (Ariz. 2003); Ariz. Rev. Stat. § 13-703.B, -.C.[18]

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[18] Nor does any notion of unfairness aid petitioner's cause. "[T]he concept of 'unfairness to the government' [as a reason to hold the Guidelines inseverable] lacks any foundation in either law or history." *United States* v. *Swan*, 327 F. Supp. 2d 1068, 1072 (D. Neb. 2004). "The protections mandated by the Sixth Amendment are for the benefit of the individual, not the government. Reliance on 'unfairness to the government' as a rationale is akin to the assertion that it is not fair to require the government to prove every element of its case." *Id.*; *Montgomery*, 324 F. Supp. 2d at 1272. "Thus, the government is no more disadvantaged in applying *Blakely* to the federal sentencing guidelines than it has been in applying *Apprendi* to the guidelines." *Id.*; *Swan*, 327 F. Supp. 2d at 1072-73.

e. Petitioner's remaining complaints about jury factfinding are likewise insufficient to overcome the presumption of severability. Surely some number of pending cases will be affected by the severance of the Guidelines. Cases in which sentencing has occurred, or in which trial has been completed but sentencing has not, may face constitutional obstacles to reindictment or resentencing. Pet. Br. 68-69.[19] But severability analysis does not rest on whether short-term dislocations will result from severance; the proper inquiry is whether the resulting statutory or regulatory scheme comports with the intent of the enacting Congress. Furthermore, the effects that petitioner fears may not be so great. Courts can and already have used various techniques to minimize these problems. *E.g.*, *Harris*, 2004 WL 1853920, at *10-*11; *O'Daniel*, 328 F. Supp. 2d at 1176-83. And prudent prosecutors could have prevented these problems by indicting and proving to a jury all sentence-enhancing facts after *Apprendi*—a fact that is tacit in petitioner's decision to do so after *Blakely*. See *DOJ Legal Positions and Policies in Light of Blakely v. Washington* ("*Comey Memo*"), *reprinted in* 16 Fed. Sent. Rep. 357, 358 (2004) ("Prosecutors should immediately begin to include in indictments all readily provable Guidelines upward

[19] In this case, indeed, to subject Fanfan to additional jury factfinding in order to increase his sentence beyond that supported by the first jury's verdict would likely violate the Indictment Clause, the Double Jeopardy Clause, and/or the ex post facto component of the Due Process Clause. Perhaps for those reasons, petitioner has, conspicuously, not sought that remedy, and seems to concede that it is unavailable, Pet. Br. 68-69 (arguing that if jury factfinding is required then "Fanfan could be sentenced to no more than 78 months of imprisonment"). Accordingly, if this Court determines that the Guidelines are unconstitutional at least in part and concludes that the Guidelines should be severed or reinterpreted to provide for jury factfinding, it should therefore simply affirm Fanfan's sentence. In any event, the Court should not remand the case for jury factfinding in order to increase his sentence. Any remand proceedings should permit Fanfan to argue that petitioner has waived its right to conduct further proceedings against him and that any such proceedings would be unconstitutional.

adjustment or upward departure factors…. [I]t is prudent for the government to protect against the possibility that such allegations in indictments will be held necessary.").

Petitioner's concern that it will be more difficult to obtain enhancements for obstruction of justice, Pet. Br. 56, is of even lesser concern. In many cases, it will be enough for the judge to deal with obstruction by increasing a sentence within the Guidelines range (as is permissible, see *United States* v. *Grayson*, 438 U.S. 41, 50-51 (1978)). If the prosecutor believes this remedy to be insufficient, then the requirement that such enhancements be proved to the jury would simply mean, as a practical matter, that such conduct would be dealt with in contempt proceedings, or charged as a separate offense in a separate proceeding. *Blakely*, 124 S. Ct. at 2539 n.11. Such a result is fully consonant with Sixth Amendment values.

The notion implicit in these arguments—that any change in the sentencing system necessitates the wholesale abandonment of the Guidelines—fundamentally misunderstands the role of this Court, of Congress and of the Commission. The discussion of severability necessarily presumes that the Court has determined that the Guidelines are, at least in some applications, unconstitutional. Accordingly, there can be no question but that the sentencing system will undergo change. Whether this Court severs the Guidelines in a manner that effectuates jury factfinding (as respondents urge); renders the Guidelines advisory (as petitioner would have); or jettisons the Guidelines altogether (as would be the functional result of petitioner's requested relief), the system will look different than it did when Congress enacted it. The important question, then, is which result best implements Congress's purposes, and which result leaves the sentencing regime in a state that permits ongoing observation and dialogue, and that can facilitate any needed future changes. See *id.* at 2551 (Kennedy, J., dissenting) (noting the need to continue "the dynamic and fruitful dialogue … that has marked sentencing reform"). To render the Guidelines advisory because of, for instance, some

perceived asymmetry—and thereby to abandon their primary purpose—is to prevent any such dialogue. This case is not the end of sentencing reform. If the implementation of jury factfinding does in fact lead to asymmetry, and if that result is perceived to be problematic, then either Congress or the Commission can respond.[20]

B. Petitioner's Proposed Solution—To Make The Sentencing Guidelines Advisory—Directly Contradicts The Stated Purposes Of Congress And The Sentencing Commission.

Petitioner contends that judicial factfinding is not severable from the remainder of the Guidelines because Congress would not have approved of a scheme that required juries (rather than judges) to find the existence of facts that are essential to a defendant's sentence. Pet. Br. 47-63. The solution it proposes is to render the Guidelines voluntary. *Id.* at 67. This result would return sentencing to the broad discretion that existed prior to the enactment of the SRA, and would thereby do fatal violence to congressional intent.

1. Before considering the considerable problems with this proposal, it must first be noted that petitioner's proposal is itself a form of severance, claims to the contrary notwithstanding. Although petitioner wraps itself in the mantle of inseverability, Pet. Br. 66 ("the Guidelines must rise or fall as a whole"), its own proposal amounts to severing those provisions that make the application of the Guidelines mandatory. These include not only 18 U.S.C. § 3553(a) ("the court … shall consider"), and § 3553(b) ("the court shall impose")—

[20] For precisely the same reason, it is not significant that "[c]ountless provisions of the Guidelines … *might* have been crafted differently" to account for jury factfinding. Pet. Br. 51. Such speculation has no bearing on the severability inquiry, which depends not on whether the severed Guidelines are identical to those that preceded them, but on whether they would function as a "workable administrative mechanism." *Chadha*, 462 U.S. at 935. And it continues to ignore that Congress and the Commission both have the power to effectuate such changes in the future.

which petitioner does note, Pet. Br. 67—but also hundreds of provisions throughout the Guidelines that speak in mandatory terms, including such key provisions as § 1B1.3 (governing relevant conduct). A simple word search of the Guidelines Manual reveals 879 instances of the word "shall." The fact that many, if not most, of these "shalls" would have to be severed for petitioner's proposal to take effect makes clear that severance is indeed what petitioner seeks. Severance in this fashion would require both scalpel and scythe. With both parties squarely in the position of advocating some form of severance, the question is which form of severance is faithful to the purposes of the enacting Congress. *Mille Lacs*, 526 U.S. at 191.

2. On that score, it is plain that making the Sentencing Guidelines voluntary, as petitioner advocates, is directly contrary to Congress's primary purpose when it enacted the Sentencing Reform Act. The SRA responds to the "major flaw in the existing criminal justice system"—the "shameful disparity in criminal sentences" produced by the "unfettered discretion" of sentencing courts, S. Rep. No. 98-225, at 38, 65, *reprinted in* 1984 U.S.C.C.A.N. at 3221, 3248, including disparities that resulted from judicial consideration of race, gender and other illegitimate factors, Senators' Br. 4, 11. Petitioner concedes, as it must, that Congress specifically intended the Guidelines to be mandatory, precisely to end disuniformity in sentencing. Pet. Br. 67-68. In fact, Congress rejected a proposed amendment that would have allowed judges to disregard the Guidelines at their discretion. It did so "because of the poor record of States" that "experimented with 'voluntary' guidelines." S. Rep. No. 98-225, at 79, *reprinted in* 1984 U.S.C.C.A.N. at 3262. Petitioner never explains why this Court should choose an option that Congress specifically rejected (voluntary guidelines) over an option that Congress never directly addressed (jury factfinding).

Choosing the option Congress expressly rejected makes no sense. Rendering the Guidelines advisory would institution-

alize the problem that Congress sought to eliminate. Petitioner's suggested resolution of the severability question is, accordingly, the least restrained possible result, and would fully thwart congressional intent. *Ameline*, 376 F.3d at 982 ("were we to hold that *Blakely* precludes application of the Guidelines as a whole, we would do far greater violence to Congress' intent than if we merely excised the unconstitutional procedural requirements").

Worse, the advisory scheme proposed by petitioner would lead to even greater disparities than the system that preceded the enactment of the Guidelines. Petitioner argues, in a revealingly cautious turn of phrase, that under its proposal the Guidelines "would be inapplicable *in a case in which the Guidelines would require the sentencing court to find a sentence-enhancing fact*." Pet. Br. 66-67 (emphasis added). Similar guarded phrases appear throughout its brief.[21] The unmistakable implication, which petitioner has explicitly embraced elsewhere,[22] is that the Guidelines remain fully applicable when no sentence-enhancing facts are at issue. This is an extraordinary proposal, and it would lead to unprecedented

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[21] *E.g.*, Pet. Br. 44 ("*in any case in which the Constitution prohibits the judicial factfinding procedures* … the Guidelines as a whole become inapplicable" (emphasis added)); *id.* at 69 ("if the Court were to hold that *Blakely* … invalidates the system as a whole *in a case such as this*") (emphasis added).

[22] *See United States* v. *Mueffleman*, 327 F. Supp. 2d 79 (D. Mass. 2004):

> [I]t is worth noting that the Government advances a selective severability argument. They claim that the Guidelines are only unconstitutional with respect to cases involving sentence enhancements. The system can be unseverable with respect to enhancements…. In contrast, in cases in which there are no enhancements, the Government argues the Guidelines apply. The argument makes no sense.

Id. at 95; *accord Comey Memo*, *reprinted in* 16 Fed. Sent. Rep. at 358 (if *Blakely* applies to the Guidelines, then "in cases where a court … finds that there are no applicable upward adjustments under the Guidelines beyond the admitted facts or the jury verdict on the elements of the offense, the Guidelines are constitutional and should be applied").

sentencing disparities. For some defendants (those for whom no sentence-enhancing facts were at issue), the Guidelines would apply, and their sentence would be determined by their base offense level (and possibly certain limited other facts, such as the fact of a prior conviction, see *Almendarez-Torres* v. *United States*, 523 U.S. 224, 246 (1998)). For other defendants, the Guidelines would not apply at all, and the sentencing judge would have full discretion to sentence those defendants within the statutory range, Pet. Br. 67, and to follow or not to follow the then-advisory Guidelines. Even leaving aside the constitutional questions that this dual system might raise,[23] this result would amount to institutionalized disuniformity far worse than even the well-documented problems of the pre-Guidelines era.

This system would vest nearly total power in prosecutors to determine which sentencing regime would apply in a given case. Such a shift of power to prosecutors to select the applicable sentencing regime would be troubling enough from a separation-of-powers perspective, but it would be doubly offensive because of the potential for abuse. A prosecutor blessed with a "hanging" judge could choose to plead sentence-enhancing facts, thereby rendering the Guidelines inapplicable and permitting the judge to sentence the defendant to the full statutory maximum. A prosecutor who drew a judge with a reputation for leniency could choose not to allege such facts, in order to guarantee a minimum sentence determined by the Guidelines base offense level. And, although prosecutors probably could predict which judge they would draw only in some judicial districts, the same result could be accomplished by amending indictments to add or drop sentence-enhancing facts in response to the assigned judge. This

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[23] *Cf. Muefflemen*, 327 F. Supp. 2d at 96 ("It would be troubling—to say the least—if judges announced that they were sentencing under an indeterminate regime, but in fact applied Guideline sentences now wholly without the procedural protections that *Apprendi* and *Blakely* were beginning to address.").

revolutionary and manipulable system is so far beyond what Congress could have imagined that it must be rejected.[24]

Moreover, such a system would bear no resemblance to any system—either pre-Guidelines or Guidelines-era—that Congress could have envisioned. Under the present system, the Guidelines intermediate between Congress (and the full statutory range it enacts) and the judge's otherwise almost-limitless discretion, by normalizing sentences within the full statutory range. In the pre-Guidelines era, parole and good time credit (despite their flaws) served a similar leveling function. S. Rep. No. 98-225 at 46, 49-50, *reprinted in* 1984 U.S.C.C.A.N. at 3229, 3232-33. But petitioner's proposal would result in no replacement for either mechanism; judges would simply have full discretion to sentence within the statutory range. This is a novel system, with unpredictable results, that Congress would not have intended.

3. In the end, the search for a serious explanation by petitioner of the function or effect of "advisory" Guidelines is purely quixotic. Although petitioner devotes some 23 pages to attacking jury factfinding, Pet. Br. 43-66, it begins and ends its discussion of advisory Guidelines in just over one

[24] The fact that petitioner's proposal would mark a return to fully non-uniform sentencing is a complete answer to its complaint that jury factfinding would constitute an impermissible shift from a real-offense to a charge-offense system. Pet. Br. 57-58. First, any such shift is of relatively slight importance. *See* USSG § 1A1.1 hist. note 4(a) ("it is important not to overstate the differences in practice between a real and a charge offense system"). Second, this argument shows striking disrespect for the beyond-a-reasonable-doubt standard of proof. It assumes that the government should be entitled to punish individuals based on conduct it cannot prove beyond a reasonable doubt. A jury factfinding system is faithful to a "real-offense" approach; it just makes the government *prove* what "really" happened. And even if sentencing based upon jury factfinding would mark a partial shift in the direction of charge-offense, the shift would not be complete, because judges would maintain some discretion to sentence within the range mandated by the jury-found facts. In any event, any partial shift is surely preferable to the government's wholesale abandonment of sentencing uniformity.

page, *id.* at 66-67. Perhaps the details are forthcoming on reply. But at this juncture, it appears that advisory Guidelines are a nullity. Petitioner fails to explain what an "advisory" rule is. It does not suggest when and how a district court should take the Commission's "advice." It does not hint at the appropriate standard for reviewing a court that rejects this advice—clear error? abuse of discretion?—or even whether rejecting the advisory Guidelines would be reviewable.

Tacitly recognizing that boundless discretion in the form of advisory Guidelines is quite incompatible with Congress's intent, petitioner suggests that 18 U.S.C. § 3553(a) could take the place of the Guidelines by steering judicial decisionmaking. Pet. Br. 67. (Section 3553(a) identifies the factors that courts must consider in sentencing defendants; section 3553(b) specifies that sentencing must be in accordance with the Guidelines.) As an initial matter, petitioner—which styles itself a supporter of inseverability—fails to explain why § 3553(a) would survive when § 3553(b), which concerns only the mandatory application of Guidelines sentences, would have to be struck down to achieve advisory Guidelines.

More importantly, petitioner fails to acknowledge that, in addition to subsection (b), nearly all of subsection (a) also relates to Guidelines sentencing. So, for instance, petitioner claims that subsection (a)(1) simply requires a judge to comply with various "statutory purposes." Pet. Br. 67. This is not quite right. Subsection 3553(a)(1) relates specifically to *Guidelines* purposes—it was meant to "assist [the sentencing judge] in assessing how the sentencing guidelines and policy statements should apply to the defendant." S. Rep. No. 98-225, at 75, *reprinted in* 1984 U.S.C.C.A.N. at 3258. Subsections (a)(4) and (a)(5) likewise apply directly to the Guidelines—they "require that the sentencing judge consider the kinds of sentence and the sentencing range applicable to the category of offense committed by the category of offender under the sentencing guidelines issued pursuant to 28 U.S.C. 944(a) and under any applicable policy statements issued by

the Sentencing Commission." *Id.* at 77, *reprinted in* 1984 U.S.C.C.A.N. at 3260.

But even if *all* of § 3353(a) could apply in a world of advisory Guidelines, it would not guide judicial discretion one whit. Its provisions do nothing more than restate the most basic penal purposes—"to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," for instance. 18 U.S.C. § 3553(a)(2)(A). Without binding Guidelines, these general statements are nothing but aphorisms.

In short, petitioner fails to offer any convincing rationale for rendering the Guidelines advisory, or any explanation about how such a system would work. This is because it would not. Advisory Guidelines would utterly frustrate the goals of Congress, and would create a situation even worse than the one that led to their creation in the first place.

* * * *

The Sixth Amendment requires that any sentence-enhancing fact must be found by a jury beyond a reasonable doubt. To the extent the SRA and the Guidelines require judges to find such facts, they are constitutionally infirm. Accordingly, in order best to effectuate Congress's intent to end sentencing disparities by means of a mandatory and uniform sentencing structure, this Court should sever or reinterpret any provisions of the SRA and the Guidelines that are understood to compel judicial factfinding. Because petitioner did not seek to amend its defective indictment in this case or to try sentence-enhancing facts to a jury, has not asked leave on remand to do so here, and concedes that such relief is unavailable, the judgment and sentence in this case should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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