No. 05-6551

IN THE
Supreme Court of the United States

John Cunningham,
Petitioner,
v.

The State of California,
Respondent.

On Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Five

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 11,200 attorneys and 28,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors.[1] NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights, including the right to a trial by jury at issue in this case, and has a keen interest in ensuring that criminal proceedings are handled in a proper and fair manner. To promote these goals, NACDL has frequently appeared as *amicus curiae* before this Court in all manner of cases concerning substantive criminal law and criminal procedure, including *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), *Ring* v. *Arizona*, 536 U.S. 584 (2002), *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005). Because the decision below is contrary to the rule set forth by this Court in *Apprendi*, *Ring*, *Blakely*, and *Booker*, NACDL respectfully submits this brief *amicus curiae* in support of petitioner.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored any part of this brief, and no person or entity, other than *amicus*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. This Court need not break any new ground to hold that California's determinate sentencing system violates the Sixth Amendment.

A. It is, by now, settled that the Sixth Amendment prohibits states from imposing sentences beyond statutory maximums on the basis of facts not tried to a jury or admitted by the defendant. California's Determinate Sentencing Law runs afoul of this clear proscription. Under that law, judicial factfinding exposes criminal defendants such as petitioner to harsher punishments than jury verdicts alone allow. That is all this Court needs to know. Indeed, over the past two years, courts in nearly all of the twelve other states that had similar determinate sentencing systems in place after this Court's decision in *Blakely* v. *Washington*, 542 U.S. 296 (2004), have had little difficulty recognizing the systems' constitutional infirmity. This Court should simply bring the final few outliers, including California, into compliance.

B. The California Supreme Court's error derives from a fundamental misunderstanding of *Blakely* and this Court's subsequent decision in *United States* v. *Booker*, 543 U.S. 220 (2005). The California Supreme Court wrongly believed that the Sixth Amendment primarily concerns how much sentencing discretion judges may have, and that if judges in a determinate sentencing system have discretion comparable to that which they may have in an indeterminate sentencing system, then the former must be constitutional. Not so. The Sixth Amendment is not so much a limitation on judicial power as it is a reservation of jury power against legislative and executive encroachment. It prohibits legislatures from criminalizing or gradating behavior without affording the procedural protections that must accompany such laws, and thereby progressively eroding the relevance of the jury trial to a mere formality. And it prohibits prosecutors from seeking greater punishment than is otherwise allowed based on accusations they are unwilling or unable to prove in the traditional adversarial process. To be sure, lawmakers may evade these Sixth Amendment prohibitions by limiting criminal codes to generalized crimes and broad, indeterminate sentences. But over the long run, structural democratic impulses will push legislatures to strive toward proportionate and predictable punishment, notwithstanding the procedural protections that must accompany progressive legislation.

II. Recent state sentencing legislation confirms that the rule set forth in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* is not only theoretically sound but also is practically workable.

A. Complying with the Sixth Amendment has caused neither widespread chaos nor the abandonment of sentencing reform in state criminal justice systems. Over the past few years, seven of the nine state legislatures that have amended their laws have "*Blakely*-ized" their sentencing systems by requiring aggravating factors to be tried to juries. Colorado's high court also *Blakely*-ized its state system by judicial decision and the New Mexico House has passed a bill that would do the same. While a couple of states affected by *Blakely* have retreated somewhat from determinate sentencing regimes, not a single one has done what this Court's dissenters in *Blakely* feared the most: returned to a true indeterminate sentencing system.

B. California's system likewise is amenable to *Blakely*-ization. After this Court's decision in *Blakely*, but before the California Supreme Court's refusal to follow it in *People* v. *Black*, 113 P.3d 534 (Cal. 2005), some California trial and appellate courts were assuming that *Blakely* applied and were behaving accordingly. All indications are that these interim procedures worked just fine. And the state sentencing system has long followed the dictates of *Blakely* with respect to sentence "enhancements," many of which are extremely similar to aggravating facts. In any event, the relative prospects for incorporating *Blakely* into the state's existing determinate sentencing system are not paramount here. The most important thing this Court can, and should, do is to continue insisting that states respect the constitutional ground rules for sentencing reform. The jury's role in the criminal justice system is far too vital ever to be marginalized for the sake of expediency or efficiency.

ARGUMENT

I. California's Sentencing System Contravenes the Rule Set Forth in *Apprendi* and *Blakely*.

This case calls for nothing more than the simple application of the rule articulated in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny to California's determinate sentencing system. The plain text of the California statute reveals that the law violates the Sixth Amendment in precisely the same manner as the regimes invalidated in *Apprendi*, *Ring* v. *Arizona*, 536 U.S. 584 (2002), *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005). Indeed, most other states with similar regimes have already recognized that their systems were constitutionally infirm. There is nothing special about California's system that exempts it from the separation-of-powers concerns that animate *Apprendi*.

A. California's Sentencing System Implicates the Sixth Amendment Because It Necessitates Factfinding Beyond the Jury Verdict to Impose a Sentence Longer than the Middle Term.

1. *Apprendi* and *Blakely* provide a straightforward, "bright-line rule" regarding the constitutionality of sentencing decisions made by judges. *Blakely*, 542 U.S. at 308. The rule is that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 301 (quoting *Apprendi*, 530 U.S. at 490). This Court clarified in *Blakely* that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any

additional findings." 542 U.S. at 303-304 (emphasis in original). Thus, with the sole exception of the fact of a prior conviction (which is not at issue here), a judge cannot rely on facts neither found by a jury nor admitted by a defendant to increase a defendant's sentence beyond the maximum that state law would otherwise authorize. See *id.* at 301.

The California determinate sentencing scheme plainly runs afoul of this command. The California Penal Code states, "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall order imposition of the middle term* unless there are circumstances in aggravation or mitigation of the crime." § 1170(b) (emphasis added). A fact cannot constitute an aggravating fact unless it involves something beyond the elements of the crime of conviction – that is, something beyond the jury's verdict. See *People* v. *Black*, 113 P.3d 534, 538 (Cal. 2005) ("In imposing the upper term sentence, the court may not consider any fact that is an essential element of the crime itself * * *."). Thus, as the dissenting judge in the California Supreme Court recognized – in accord with numerous divisions of the California Court of Appeal – "the statutory maximum, that is, 'the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict*,' is the middle term of imprisonment." *Id.* at 553 (Kennard, J., dissenting) (quoting *Blakely*, 542 U.S. at 303).[2]

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[2] For a selection of pre-*Black* opinions to this effect from the California Court of Appeal, see *People* v. *Harless*, 22 Cal. Rptr. 3d 625, 645 (Cal. Ct. App. 2004) ("The emerging majority view is that * * * the maximum penalty the court can impose under California law without making additional factual findings is the middle term."); see also *People* v. *Butler*, 19 Cal. Rptr. 3d 310, 315 (Cal. Ct. App. 2004) (holding that *Blakely* "flatly contradicted" the State's argument that the upper term could be imposed without violating the Sixth Amendment); *People* v. *George*, 18 Cal. Rptr. 3d 651, 655 (Cal. Ct. App. 2004) (holding that "[b]ecause the maximum penalty the court can impose under California law

2. Declining to hold that the California determinate sentencing system violates the Sixth Amendment would throw the law into a state of deep uncertainty, for there is absolutely no relevant distinction between California's system and the sentencing regimes that this Court found unconstitutional in *Ring*, *Blakely*, and *Booker*. In *Ring*, this Court overturned a death sentence because "[b]ased solely on the jury's verdict * * * the maximum punishment [Ring] could have received was life imprisonment." 536 U.S. at 597. Arizona law "authorize[d] the judge to sentence the defendant to death" only with the finding of "at least one aggravating circumstance" from an enumerated list. *Id.* at 592-93 (citation omitted). Because a sentencing judge, and not a jury, made such factual findings, the capital sentencing law violated the Sixth Amendment. *Id.* at 609.

This Court subsequently made clear that *Apprendi* applies equally to non-capital determinate sentencing systems. In *Blakely*, this Court applied *Apprendi* to the State of Washington's sentencing system, which required a judge to impose a "standard range" for various crimes unless there was a "substantial and compelling" reason to impose a higher (so-called "exceptional") sentence. *Blakely*, 542 U.S. at 299. In order to find such a reason, a judge was required to find an "aggravating factor," either from an enumerated list or involving something else beyond the elements of the crime. *Ibid*. Similarly, in *Booker*, this Court invalidated section 3553(b) of the Federal Sentencing Guidelines, which commanded that a court "*shall* impose a sentence of the kind, and within the range established by the Guidelines, subject to departures in specific, limited cases." 543 U.S. at 234 (emphasis in original) (quotation omitted). Because the jury verdict itself in *Booker* did not authorize the judge to impose

without making additional factual findings is the middle term, *Blakely* applies"); *People* v. *Vu*, 21 Cal. Rptr. 3d 844, 852 (Cal. Ct. App. 2004) (same). The California Supreme Court "depublished" these opinions in light of its decision in *Black*.

a sentence above a certain threshold, the judge's factfinding to support the defendant's sentence ran afoul of *Apprendi* and *Blakely*. See *id.* at 235.

In language nearly identical to the statutes invalidated in *Blakely* and *Booker*, California Penal Code section 1170(b) states that, "the court *shall order imposition of the middle term* unless there are circumstances in aggravation or mitigation of the crime." (emphasis added). All three sentencing systems violate the Sixth Amendment for the same reason: they permit a judge, based on his own factfinding, to impose a sentence greater than the maximum term authorized by the jury's verdict. In California, a judge may depart from the middle term "only upon the finding some additional fact" – a finding that the judge, rather than the jury, makes. *Booker*, 543 U.S. at 235; *Blakely*, 542 U.S. at 305. Under this Court's clearly articulated Sixth Amendment jurisprudence, this system cannot stand.

3. Confirming that California's sentencing system violates the Sixth Amendment will cause little impact beyond that which *Apprendi* and *Blakely* have already had. After this Court decided *Apprendi,* the Kansas Supreme Court recognized that its determinate sentencing system needed to be reconfigured. See *State* v. *Gould*, 23 P.3d 801 (Kan. 2001), cited with approval in *Blakely*, 542 U.S. at 309. And after this Court decided *Blakely*, commentators and sentencing experts quickly identified the twelve states besides Kansas and Washington whose sentencing systems were "functionally equivalent" to those states' regimes. See Jon Wool & Don Stemen, *Aggravated Sentencing:* Blakely v. Washington, *Practical Implications for State Sentencing Systems* 1-2 (Vera Institute of Justice 2004), *available at* http://www.vera.org/publication_pdf/242_456.pdf (listing states); see also Kate Stith, *Crime and Punishment Under the Constitution*, 2004 Sup. Ct. Rev. 221, 223 n.17 (same).

Over the past two years, high courts in seven of these twelve states and a binding decision from an intermediate court in another already have properly applied this Court's directives to their states' sentencing systems. See *State* v. *Brown*, 99 P.3d 15 (Ariz. 2004) (en banc); *Lopez* v. *People*, 113 P.3d 713 (Colo. 2005) (en banc); *Smylie* v. *State*, 823 N.E.2d 679 (Ind. 2005); *State* v. *Shattuck*, 704 N.W.2d 131 (Minn. 2005) (en banc); *State* v. *Natale*, 878 A.2d 724 (N.J. 2005); *State* v. *Allen*, 615 S.E.2d 256 (N.C. 2005); *State* v. *Foster*, 845 N.E.2d 470 (Ohio 2006); *State* v. *Dilts*, 103 P.3d 95 (Or. 2004); *Milligrock* v. *State*, 118 P.3d 11 (Alaska Ct. App. 2005). The decisions from the Arizona, Colorado, Indiana, and New Jersey Supreme Courts deserve special mention because those states' sentencing systems so closely resembled California's.

Brown involved a case in which Arizona state law dictated that a defendant "*shall* receive a sentence of five years" for a class two felony. 99 P.3d at 17 (emphasis added) (internal quotation and citation omitted). The Arizona Supreme Court rejected the state court of appeals' conclusion that the relevant statutory maximum for *Apprendi* purposes was a "twelve-and-one-half year super-aggravated sentence," *id.* at 16, that could be imposed only if a judge found "at least two substantial aggravating factors." *Id.* at 18 (internal quotation and citation omitted). Instead, in a brief, five-page opinion, the court concluded – as the State ultimately conceded – that "[b]ecause a sentence in excess of five years could be imposed on [the defendant] only after a finding of one or more * * * aggravating circumstances * * * the Sixth Amendment guarantee of jury trial extends to the finding of these facts and requires proof beyond a reasonable doubt." *Ibid.*

Colorado's high court followed a similar path in *Lopez*. Using mandatory language analogous to California's sentencing law, the Colorado statute at issue provided that "the court *shall impose a definite sentence which is within the presumptive ranges* set forth * * * unless it concludes that extraordinary mitigating or aggravating circumstances are present * * *." *Lopez*, 113 P.3d at 724 (emphasis added) (internal quotation and citation omitted). Applying *Apprendi* and *Blakely*, the court concluded that

> the trial judge must impose a sentence within the presumptive range unless he or she engages in the extraordinary aggravating or mitigating circumstances analysis. If that analysis requires judicial fact-finding to which the defendant has not stipulated, then the rule of *Blakely* applies and any additional facts used to aggravate the sentence must be *Blakely*-compliant or *Blakely*-exempt.

Id. at 726. Facts that are *Blakely*-compliant or *Blakely*-exempt are: "(1) facts found by a jury beyond a reasonable doubt; (2) facts admitted by the defendant; (3) facts found by a judge after the defendant stipulates to judicial fact-finding for sentencing purposes; and (4) facts regarding prior convictions." *Id.* at 716.

The Indiana Supreme Court also properly applied *Blakely* in *Smylie*. Reasoning from the text of the state sentencing statute, which stated that a defendant "*shall* be imprisoned for a fixed term," the court concluded that Indiana's system was "a regime that requires a given presumptive term for each class of crimes, except when the judge finds aggravating or mitigating circumstances deemed adequate to justify adding or subtracting years." *Smylie*, 823 N.E.2d at 683 (emphasis added). Therefore, the court held, Indiana's "fixed term presumptive sentence" was the statutory maximum for *Apprendi* and *Blakely* purposes, *id.* at 684, and any aggravating facts would henceforth need to be tried to a jury to satisfy the Sixth Amendment. See *id.* at 686.

The Supreme Court of New Jersey reached an identical conclusion in *Natale*. There, the New Jersey sentencing law dictated that "the court *shall* impose the presumptive term" unless the judge found additional facts. *Natale*, 878 A.2d at 738 (emphasis added) (internal quotation and citation omitted). Because the presumptive term was "the maximum sentence" that could be imposed "before any judicial factfinding," the court held it to be the statutory maximum for *Blakely* purposes and concluded that a sentence beyond the presumptive term violated the Sixth Amendment. *Id.* at 739. The *Natale* Court expressly rejected the California Supreme Court's approach in *Black* "because it appears to be in direct conflict with *Blakely*." *Id.* at 738.

To be sure, the Supreme Courts of Tennessee and New Mexico, like the California Supreme Court, have refused over vigorous dissents to apply *Blakely* to their determinate sentencing systems. See *State* v. *Gomez*, 163 S.W.3d 632, 660-62 (Tenn. 2005), petition for cert. filed, 74 U.S.L.W. 3131 (U.S. Aug. 15, 2005) (No. 05-296); *State* v. *Lopez*, 123 P.3d 754, 768 (N.M. 2005).[3] The Tennessee Supreme Court even reached this conclusion in spite of the state Attorney General's concession on the merits and again in a petition for rehearing that the state sentencing system violated *Blakely*. See *Gomez*, 163 S.W.3d at 661-62, reh'g denied, 163 S.W.3d 632, 672 n.1 (Tenn. 2005).

Nothing about the Tennessee and New Mexico decisions should give this Court pause. The decisions distort the import of *Blakely* and refuse to follow this Court's precedent. This Court should simply finish the job it started in *Apprendi* and require these final outliers to bring their jurisprudence into Sixth Amendment compliance.

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[3] As in California, these decisions also rejected well reasoned decisions from the states' intermediate courts of appeals. See, *e.g.*, *State* v. *Walters*, No. M2003-03019-CCA-R3CD, 2004 WL 2726034, *15-18 (Tenn. Crim. App. 2004) (unpublished opinion), overruled by *Gomez*, 163 S.W.3d at 632; *State* v. *Frawley*, 106 P.3d 580 (N.M. Ct. App. 2004), overruled by *Lopez*, 123 P.3d at 754.

B. Allowing Judges to Increase Sentences Based on Legislatively Mandated Sentencing Factors Offends the Separation-of-Powers Principles that Animate the Sixth Amendment in Ways that Indeterminate Sentencing Systems Do Not.

The California Supreme Court misapplied *Blakely* because it wrongly analogized the role of judicial factfinding under the Determinate Sentencing Law to the role of judicial factfinding in constitutionally permissible indeterminate sentencing schemes. The Sixth Amendment does not prescribe how much sentencing discretion a judge may have. See *Williams* v. *New York*, 337 U.S. 241, 246 (1949). Rather, it is "a reservation of jury power." *Blakely*, 542 U.S. at 308. It prohibits encroachment – by legislative, executive, or judicial power – on "the jury's traditional function of finding the facts essential to lawful imposition of the penalty." *Id.* at 309.

Sentencing systems such as California's represent just such an encroachment. Elements of basic crimes must be proved to juries beyond a reasonable doubt. But facts that the California Legislature has labeled "aggravating factors" need be proved only to judges, by a preponderance of the evidence, even though these facts expose defendants to significantly increased punishment.[4]

The problem with such a system is not so much that it gives judges extra power at the expense of juries; as the California Supreme Court observed, such a system may at

[4] In petitioner's case, the "aggravating factors" found by the district court judge increased his sentence by *one-third*, from twelve years to sixteen. See Cal. Penal Code 288.5(a); *People* v. *Cunningham*, No. A103501, 2005 WL 880983, at *7 (Cal. Ct. App. Apr. 18, 2005). Even larger increases are justified by aggravating factors for first degree robbery (fifty percent, from four years to six), Cal. Penal Code 213(a)(1)(B), kidnapping (sixty percent, from five years to eight), *id.* § 208(a), and voluntary manslaughter (eighty-three percent, from six years to eleven), *id.* § 193(a).

least initially replicate the judge/jury division of labor in the system it replaces. See *Black*, 113 P.3d at 544-45. The problem is that once legislatures are able to gradate offenses without providing the ordinary protections that go along with elements of crimes, they are apt to use "aggravating factors" to create more and more of a "shadow" penal code. Given the "many immediate practical advantages of judicial factfinding," *Blakely*, 542 U.S. at 307 n.10, legislatures will have every incentive to criminalize behavior through such shadow penal codes rather than their official penal codes, thus progressively eroding the relevance of the jury trial to mere "low-level gatekeeping." *Jones* v. *United States*, 526 U.S. 227, 244 (1999).

Leaving determinate sentencing systems like California's beyond the purview of the Sixth Amendment similarly would weaken the jury's checking function against executive overreaching. Absent a prohibition against exempting sentence-enhancing facts from the traditional adversarial process, a dangerous opening would exist for the executive branch to maximize its number of convictions by charging whatever crimes are easiest to prove to juries, while also maximizing punishments by offering less compelling evidence of aggravating factors to judges. See Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1714-15 (1992). Under *Apprendi* and *Blakely*, defendants can force prosecutors to obtain jury verdicts with respect to *all* allegations that subject them to heightened punishment.

To be sure, the Sixth Amendment as explicated in *Apprendi* and *Blakely* allows lawmakers to evade its effect on regimented criminal codes simply by limiting such codes to generalized crimes and broad, indeterminate sentencing ranges. For instance, a legislature could decide to extend "all statutory maximums to, for example, 50 years" and leave it to judges' discretion to reduce sentences below that maximum. *Apprendi*, 530 U.S. at 490 n.16. But the point of the Sixth

Amendment is that it would require such a legislature to be democratically accountable for "expos[ing] *every* defendant" to a maximum "exceeding that which is * * * proportional to the crime." *Ibid*. And it would require legislatures (as well as prosecutors who pursued such charges) to risk juries invoking their power as "circuitbreakers" and refusing to convict defendants, at least in questionable cases. See *Blakely*, 542 U.S. at 306-07 (discussing the "circuitbreaker" power); *United States* v. *Maybury*, 274 F.2d 899, 902 (CA2 1960) (Friendly, J.) (noting that juries may issue verdicts "in the teeth of both law and facts * * * to prevent the punishment from getting too far out of line with the crime") (quotation omitted).

With these counterbalancing incentives properly in place, legislatures interested in creating fairer, more regimented, predictable, and cost-effective systems of punishment remain likely to press ahead, even if it means having to afford defendants the procedural protections that go along with such advances. The aftermath of this Court's decision in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), illustrates the point. In *Mullaney*, this Court confronted a Maine law under which murder and manslaughter were defined as varieties of the same crime – felonious homicide – but were punished differently. *Id.* at 689. If a defendant could show that he had killed the victim because of a sudden provocation or in the heat of passion, he could be convicted only of the less serious offense. Nonetheless, this Court held that the Due Process Clause required the state to prove the factual elements of the more serious crime "beyond a reasonable doubt" rather than to shift the burden to the defendant to prove otherwise. *Id.* at 704. Of course, it would have been possible for the state to respond to this decision by abandoning the murder/manslaughter distinction altogether, subjecting all who killed feloniously to the maximum penalty allowed for murder. But it did not, despite arguments the state had made about the "practical impossibility" of proving the *absence* of sudden provocation or heat of passion. *State* v. *Wilbur*, 278

A.2d 139, 145 (Me. 1971). In fact, Maine law after *Mullaney* divided homicide into six different degrees, each of which carried different levels of punishment and required different factual elements to prove. See Peter J. Rubin, *Homicide*, 28 Me. L. Rev. 57, 57 (1976). The same general story holds true, of course, with respect to countless other crimes that states gradate according to degrees. Each degree is separated from less serious ones by extra facts, and states continue to require prosecutors to prove these extra facts when defendants contest them.

Indeed, the principle that even legislation that extends a benefit must comport with constitutional requirements is familiar across a variety of doctrines, both inside and outside the realm of criminal procedure. See, *e.g.*, *Smith* v. *Massachusetts*, 543 U.S. 462, 474 (2005) (a state need not allow for final acquittals in the middle of a trial, but if it does, such acquittals implicate full Double Jeopardy Clause protections); *Batson* v. *Kentucky*, 476 U.S. 79, 89-91 (1986) (a state need not allow peremptory challenges, but if it does their use must comply with the Equal Protection Clause); *Palmer* v. *Thompson*, 403 U.S. 217, 226 (1971) (a city need not provide a municipal swimming pool, but if it does the pool must be open to all in conformance with the Equal Protection Clause); *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970) (a state need not provide welfare benefits, but if it does it cannot take them away without due process of law); *Kramer* v. *Union Free School Dist.*, 395 U.S. 621, 629 (1969) (a state need not create elected school boards, but "'once the franchise is granted,'" the state has to comply with equal protection constraints with respect to the electorate (quoting *Harper* v. *State Bd. of Elections*, 383 U.S. 663, 665 (1966)). When democratic forces push legislatures to enact such legislation, the Constitution ensures that it is crafted the right way and does not inadvertently undermine fundamental protections upon which all true progress depends.

II. The Experience of the States Thus Far Demonstrates the Workability of the Rule Set Forth in *Apprendi* and *Blakely*.

Not only does this Court's precedent dictate a clear result here, but practical considerations do as well. The overwhelming majority of states affected by *Apprendi* and *Blakely* are retaining determinate sentencing by incorporating into their systems the Sixth Amendment protections that those decisions require. California has not yet followed suit, but evidence indicates that the state could effectively preserve its sentencing priorities by including procedural protections for criminal defendants modeled on the systems of other states.

A. Most States Have *Blakely*-ized Affected Systems, and Their New Systems Work Well.

While Justice O'Connor expressed concern in *Blakely* that "[o]ver 20 years of sentencing reform are all but lost," 542 U.S. at 326 (O'Connor J., dissenting), the majority answered by emphasizing that the case was not about the constitutionality of determinate sentencing but rather "how it can be implemented in a way that respects the Sixth Amendment." *Id.* at 308. The continued flourishing of determinate sentencing post-*Blakely* bears out this assertion.

Seven of the nine states that have enacted legislation to bring themselves into compliance with *Apprendi* and *Blakely* have "*Blakely*-ized" their systems – that is, they have retained determinate sentencing systems by requiring jury factfinding for aggravating factors.[5] Another state has taken this course by means of a judicial opinion, and yet another has legislation in the works to this effect. Only two state legislatures have

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[5] This count includes the state of Tennessee, whose Attorney General concluded that its law was affected by *Blakely.* A bare majority of the Tennessee Supreme Court later refused to accept that concession. See *State* v. *Gomez*, 163 S.W.3d 632, 661-62 (Tenn. 2005). The legislature amended Tennessee's law anyway.

"*Booker*-ized" their systems – that is, moved away from determinate sentencing systems. Yet even these states have resisted returning to true indeterminate sentencing, instead maintaining non-binding guidelines resembling the federal guidelines after *Booker*.

1. **Washington.** Washington's experience illustrates states' ability to retain effective determinate sentencing systems post-*Blakely*. After this Court invalidated Washington's system for imposing exceptional sentences, the Washington Legislature amended its system to bring it into compliance with the Sixth Amendment. Most significantly, aggravating factors previously found by judges are now required to be alleged in advance and, if contested, proven to a jury beyond a reasonable doubt. Wash. Rev. Code 9.94A.537(1)-(2) (2006). Courts typically submit such allegations to juries as part of a single guilt phase, but the statute allows judges to bifurcate trials when a particularly prejudicial aggravator is at issue. *Id.* § 9.94A.537(3). When the jury finds the existence of an aggravating factor, the judge (as in Washington's previous system) retains discretion to decide whether to impose an enhanced sentence. *Id.* § 9.94A.535.

These changes to Washington's system have effectively minimized *Blakely*'s disruption to the state's sentencing system. One member of the sentencing subcommittee charged with proposing changes to the system described the group's goal as "to provide an amendment that changed the overall statute as little as possible." Lenell Nussbaum, *Sentencing in Washington After* Blakely v. Washington, 18 Fed. Sent'g Rep. 23, 24 (2005). Accordingly, the group declined to make the sentencing guidelines advisory and decided to retain the discretionary nature of upward departures, allowing but not requiring judges to impose enhanced sentences when aggravating factors are found by a jury. *Ibid.*

2. Legislatures in Alaska, Arizona, Kansas, Minnesota, North Carolina, and Oregon also have *Blakely*-ized those

states' determinate sentencing systems. While the details of each of these responses vary, they share a key feature: prosecutors must prove disputed aggravating factors leading to sentences above presumptive terms or presumptive ranges beyond a reasonable doubt to juries. These states' new laws, and the considerations that drove them, are briefly detailed below.

Kansas. Kansas, of course, was the lone state to alter its determinate sentencing system after *Apprendi* but before *Blakely*. Its new system would now be described as *Blakely*-ized: all aggravating factors must be "submitted to a jury and proved beyond a reasonable doubt." Kan. Stat. Ann. 21-4716(b) (2005). Courts possess the discretion, "in the interests of justice," to require aggravating factors to be litigated in a bifurcated proceeding. *Id.* § 21-4718(b)(4).

Kansas' transition to a *Blakely*-ized sentencing system has gone smoothly and served as an exemplar for other states seeking to bring determinate sentencing systems into compliance with *Blakely*. In a case tried shortly after the new system's enactment, a state prosecutor described the impact as adding "about an hour onto a four-day jury trial." Adam Liptak, *Justices' Sentencing Ruling May Have Model in Kansas*, N.Y. Times, July 13, 2004, at A12. The effectiveness of this system led many states to look to Kansas' experience when adapting their sentencing systems to meet Sixth Amendment requirements. See, *e.g.*, Minn. Sent'g Guidelines Comm'n, *The Impact of* Blakely v. Washington *on Sentencing in Minnesota: Short Term Recommendations* 1 (Aug. 2004), *available at* http://www.ussc.gov/STATES/blakely/Minnesota_Blakely.pdf (noting that the state's procedures could "be corrected, as demonstrated by the state of Kansas * * * with limited impact on the criminal justice system as a whole"); Tom Lininger, *Oregon's Response to* Blakely, 18 Fed. Sent'g Rep. 29, 30 (2005) (noting that "Oregon's policy makers settled on the 'Kansas model'"); Nussbaum, *supra*, at 24 (noting that Washington "looked to the experience of Kansas"); Ronald F.

Wright, Blakely *and the Centralizers in North Carolina*, 18 Fed. Sent'g Rep. 19, 20 (2005) (noting that North Carolina "relied on accounts of the Kansas experience").

Minnesota. Minnesota *Blakely*-ized its system by modifying the procedure for making upward departures. Aggravating factors must now be proven to a jury. Minn. Stat. 244.10(5) (2006). In order to ensure continuity in the number of departures and the costs of the system, the state also provided for a unitary trial in most cases and expanded the upper and lower terms of some sentencing ranges. See Dale G. Parent & Richard S. Frase, *Why Minnesota Will Weather* Blakely*'s Blast*, 18 Fed. Sent'g Rep. 12, 16 (2005).

Prior to recommending this fix, Minnesota's sentencing commission determined that *Blakely* would impact only a small subset of the state's sentencing decisions. In 2003, 7.3 percent of felony cases involved sentences that departed from the presumptive sentence because of aggravating factors. Minn. Sent'g Guidelines Comm'n, *The Impact of* Blakely v. Washington *on Sentencing in Minnesota: Long Term Recommendations* 8 (Sept. 2004), *available at* http://www.ussc.gov/STATES/blakely/Minn_Blakely_Gov_Report2.pdf. Thus, the commission concluded that *Blakely* "will not constitute a crisis within the state." *Id.* at 3.

Early results indicate the effectiveness of these modifications. Analyzing data gathered post-*Blakely*, the sentencing commission asserted that the changes "have resulted in maintaining enhanced sentences as an option for consideration when warranted and necessary." Minn. Sent'g Guidelines Comm'n, *Report to the Legislature* 13 (Jan. 2006), *available at* http://www.msgc.state.mn.us/Data%20Reports/LegReportJan06.pdf. And, while the commission has recommended minor changes to the legislature, it emphasized that "[t]he structure of Sentencing Guidelines in Minnesota remains constitutional, as do aggravated departures." *Id.* at 9.

North Carolina. North Carolina's sentencing commission recommended and the state passed a bill preserving determinate sentencing by requiring aggravating factors to be proven to a jury. N.C. Gen. Stat. 15A-1340.16(a1) (2006). Aggravating factors are generally considered along with the other elements of the crime in a unitary proceeding unless the court determines "the interests of justice" require a separate proceeding. *Ibid.* This response is an effort to maintain continuity with North Carolina's pre-existing sentencing system. State officials value determinate sentencing for its ability to provide predictable sentences, allowing for accurate projection of the state's prison population well into the future. Wright, *supra*, at 20. Following *Blakely*, some state sentencing commissioners recommended moving toward a more discretionary system, but the commission rejected this proposal because it would result in inconsistent sentences. *Id.* at 19-20.

Oregon. Oregon also *Blakely*-ized its system, creating a bifurcated jury procedure for aggravating sentencing factors related to the defendant while providing for a unitary procedure for aggravating factors related to the charged offense. Act of June 29, 2005, 2005 Or. Laws 463, secs. 3(1), 4(1). As in other states, Oregon's response to *Blakely* seeks to retain the benefits of determinate sentencing, including uniform and predictable sentences and the related benefit of improved prison population projections. See Lininger, *supra*, at 33. For this reason, Oregon rejected proposals to return to indeterminate sentencing.

Alaska. Alaska responded to *Blakely* by requiring jury factfinding of aggravating sentencing factors. Alaska Stat. 12.55.155(f) (2006). It also converted presumptive sentence terms into presumptive sentence ranges in several instances. See *id.* § 12.55.125(c). This is an attempt to retain some of the judicial flexibility in the pre-*Blakely* system while also promoting the predictability and procedural protections of determinate sentencing. See Press Release, Criminal Sentencing Bill Signed into Law (Mar. 22, 2005), *available at* http://www.akrepublicans.org/therriault/24/news/ther2005032201p.php (Senate Judiciary Committee Chair describing new law as bringing "certainty to Alaska's sentencing procedures" while protecting "the rights of defendants").

Arizona. Arizona has also *Blakely*-ized its system, passing legislation requiring jury factfinding for sentences above the presumptive term. See Ariz. Rev. Stat. 13-702.01 (2006) (defining the "trier of fact" for aggravating factors as "a jury, unless the defendant and the state waive a jury in which case the trier of fact means the court"), amended by Act of Apr. 17, 2006, Ariz. 2006 Legis. Serv. 148 (specifying that a court can find aggravating factors relating to previous felony convictions).

3. In one state, the judiciary *Blakely*-ized the system itself. After holding that *Blakely* applied to its sentencing system, the **Colorado** Supreme Court simply *Blakely*-ized the system itself. Under the court's ruling, "the jury can be asked by interrogatory to determine facts potentially needed for aggravated sentencing." *Lopez* v. *People*, 113 P.3d 713, 716 (Colo. 2005). The legislature apparently is content with this solution; this procedure has been on the books for nearly a year now without amendment.

4. Indiana and Tennessee have enacted *Booker*-ized systems in response to *Blakely*. Each has converted formerly presumptive sentences into advisory sentences that allow judges to depart from recommended terms without a finding of fact. While these systems increase judicial discretion, neither is a return to wholly indeterminate sentencing.

Tennessee. Tennessee's new system attempts to retain the consistency in sentencing produced by its former presumptive guidelines. It removes the presumptive nature of certain terms and grants judges discretion to apply any term within the prescribed ranges. However, judges must still "consider" the now-advisory guidelines in crafting sentences. Tenn. Code Ann. 40-35-210(c) (2005). Any factors leading to an enhanced or mitigated sentence must be placed in the record "in order to ensure fair and consistent sentencing." *Id.* § 40-35-210(e). Sentencing decisions are still subject to appellate review for their consistency with the purposes of sentencing as set out in the sentencing guidelines. *Id.* § 40-35-401(b)(3).

Indiana. Indiana's amended system provides that judges "may voluntarily consider" the state's guidelines when making sentencing decisions. Ind. Code 35-50-2-1.3(a) (2006). This legislation does not entirely do away with the guidelines, but, even so, many are concerned that making the guidelines voluntary will lead to longer sentences. An Indiana Superior Court judge indicated that this weakness of the system could lead to legislative amendment. Charles Wilson, *New Law May Trigger Wave of Appeals*, Evansville Courier & Press, July 5, 2005, at B3. Thus, this *Booker*-ized system may not survive if it does not adequately promote proportionality and predictability in sentencing.

5. **Ohio and New Jersey.** The Supreme Courts of Ohio and New Jersey have been the two most recent high courts to confirm that *Blakely* impacts their states' sentencing systems. See *State* v. *Foster*, 845 N.E.2d 470 (Ohio 2006); *State* v. *Natale*, 878 A.2d 724, 741 (N.J. 2005). Like the vast majority of those before them, both courts ruled that it is up to their states' legislatures to decide how, or whether, to amend the states' laws.[6] It is too soon to know how those legislatures will respond, but the Ohio Supreme Court, for its

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[6] See, *e.g.*, *State* v. *Brown*, 99 P.3d 15, 18-19 (Ariz. 2004) (en banc) ("We also are mindful that the legislature may choose to moot many such questions * * * by enacting new sentencing statutes."); *State* v. *Shattuck*, 704 N.W.2d 131, 148 (Minn. 2005) ("For us to engraft sentencing-jury or bifurcated-trial requirements onto the Sentencing Guidelines and sentencing statutes would require rewriting them, something our severance jurisprudence does not permit."); *State* v. *Dilts*, 103 P.3d 95, 98 (Or. 2004) ("In response to *Blakely*, prosecutors, the criminal defense bar, and members of the legislature in many states, including Oregon, may be reviewing sentencing procedures for possible modification."); *State* v. *Hughes*, 110 P.3d 192, 196 (Wash. 2005) ("[E]mpanelling juries on remand for re-sentencing would usurp the legislature's authority.").

part, openly invited the state legislature to *Blakely*-ize Ohio's system. See *State* v. *Foster*, 845 N.E.2d 470, 495 (Ohio 2006) ("Certainly the General Assembly may enact legislation to authorize juries to find beyond a reasonable doubt all facts essential to punishment in felony cases."). A leading newspaper in the state has called for the legislature to do precisely this. See Editorial, *Ohio's Sentencing Laws Need Urgent Fix*, Cincinnati Enquirer, Mar. 1, 2006. Additionally, the state's sentencing commission already has recognized that declining to *Blakely*-ize its system could imperil consistency and cost control. See Memorandum from Dave Diroll & Scott Anderson, Ohio Criminal Sentencing Commission, to Judges and Other Interested Parties re: Felony Sentencing After *Foster* 4 (Mar. 28, 2006), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/ocsc_on_foster.doc ("*Foster* eliminates guidance from the statutes designed to assure adequate prison space for the worse [sic] offenders and to make sentences more consistent statewide.").

6. Finally, it bears noting that the **New Mexico** Sentencing Commission has unanimously recommended, and the state House has passed, a bill that would *Blakely*-ize its system. See Tony Ortiz, *The New Mexico Sentencing Commission's Legislative Proposal Subsequent to* Blakely v. Washington, 18 Fed. Sent'g Rep. 54 (2005). That bill, however, has been shelved in light of the New Mexico Supreme Court's unexpected ruling in *State* v. *Lopez*, 123 P.3d 754 (N.M. 2005), that *Blakely* did not affect the state's sentencing system. See Ortiz, *supra*, at 55. Presumably that bill will be revived if this Court reverses in this case and forces the New Mexico Supreme Court to reconsider its position.

B. California Has Already Shown Its System Can Be Brought Into Compliance with *Blakely* Without Great Difficulty.

There is no reason to exempt California from the democratic process that is churning ahead in other states affected by *Blakely*.

1. As has been the case in other states, requiring California to amend its sentencing system in order to bring it into compliance with *Blakely* will not be unduly problematic. The California Supreme Court has noted that sentencing courts rarely impose the upper term. From 1981 to 1988, "the percentage of cases in which the upper term was imposed ranged from 13.36 percent to 17.73 percent." *Black*, 113 P.3d at 546 n.14. This rate of departure from the legally mandated sentence is roughly in line with other states'. In the most recent figures available, Alaska recorded aggravated departures from the presumptive sentence in twenty percent of convictions. See Alaska Judicial Council, *Alaska Felony Process: 1999*, at 81 fig. 8 (2004), *available at* http://www.ajc.state.ak.us/reports/Final%20Version%20of%20Report9.pdf. In Oregon, the figure is approximately eleven percent. See State of Oregon Criminal Justice Commission, *Sentencing Practices: Summary Statistics for Felony Offenders Sentenced in 2001*, at 13 (2003), *available at* http://www.oregon.gov/CJC/SG01v2.pdf (including both dispositional and durational aggravated departures). Minnesota reported a 7.3 percent departure rate in 2003. See *Shattuck*, 704 N.W.2d at 146 n.14. In North Carolina, it is approximately seven percent. See Wright, *supra*, at 22 n.4.

The effects of *Blakely*-ization in California, as elsewhere, will be further mitigated by the fact that even when the state seeks the upper term, the issue will rarely be litigated. The vast majority of defendants will enter into plea deals, waive their right to jury trials, or stipulate to certain aggravating facts in exchange for the State dropping additional charges. See *Blakely*, 542 U.S. at 337 (Breyer, J., dissenting) (noting that "in 1996, fewer than 4% of adjudicated state felony defendants have jury trials, 5% have bench trials, and 91% plead guilty") (citation omitted); see also Minn. Sent'g Guidelines Comm'n, *The Impact of* Blakely v. Washington *on Sentencing in Minnesota: Long Term Recommendations* 9 (Sept. 2004) (noting that 66% of aggravated departures imposed in 2003 were not contested or were requested by the defendant as part of a plea deal).

In the rare event that prosecutors and defendants cannot reach an acceptable deal and they proceed to trial, courts would find it easy to apply a *Blakely*-ized version of California's sentencing system. Indeed, after this Court's ruling in *Blakely* but before the California Supreme Court's ruling in *Black*, some sentencing courts in California judicially *Blakely*-ized the state's system in their courtrooms without any serious problems. See Brent Kendall, *Supreme Court Puts Sentencing in California on Shaky Ground*, Daily Journal, Feb. 22, 2006, *available at* http://pda-appellateblog.blogspot.com/2006_02_01_pda-appellateblog_archive.html (noting that prior to *Black*, courts in San Francisco "were operating as if *Blakely* applied to California's sentencing law"). Furthermore, immediately following this Court's ruling in *Blakely*, two California superior court judges circulated a memorandum explaining that it was "reasonably probable" that *Blakely* applied to California's system and suggesting several steps courts could take to minimize the extent of *Blakely*'s disruption. See Memorandum from J. Richard Couzens, Placer County Superior Court Judge, and Tricia A. Bigelow, Los Angeles County Superior Court Judge, *Application of* Blakely vs. Washington *to California Courts*, at 1 (July 23, 2004), http://www.fdap.org/downloads/blakely/CouzensBigleowBlakelyMemo.pdf. Among those steps was possibility of submitting disputed aggravating factors to juries. *Id.* at 7. The memorandum questioned whether current California law authorizes such procedural action, but it did not question its workability. *Id.* at 8-9.

Indeed, California courts and litigants already are accustomed to following the basic procedures that *Blakely* requires. For decades, California has conducted jury trials on sentence "enhancement" allegations, many of which present very similar factual questions to those which trials involving aggravating circumstances would require. An "enhancement" under California law is an additional term that is added directly to the base term, just like the "firearm" enhancement in *Blakely* itself that added thirty-six months to the standard sentencing range. See *Blakely*, 542 U.S. at 299. Examples of California enhancements, along with their aggravating-fact counterparts include: using a deadly weapon, Cal. Penal Code 12022(b), and arming with a firearm, *id.* at § 12022(a) (compare Cal. Rules of Court 4.421(a)(2)); inflicting great bodily injury, Cal. Penal Code 12022.7 (compare Cal. Rules of Court 4.421(a)(1)); victim vulnerability, Cal. Penal Code 667.9(a) (compare Cal. Rules of Court 4.421(a)(3)); amount stolen, Cal. Penal Code 12022.6 (compare Cal. Rules of Court 4.421(a)(9)); and quantity of contraband, Cal. Health & Safety Code 11370.4 (compare Cal. Rules of Court 4.421(a)(10)). California prosecutors routinely try these enhancements to juries as part of their cases-in-chief, requiring juries to return special verdicts on the specific enhancement allegations. Consequently, California, like Washington before it, already is familiar with what *Apprendi* and *Blakely* require. All California needs to do is to apply those procedures across the board.

2. Although there is reason to believe that California will join a long and growing list of other states to *Blakely*-ize their determinate sentencing systems, this simply underscores the manageability of the *Apprendi* doctrine. It should not drive this Court's constitutional analysis. See *Blakely*, 542 U.S. at 313 (explaining that constitutional doctrine "cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice"). Accordingly, even if this Court had some reason to believe that the California Legislature would react by amending the state law to re-

institute indeterminate sentencing, that would provide this Court no warrant to flinch from holding that the current system violates the Sixth Amendment.

This Court's duty in this case is to ensure that the ground rules that require legislatures (as well as prosecutors and judges) to respect defendants' Sixth Amendment rights remain in place. Over the long run, that is the best prescription to protect individual liberty and to move toward fairer systems of criminal justice.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be reversed.

Respectfully submitted,

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