No. 08-1569

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN O'BRIEN and ARTHUR BURGESS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICI CURIAE BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS & THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE RESPONDENTS

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INTEREST OF *AMICI*[*]

Families Against Mandatory Minimums ("FAMM") is a non-profit, non-partisan, educational association that conducts research and engages in advocacy regarding mandatory minimum sentencing laws. Founded in 1991, FAMM has over 24,500 members. Many of FAMM's members are either serving mandatory minimum sentences or are family members of such prisoners. In addition to advocating for change through the legislative process, FAMM participates in precedent-setting legal cases, like this one, that raise important statutory and constitutional issues with respect to mandatory minimum sentencing laws. FAMM's interest lies in ensuring that courts construe and apply mandatory minimum laws in a manner consistent with statutory and constitutional principles.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The NACDL seeks to promote the proper administration of state and federal

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[*] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. The Respondents have filed blanket waivers of consent to the filing of all *amicus* briefs. The Petitioner has consented to the filing of this *amici* brief, and such consent is being lodged herewith.

sentencing laws to ensure that findings that affect the length of criminal sentences are made according to statutorily and constitutionally required procedures.

SUMMARY OF ARGUMENT

This brief discusses why 18 U.S.C. § 924(c)(1)(B)(ii), as the Government construes it, cannot be constitutionally applied to Respondents O'Brien and Burgess. According to the Government, the statute mandates that a 30-year minimum sentence be imposed on Respondents if the district court finds by a preponderance of the evidence that the firearm that was brandished by a co-defendant during their robbery of an armored car was a "machinegun," as defined in 18 U.S.C. § 921(a)(23) and 26 U.S.C. § 5845(b). However, without such a judicial finding, a 30-year sentence for either Respondent would be substantively unreasonable under the Sentencing Reform Act. Under this Court's Sixth Amendment jurisprudence, lacking either a jury finding or admission of that fact, the district court cannot constitutionally impose the Government's suggested 30-year sentences. In other words, the "machinegun" fact must be treated as an element.

In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court excised the unconstitutional parts of the Sentencing Reform Act, leaving in place what is now the governing structure for federal sentencing: Under *Booker*, the absolute maximum sentence that a district court may lawfully impose is a sentence whose length could be upheld on appeal as "substantively reasonable." By reference to the "overarching" substantive standard Congress has established in the Sentencing Reform Act, a "reasonable" sentence means one that a court could fairly find to be "not greater than necessary" to further the purposes of criminal sentencing. *Kimbrough* v. *United States*, 552 U.S. 85, 101 (2007)

(explaining 18 U.S.C. § 3553(a)). The *Apprendi* rule is equally familiar: Under the Sixth Amendment, the sentence that a court imposes on a defendant must not exceed the maximum sentence that is legally authorized based on those facts either admitted by the defendant or found by a jury beyond a reasonable doubt.[1] *See Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (explaining and applying *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)).

The Government's opening brief does not discuss the relationship between *Booker*'s substantive reasonableness standard and the *Apprendi* rule, and its certiorari stage briefs seem implicitly to suggest that none exists. Without seeking to anticipate how (or whether) the Government might try to defend the constitutionality of invoking the "machinegun" provision (as a sentencing factor) to impose a 30-year sentence on Respondents, *Amici* urge this Court to clarify the following two points of federal sentencing law: **(1)** When a defendant's sentence would not survive appellate review for substantive reasonableness absent the existence of a particular fact, the Sixth Amendment requires that fact to be treated as an element and thus either found by the

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[1] This brief recognizes that *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998)—although, in the view of *Amici*, constitutionally unsound—has not been overruled. For ease of reading, this brief includes prior convictions as among those facts that has been found by a jury beyond a reasonable doubt and thus may constitutionally be used to support the legal validity of a sentence.

jury or admitted by the defendant.[2] (2) If a statute's mandatory minimum sentence would be substantively unreasonable absent a judge's finding of the disputed mandatory minimum-triggering fact, then that statute cannot constitutionally be applied to the defendant; in that event, the district court must disregard the statutory minimum and impose a sentence that is substantively reasonable—that is, "sufficient but not greater than necessary," 18 U.S.C. § 3553(a)—based on the facts found by the jury or admitted by the defendant.

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[2] *Amici* note here, but do not further discuss, that the *Apprendi* rule also has a Fifth Amendment component: the sentence-enhancing fact must also be alleged in the indictment or other charging instrument.

ARGUMENT

In and since *Booker*, this Court has made clear several principles of federal sentencing law. First, as held in *Apprendi*, the Sixth Amendment limits the authority of a judge to enhance a sentence based on facts neither admitted by the defendant nor found by a jury beyond a reasonable doubt. Second, even if the district court follows all of the decision-making steps that the Sentencing Reform Act and Rules of Criminal Procedure procedurally require, the sentence it ultimately imposes must still be *substantively* reasonable as defined by the Sentencing Reform Act. Third, just as a sentence can be substantively unreasonable because it is too lenient (that is, insufficient to achieve the purposes of sentencing), it can also be substantively unreasonable because it is too *harsh* (that is, greater than necessary to achieve those ends).

Collectively, these principles compel the following conclusions: **(1)** If a given sentence would be found substantively *un*reasonable solely on the *Apprendi*-compliant facts (*i.e.*, those facts either found by a jury or admitted by the defendant), then that sentence cannot constitutionally be imposed, even if it would be substantively reasonable were the judicially found facts considered as well. **(2)** If a statutory mandatory minimum triggered by a judicially found sentencing factor would compel the district court to impose a sentence that would be substantively unreasonable based on the *Apprendi*-compliant facts, then that statutory minimum cannot be constitutionally applied to the defendant.

A. Any Sentence Imposed Must Comply With *Apprendi*.

Under *Apprendi*, the maximum sentence a defendant constitutionally may receive is "the maximum sentence a judge may [lawfully] impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Booker*, 543 U.S. at 232 (Stevens, J.) (quoting *Blakely*, 542 U.S. at 303; internal quotations and italics removed). *Apprendi* is settled law, and any sentence imposed on Respondents must comply with *Apprendi*.

B. *Booker* Reasonableness Review Contains a Substantive Component.

The *Booker* remedial opinion "plainly contemplated that reasonableness review would contain a substantive component." *Rita* v. *United States*, 551 U.S. 338, 365 (2007) (Stevens, J., concurring). Subsequently, this Court has explicitly held that even if "the district court's sentencing decision is procedurally sound, the appellate court should . . . consider the substantive reasonableness of the sentence imposed under an abuse of discretion standard." *Gall* v. *United States*, 552 U.S. 38, 51 (2007); *see also id.* at 60 (Scalia, J., concurring) (giving "*stare decisis* effect" to the inclusion of a substantive component in reasonableness review).

The Government itself has plainly accepted that reasonableness review includes a substantive component: Both before and subsequent to this Court's decision in *Gall,* the Government has frequently challenged as substantively unreasonable sentences that it perceives as too lenient. *See, e.g.*, *United States* v. *Stewart*, No. 06-5015, 2009 U.S.

App. LEXIS 28595 (2d Cir. November 17, 2009) (challenging as substantively unreasonable a term of 24 months' imprisonment that was twice the applicable Guidelines' range prior to the addition of a judicially-found "terrorism enhancement"); *United States* v. *Stall*, 581 F.3d 276 (6th Cir. 2009) (challenging as substantively unreasonable sentence of 1 day's imprisonment and 10 years' supervised release for first time offender who pled to two counts of possession of child pornography); *United States* v. *Tomko*, 562 F.3d 558 (3d Cir. 2009) (en banc) (challenging as substantively unreasonable a sentence of probation with a year's home confinement, community service, and full restitution plus a maximum fine in a $229,000 tax evasion case).

This Court has not yet provided a more precise definition of what it means for a sentence to be substantively unreasonable. However, the logical implication of *Kimbrough*, 552 U.S. at 101, is that substantive reasonableness is defined by the concept —firmly grounded in American penal philosophy— that operates as the "overarching instruction," *id.* at 111, of the Sentencing Reform Act, 18 U.S.C. § 3553(a): the principle of parsimony. This Court should clarify that a defendant's sentence is substantively unreasonable if a reasonable jurist would necessarily find it either insufficient or "greater than necessary," *id.*, to further the goals of criminal punishment set forth in Section 3553(a)(2).[3]

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[3] That is not to say that appellate review of a sentence the Government asserts is too lenient is identical to review of a sentence a defendant asserts is excessive. Given Section 3553(a)'s parsimonious (continued . . .)

C. A Sentence Below the Default Statutory Maximum Is Nevertheless Substantively Unreasonable If Greater Than Necessary to Serve the Purposes of Sentencing.

Just as a sentence may be unreasonable because it is too lenient (that is, not "sufficient"), a sentence may also be unreasonable because it is too severe (that is, "greater than necessary"). *See Gall*, 552 U.S. at 46 (stating that, for its sentence to survive a defendant's reasonableness challenge, a district court "must explain [its] conclusion that . . . an unusually harsh sentence is appropriate . . . with sufficient justifications"); *Rita*, 551 U.S. at 373 n.2 (Scalia, J., concurring) (stating that substantive "reasonableness review should not function as a one-way ratchet").

That reasonableness review cannot be a one-way street, allowing the Government to challenge sentences it views as too lenient yet insulating from all substantive review sentences challenged as too harsh, has never been seriously questioned by this Court. The courts of appeals have agreed, vacating as excessive sentences that nonetheless did not exceed the "default statutory maximum."[4] *See, e.g.*,

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(. . . continued)

preference for leniency (that is, a sentence that is merely "sufficient" withou t being "greater than *necessary*"), it follows that appellate review of sentences alleged to be too short must be more deferential than review of sentences challenged as too long.

[4] By "default statutory maximum," this brief refers to the absolute maximum punishment that the congressional statute prescribes for the crime of conviction. For example, the "default statutory

(continued . . .)

United States v. *Olhovsky*, 562 F.3d 530, 547 (3d Cir. 2009) (vacating as excessive and thus substantively unreasonable a below-Guidelines sentence of six years' imprisonment for possession of child pornography that failed to account for defendant's youth and psychological infirmities); *United States* v. *Ofray-Campos*, 534 F.3d 1, 42-44 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 588 (2008) (vacating as excessive and thus substantively unreasonable 480-month sentence for participation in a multi-drug conspiracy); *United States* v. *Ortega-Rogel*, 281 Fed. Appx. 471 (6th Cir. 2008) (vacating as excessive and thus substantively unreasonable 24-month term for possession of false identification documents).

Because sentences not exceeding the applicable default statutory maximum can still be unlawfully excessive under *Booker*, the harshest substantively reasonable sentence functions as a "statutory maximum" within the meaning of the *Apprendi* rule. It necessarily follows that the Sixth Amendment prohibits a court from imposing on a defendant a sentence whose substantive reasonableness depends upon the presence of a fact neither found by the jury nor admitted by the defendant. In this case, the status of the firearm as a "machinegun" would be such a fact.

(. . . continued)

maximum" for federal bank fraud is 30 years. *See* 18 U.S.C. § 1344 (providing that a defendant shall not be imprisoned for "more than 30 years").

D. Under *Apprendi*, If a Sentence Would Be Substantively Unreasonable Absent a Fact Neither Found by the Jury Nor Admitted by the Defendant, Then That Sentence Violates the Sixth Amendment.

In *Gall*, this Court held that although reasonableness review is not susceptible to a mathematical formula, "a major departure [from the applicable Guidelines' range ordinarily] should be supported by a more significant justification than a minor one." 552 U.S. at 50. This expectation, where it applies, follows from the respect that is due the Sentencing Commission's expert work when it fulfills its "characteristic institutional role." *Kimbrough*, 552 U.S. at 110.[5]

At the certiorari stage, the Government argued that had the district court found the disputed

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[5] It also follows from *Rita*'s holding that the courts of appeals may (but are not required to) apply an appellate presumption of reasonableness to sentences within the applicable Guidelines' range. *See Rita*, 551 U.S. at 340. In such cases, it is not the *range* that receives the presumption of reasonableness—otherwise the district courts would be authorized to indulge such a presumption, which they are not—but rather the *sentence*, because such cases are those in which the district judge's independent assessment of the sentence that is "sufficient, but not greater than necessary," coincides with the range the Commission has suggested for the applicable "category of cases." Where two different experts—district judge and Commission—find themselves in agreement after looking at the matter from different perspectives, then the appellate court may presume the result to be reasonable.

"machinegun" fact, a 30-year sentence for Respondents would not have been subject to a substantive reasonableness challenge. But this is not an answer to the *Apprendi* problem that Respondents have identified, which is that a 30-year sentence would be substantively *un*reasonable (and hence unlawful) *without* the judicially found "machinegun" fact. This Court's "precedents make clear" that the maximum sentence that may be imposed on a defendant "is the maximum sentence a judge may impose" solely on the facts either found by the jury or admitted by the defendant. *Blakely*, 542 U.S. at 303-04. "When a judge inflicts punishment that" those facts alone "do[ ] not allow," then the "judge exceeds his [constitutional] authority." *Id.* at 304. Whether the applicable maximum sentence for *Apprendi* purposes is determined by statute (as in *Apprendi* and *Blakely*), administrative guideline (as under the Federal Sentencing Guidelines, prior to *Booker*), or judicial decision (as with substantive reasonableness review), the Sixth Amendment applies all the same.

Under *Apprendi*, if a sentence would not be legally authorized based solely on those facts either found by a jury beyond a reasonable doubt or admitted by the defendant, then that sentence cannot be constitutionally imposed. This Court has plainly held that appellate review for reasonableness has a substantive component, and this necessarily establishes that the applicable *Apprendi* "maximum" for any particular defendant is the maximum sentence that would be upheld on appeal as substantively reasonable based solely on those facts found by the jury beyond a reasonable doubt or admitted by the defendant. *See Blakely*, 542 U.S. at

303 (defining "statutory maximum" for *Apprendi* purposes). Thus, if the defendant's sentence would be held substantively *un*reasonable absent the judicially found facts, then the defendant's sentence violates the Sixth Amendment and cannot stand.

Five Justices of this Court have identified this convergence point between *Apprendi* and substantive reasonableness review. Justice Alito has explained that "reasonableness review imposes a very real constraint on a judge's ability to sentence across the full statutory range without finding some aggravating fact. . . . [T]here inevitably will be *some* sentences that, absent any judge-found aggravating fact, will be unreasonable." *Cunningham* v. *California*, 549 U.S. 270, 309 & n. 11 (2007) (Alito, J., dissenting, joined by Kennedy & Breyer, JJ.). Justice Scalia has explained that *Apprendi* entitles a defendant to challenge his sentence on the ground that it "would not [be] upheld as reasonable on the facts encompassed by the jury verdict or guilty plea." *Rita*, 551 U.S. at 375 (Scalia, J., dissenting). And Justice Thomas has indicated that he agrees with Justice Scalia's analysis. *See Irizarry* v. *United States*, — U.S. —, 128 S. Ct. 2198, 2204 (2008) (Thomas, J., concurring). As Justice Scalia has recently stated, "The door . . . remains open for a defendant to demonstrate that his sentence . . . would not [be] upheld [as substantively reasonable] but for the existence of a fact found by the sentencing judge[.]" *Gall*, 552 U.S. at 60 (Scalia, J., concurring). The Government treats that door not merely as closed, but as non-existent. The majority of the Justices of this Court has suggested otherwise.

Though *Amici* believe that the First Circuit's statutory construction in this case is correct, that the

Sixth Amendment holding in *Harris* v. *United States*, 536 U.S. 545 (2002) (plurality opinion), is wrong, and that Congress cannot make the "machinegun" fact a sentencing factor without facially violating the Due Process Clause, the time has also come for the Court to clarify formally the following crucial aspects of substantive reasonableness review, which arise in this case and limit the scope of any remand:

First, a defendant's sentence is substantively unreasonable if a reasonable jurist would find it "greater than necessary" to further Congress's statutorily articulated goals of criminal punishment. *See supra* at 6. Second, the existence of substantive reasonableness review triggers *Apprendi*, and a sentence that would be held substantively *un*reasonable based on the facts found by the jury or admitted by the defendant cannot pass Sixth Amendment muster simply because there is a judicially found fact that changes the calculus. Given this, in determining whether a defendant's sentence violates *Apprendi*, the proper starting point to an appellate court's predicate substantive reasonableness analysis must be the advisory Guidelines' range that reflects the jury-found and admitted facts alone. *Cf., e.g.*, *United States* v. *Sexton*, 512 F.3d 326, 334-35 (6th Cir. 2008) (Merritt, J., dissenting) (noting that, in resolving a defendant's challenge to the substantive reasonableness of his sentence, starting from a Guidelines' range "ratchet[ed] up" by "judicial findings of fact" is "completely inconsistent with the *Blakely* and *Booker* opinions").

E. The Disputed "Machinegun" Fact That Triggers Section 924(c)(1)(B)(ii)'s Statutory Minimum Must Be Treated as an Element in Respondents' Case.

In this case, based on the *Apprendi*-compliant facts (*i.e.*, the plea-admitted facts, and absent a judicial finding of the disputed "machinegun" fact), the advisory Guidelines' sentence for Respondents O'Brien and Burgess is 7 years. U.S.S.G. § 2K2.4(a). While no Guidelines' sentence is binding, in light of the Commission's assessment that 7 years is the appropriate sentence on the facts to which Respondents pled, it is inconceivable that any fair-minded jurist would find that a 30-year sentence could be called for absent a finding that the firearm was a "machinegun." Under *Apprendi*, the legality of a 30-year sentence for Respondents cannot turn, either directly or indirectly, on whether a judge finds the disputed "machinegun" fact. Instead, whether a 30-year sentence is legal must turn on whether that sentence could be imposed absent the disputed "machinegun" fact.

Respondent O'Brien's brief demonstrates in ample detail why, in this case, an appellate court could not affirm as substantively reasonable a 30-year sentence based solely on the *Apprendi*-compliant facts. *See* O'Brien Resp. Br. at 45-50. The same is true as to Burgess, even given his prior record.[6] Because a 30-year sentence imposed on

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[6] Even upon Burgess's guilty plea to being an "armed career criminal," 18 U.S.C. § 924(e), the sentencing judge imposed no more than the statutory minimum 15-year term for that offense, plus 84 months (continued . .)

either Respondent would not be upheld as substantively reasonable on the plea-admitted facts alone, the disputed "machinegun" fact that triggers Section 924(c)(1)(B)(ii)'s statutory minimum must be treated as an element and proven to a jury beyond a reasonable doubt. The Government concedes that it lacks the proof in this case to meet that heavy burden.

Accordingly, *Amici* FAMM and NACDL submit that the judgment of the First Circuit should be affirmed.

(. . . continued)

for his vicarious possession of the firearm, totaling 264 months' imprisonment (22 years). A sentence more than 100% longer than that (*i.e.*, 15 + 30 years) would be outside the range of reasonable difference in applying Section 3553(a). On the Section 924(c) count alone—the count at issue here—the discrepancy would exceed 400% (360 months versus 84 months), far outside any reasonable range of differing judgment.

CONCLUSION

This Court need not address how reasonableness review implicates a Sixth Amendment limitation on federal sentences if it simply affirms the First Circuit on statutory grounds. However, if it disagrees with the First Circuit's construction of Section 924(c)(1)(B)(ii) and also rejects Respondents' facial constitutional challenges to Section 924(c)(1)(B)(ii), it should make clear that the statute's 30-year mandatory minimum nevertheless cannot constitutionally be imposed on Respondents O'Brien and Burgess.

Respectfully submitted,

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