No. 21-7769

In The
Supreme Court of the United States

LONNELL TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMICI CURIAE CRIMINAL LAW SCHOLARS AND LEGAL ORGANIZATIONS IN SUPPORT OF PETITIONER

DAWINDER S. SIDHU
Counsel of Record
SHON R. HOPWOOD
KYLE SINGHAL
HOPWOOD & SINGHAL PLLC
1701 Pennsylvania Ave. NW
Washington, DC 20006
(202) 769-4080
sidhu@hopwoodsinghal.com

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the methodology used by a district court to determine drug quantity for purposes of sentencing for drug trafficking offenses should be reviewed *de novo*, under a heightened standard, or only for clear error, the standard followed by D.C. Circuit below.

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INTEREST OF AMICI CURIAE[1]

Amici are a former federal judge, law professors, and legal organizations that collectively teach, study, and practice criminal law. As this Court has recognized, and as amici's professional experience confirms, the culpability of an individual convicted of a federal drug offense is tied to the drug quantity attributed to the defendant; as such, drug quantity determinations drive sentencing outcomes. Petitioner has pointed out, however, that the methodology used in drug quantity determinations varies among sentencing courts and that the standard of review used to check the selected methodology varies among federal appeals courts. Amici are concerned that, because of these differences, individuals convicted of federal drug offenses are receiving and serving disproportionate and disparate sentences. Amici therefore support the Petition.

Amici note that this Court has routinely denied certiorari in cases implicating the federal sentencing guidelines. Amici write separately to ensure that the Court does not decline review—and forgo the opportunity to promote the reasoned and equitable administration of criminal justice—on this basis.

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[1] In accordance with Rule 37.6, Amici certify that no counsel for either party authored this brief in whole or in part, and no person or entity other than named amici made a monetary contribution for the preparation or submission of this brief. The parties received notice and have consented to the filing of this brief.

Amici are as follows:

The Rutherford Institute—nonpartisan, apolitical and committed to the principles enshrined in the Constitution and Bill of Rights—works to reshape the government from the bottom up into one that respects freedom, recognizes the citizens' worth as human beings, resists corruption, and abides by the rule of law.

The Arkansas Association of Criminal Defense Lawyers (AACDL) is a 300-member state affiliate of the National Association of Criminal Defense Lawyers. The AACDL serves as a professional organization for criminal defense attorneys in Arkansas and advocates for reform in criminal justice in Arkansas and at the federal level and works to ensure fairness in the criminal justice system and due process for persons accused of crimes.

The District of Columbia Association of Criminal Defense Lawyers (DCACDL) is an organization dedicated to protecting the rights of persons accused of crimes in the District of Columbia local and federal court and to fostering and enhancing the ability of D.C. lawyers to effectively represent those persons. DCACDL also works to improve the criminal justice system to those ends. It is an affiliate organization of the National Association of Criminal Defense Lawyers.

The Illinois Association of Criminal Defense Lawyers (IACDL) serves as a leader, alongside diverse coalitions, in identifying and reforming flaws and inequities in the criminal justice system, and redressing systemic racism, and ensuring that its members and

others in the criminal defense bar are fully equipped to serve all accused persons at the highest level. IACDL is committed to enhancing the criminal defense bar's capacity to safeguard fundamental constitutional rights. It is an affiliate organization of the National Association of Criminal Defense Lawyers.

The Kansas Association of Criminal Defense Lawyers (KACDL) is a 350-member, non-profit organization of criminal defense lawyers and related professionals. Its mission is to ensure justice and due process for persons accused of crime or other misconduct, to provide ongoing continuing legal education, and to promote public awareness of citizens' rights, the criminal justice process and the role of the criminal defense practice. The KACDL is an affiliate of the National Association of Criminal Defense Lawyers.

The Maryland Criminal Defense Attorneys' Association includes research, education, and advocacy relating to criminal defense practice, the proper administration of justice, and the protection of individual rights for criminal defendants. The Association, which has 600 members, has a particular interest in this case because when federal judges enhance sentences for narcotics offenders based upon extrapolations, there is an inherent risk that flawed methodologies underlie these extrapolations and go unnoticed or uncorrected by the sentencing judge. When the standard for appellate review is more deferential, flawed methodologies are more likely to be erroneously affirmed on appeal, thereby resulting in defendants serving additional time in prison for conduct that should not have been

attributed to them. A de novo standard of review, on the other hand, reduces the likelihood of this without any undue burden on appellate courts reviewing their sentences.

The Minnesota Association of Criminal Defense Lawyers (MACDL) is a 350-member organization of criminal defense lawyers. It seeks to foster and encourage the integrity, independence, and expertise of the defense lawyer in criminal cases and to promote the proper administration of criminal justice, including the protection of individual rights and the provision of justice and due process for persons accused of crime or other misconduct. The MACDL is an affiliate of the National Association of Criminal Defense Lawyers.

The Missouri Association of Criminal Defense Lawyers (MACDL), with 420 members, is an organization dedicated to protecting the rights of persons accused of crimes in Missouri, and to fostering and enhancing the ability of Missouri lawyers to effectively represent those persons. MACDL also works to improve the criminal justice system to those ends. MACDL is an affiliate organization of the National Association of Criminal Defense Lawyers.

The Nebraska Criminal Defense Attorneys Association (NCDAA), organized in 1985, seeks to promote the proper administration of criminal justice. The NCDAA endorses measures that provide the procedural and substantive safeguards necessary to assure fair trials before impartial tribunals in which every defendant stands equal before the law. The NCDAA is an

affiliate organization of the National Association of Criminal Defense Lawyers.

The New Mexico Criminal Defense Lawyers Association (NMCDLA), which includes over 600 criminal defense attorneys, social workers, paralegals, investigators, and other team members, mobilizes criminal defense professionals throughout the state to effectively represent their individual clients, who stand alone against the forces of government, and to partner with diverse coalitions advocating for systemic change and addressing injustices in the courtroom and throughout the criminal justice system as a whole. It is an affiliate organization of the National Association of Criminal Defense Lawyers.

The North Dakota Association of Criminal Defense Lawyers (NDACDL) supports the attorneys of North Dakota involved in the practice of criminal defense. The association is committed to advocating for the rights of criminal defendants in the federal and state courts, in furthering its members' professional development and in fostering a sense of community among those working in the criminal defense field in North Dakota. The NDACDL is an affiliate of the National Association of Criminal Defense Lawyers.

The Pennsylvania Association of Criminal Defense Lawyers (PACDL) has provided education, resources and more to the Pennsylvania criminal defense bar since being founded in 1988. PACDL and its 850 members are dedicated to ensuring that the federal and state constitutional vision of equal justice under law

remains the criminal justice system's guiding principle. PACDL is an affiliate of the National Association of Criminal Defense Lawyers.

The South Dakota Association of Criminal Defense Lawyers (SDACDL), founded in 2010, serves the needs of the criminal defense bar in South Dakota. The SDACDL is an affiliate organization of the National Association of Criminal Defense Lawyers.

The Wisconsin Association of Criminal Defense Lawyers (WACDL) is a 400-member organization of private attorneys and public defenders practicing criminal law across the state. As an affiliate of the National Association of Criminal Defense Lawyers, the WACDL provides support and training to criminal defense attorneys statewide and promotes the proper administration of criminal justice, including the protection of individual rights and the provision of justice and due process for persons accused of crime or other misconduct.

Peter Arenella teaches Criminal Law, Criminal Procedure, and seminars on moral agency and criminal law excuse theory at the UCLA School of Law. He is a nationally recognized criminal law and procedure scholar, writing about the relationship between criminal and moral responsibility by exploring competing conceptions of criminal culpability and moral agency at work in immaturity and mental disability defenses. He has also written extensively on the privilege against self-incrimination and grand jury practices.

The Hon. Mark W. Bennett (Ret'd) served as a Federal Judge of the United States District Court for the Northern District of Iowa for 24 years between 1994 and 2019. Judge Bennett has also published more than 25 law review articles in the past nine years at law reviews at Alabama, American, Cardozo, Florida, Harvard, Iowa, Northwestern, Texas, U.C. Davis, U.C.L.A., and Yale. He maintains an active interest in federal sentencing law.

William W. Berry, III, is a Montague Professor of Law at the University of Mississippi, He has written over 45 law review articles, primarily in the areas of capital punishment, sentencing, substantive criminal law, and sports & entertainment law. Professor Berry is the co-editor of The Eighth Amendment and its Future in a New Age of Punishment (Cambridge University Press, 2020). He is also co-author of three law textbooks, including Criminal Law (9th edition) (Carolina, 2021).

Avery Gilbert is a Clinical Lecturer in Law and Associate Research Scholar in Law at Yale Law School. She has conducted extensive research and strategic advocacy and overseen impact litigation designed to reduce over-incarceration.

Shon Hopwood is Associate Professor of Law at the Georgetown University Law Center. His research and teaching interests include criminal law and procedure, civil rights, and the constitutional rights of prisoners.

Issa Kohler-Hausmann is Professor of Law at Yale Law School and Associate Professor of Sociology at

Yale. Her primary research interests are in criminal law, sociology of law, empirical legal studies, social and legal theory. She also maintains an active pro bono legal practice in the federal courts through which she seeks to identify, address and remedy inequities arising from mass and over-incarceration.

Colin Miller is a Professor of Law at the University of South Carolina School of Law. Professor Miller is the creator and Blog Editor of EvidenceProf Blog, which addresses recent developments in evidence precedent, legislation, and scholarship. His areas of expertise include Evidence and Criminal Law and Procedure.

Brent E. Newton is Visiting Professor of Law at Penn State Dickinson School of Law. He also is of counsel with Gerger, Khalil, Hennessy, and McFarlane, where he practices white-collar defense. He was the deputy staff director of the United States Sentencing Commission from 2009–2019.

Michael M. O'Hear is a Professor of Law at the Marquette University Law School, where he teaches criminal law and related courses. He is a nationally recognized authority on criminal punishment and is the author or coauthor of more than eighty scholarly articles, books, and book chapters on sentencing, criminal procedure, and other legal topics, including *The Failed Promise of Sentencing Reform*, *Prisons and Punishment in America: Examining the Facts*, and *Sentencing Law, Policy and Practice*.

Shana-Tara O'Toole founded and serves as President of the Due Process Institute. It seeks to promote through the courts and legislature a better-informed recognition of procedural due process rights for the accused at every stage of the criminal justice system and to prevent those precious rights from erosion.

Amanda Peters is the Helen & Harry Hutchens Research Professor and Professor of Law at the South Texas College of Law in Houston. She teaches Legal Research and Writing, Texas Criminal Procedure, and Criminal Litigation Drafting. She has spoken and written on legal research and writing, and criminal law and procedure.

Ira Robbins is a Professor at American University's Washington College of Law and a founding member of its Criminal Justice Practice & Policy Institute. He is an expert on criminal law and procedure, the death penalty, habeas corpus, prisoners' rights, privatization of prisons and jails, conspiracy, and other legal issues. He was Acting Director of the Federal Judicial Center's Education and Training Division and has served as a Supreme Court Fellow and as a special consultant to the Judicial Conference of the United States' Advisory Committee on Criminal Rules. His recent books include *Habeas Corpus Checklists* (2022) and *Prisoners and the Law* (six vols., 2022).

Jacob Schuman is an assistant professor at Penn State Law and an affiliate faculty member at Penn State's Criminal Justice Research Center and Consortium to Combat Substance Abuse. He studies criminal

law, criminal procedure, and sentencing. His research has been published or is forthcoming in the Virginia Law Review, the Ohio State Journal of Criminal Law, the Washington Law Review, the Loyola of Los Angeles Law Review, the Tennessee Law Review, the Philadelphia Inquirer, the New Republic, the Marshall Project, and the Crime Report, among others.

Dawinder S. Sidhu is a former tenured law professor at the University of New Mexico who served as Special Assistant to the Chair of the U.S. Sentencing Commission, and as Supreme Court Fellow assigned to the Commission. He currently practices federal criminal law on a pro bono or low bono basis.

Patrice Amandla Sulton is an attorney, professor at the George Washington University School of Law, and a criminal justice reform advocate in Washington, D.C. She is the founder and Executive Director of the D.C. Justice Lab, which is a team of law and policy experts researching, organizing, and advocating for large-scale changes to the District of Columbia's criminal legal system and to transform the District's approach to punishment and public safety.

SUMMARY OF ARGUMENT

Because the question before this Court has divided the courts of appeals, produces disparate practical outcomes for the thousands of defendants convicted of a federal drug offense, undermines uniformity in federal sentencing, and is incapable of resolution by the

U.S. Sentencing Commission, the petition should be granted.

But relying on *Braxton v. United States*, 500 U.S. 344 (1991), this Court has repeatedly denied review in petitions raising clear circuit splits involving the federal sentencing guidelines, reasoning that the U.S. Sentencing Commission should resolve these splits in the first instance. *See*, *e.g.*, *Guerrant v. United States*, No. 21-5099, 2022 WL 89257, at *2 (S. Ct. Jan. 10, 2022) (citing *Braxton*, 500 U.S. at 348) (Sotomayor, J., statement respecting the denial of certiorari, joined by Barrett, J.); *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (citing *Braxton*, 500 U.S. at 348) (Sotomayor, J., statement respecting the denial of certiorari, joined by Gorsuch, J.); *see also* Pet. at 15–16. The question presented in the instant petition—the standard of appellate review applicable to drug quantity determinations for purposes of federal sentencing—does not implicate *Braxton*. The Sentencing Reform Act, its legislative history, the Commission's practice, and this Court's jurisprudence all confirm that the Commission cannot select or change the standard of review that federal courts of appeals are to apply in federal sentencing cases. Because *Braxton* is inapplicable, the question presented is ripe for this Court's review.

Even if the Commission possessed the authority to set or modify the standard of appellate review, *Braxton* does not stand for the broad proposition that this Court, in deference to the Commission, must decline review of guideline cases. Any language in *Braxton* that such deference is appropriate is *dicta*. Even

otherwise, at most *Braxton* suggests that this Court should consider deferring to the Commission only when the Commission is in the middle of amending the guideline giving rise to the conflict and when there is an alternative basis for the decision. Here, the Commission is not amending any guideline or associated commentary relevant to the question presented. Any deference to the Commission therefore would be predicated on a misreading and misapplication of *Braxton*. In short, *Braxton* is no bar to the Court's acceptance of the petition, which presents a clear split in federal criminal law that only this Court may resolve.

ARGUMENT

The question before this Court has divided the courts of appeals. *See* Pet. at 17–19. That question implicates drug quantity, the calculation of which is a predominant factor in a defendant's sentence. *See Kimbrough v. United States*, 552 U.S. 85, 95 (2007) (noting that the SRA relies on drug weight as the "sole proxy" to differentiate between defendants of different culpability); *Neal*, 516 U.S. at 291 ("the Sentencing Guidelines calibrate the punishment of drug traffickers according to the quantity of drugs involved in the offense."); *see also* Statement of Ricardo H. Hinojosa, Chair, U.S. Sent'g Comm'n Before the House Judiciary Cmte. Subcomm. on Crime, Terrorism, and Homeland Security, 20 FED. SENT. R. 247, 251 (2008) ("Drug type and quantity are the two primary factors that determine offense levels under the federal sentencing

guidelines[.]"). The methodology used to determine drug quantity dictates the sentences of thousands of federal defendants convicted of a drug offense, the largest offense type in federal sentences other than immigration. *See* U.S. SENT'G COMM'N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS at 45 (2021) (reporting that 26.1% of the 64,565 federal sentences in 2020 are drug offenses). The inconsistencies in methodologies, which are less likely to be ironed out by inconsistent standards of review, will practically mean that a defendant's sentencing exposure and the sentence imposed will vary according to location and circuit. These disparities are at odds with the goal of uniformity that prompted the experiment with guided sentencing. *See United States v. Booker*, 543 U.S. 220, 253 (2005) ("Congress' basic goal in passing the Sentencing [Reform] Act was to move the sentencing system in the direction of increased uniformity.") Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 32 (1988) (identifying the "intended effect" of the Guidelines as "the rationalization and lessening of disparity among criminal sentences").

As Amici argue here, the Commission is incapable of resolving the question presented, and therefore incapable of mitigating the doctrinal and human costs of the prevailing disparities in methodologies and standards of review. That inconsistency is highly consequential in terms of the principled and coherent administration of federal criminal law, and in real terms as well, as a defendant's term of imprisonment

may depend on the happenstance of where they are sentenced. Both the values that underlie our criminal justice system and the liberty of defendants depend on this Court's resolution of the question before it.

I. The United States Sentencing Commission Cannot Resolve a Conflict Concerning the Standard of Appellate Review.

A. The Commission's Substantive Work Applies to District Courts—Not Appeals Courts.

Prior to 1984, the federal sentencing system was largely unregulated: judges could sentence without any legal constraints, provided that the sentence fell within the generous statutory penalty bounds created by Congress. *See Mistretta v. United States*, 488 U.S. 361, 363 (1989) ("Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long[.]"). A byproduct of this system of unguided sentencing discretion was wide disparities among similarly situated defendants. As U.S. District Judge Marvin Frankel explained at the time: "[J]udges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the differences are explainable only by the variations among the judges, not by material differences in the defendants or their crimes." Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 29 (1972).

In 1984, Congress responded to concerns about sentencing disparities by enacting the Sentencing Reform Act ("SRA"), 18 U.S.C. § 3551 *et seq*.; 28 U.S.C. § 991 *et seq*. The SRA established the federal Sentencing Commission and charged this new agency with promulgating guidelines that would serve as national norms in sentencing determinations, the use of which would reduce unwarranted sentencing disparities. *See* Breyer, at 4–6.

The Commission's work product—the Guidelines, commentary, and policy statements—inform only the sentencing determinations made by district court judges. The limited application of the Guidelines to district courts is confirmed by (1) the plain text of the SRA, *see* 28 U.S.C. § 994(a)(1) (directing the Commission to promulgate "guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case"); (2) the legislative history of the SRA, *see* S. Rep. No. 98-225, at 51 (1983) ("The Sentencing Guidelines will recommend to the sentencing judge an appropriate kind and range of sentence for a given category of offense committed by a given category of offender."); (3) this Court's rulings, *see Mistretta*, 488 U.S. at 396 (noting the "limited reach" of the Guidelines, explaining that the Guidelines "do no more than fetter the discretion of sentencing judges to . . . impose sentences within the broad limits established by Congress"); and (4) the Guidelines themselves, *see* UNITED STATES SENTENCING GUIDELINES MANUAL, § 1.3 (Oct. 1987) ("The Commission has had to . . . minimize the discretionary powers of the sentencing court.").

The sentencing process identified by this Court reinforces the limited, district court-specific reach of the Guidelines. This Court has instructed sentencing courts to follow a three-step process: first calculate the appropriate Guidelines range, then entertain any bases for a departure that are contained in the Guidelines, and finally consider the 18 U.S.C. § 3553(a) factors. *See Gall v. United States*, 552 U.S. 38, 49–50 (2007) (discussing this three-step process); *Peugh v. United States*, 569 U.S. 530, 536–37 (2013) (same). At the second step, the work of the Commission is at an end. The remaining step, ensuring that the sentence is sufficient, but no greater than necessary to effectuate the purposes of punishment under Section 3553(a) factors, is defined by Congress, not the Commission. *See Rita v. United States*, 551 U.S. 338, 347 (2007) (explaining that Congress, in Section 3553(a), speaks directly to the sentencing court). To be sure, the Commission will study appellate rulings in considering amendments to the Guidelines. *See id*. at 350 (stating that the Commission will "collect and examine" appellate decisions and may "revise the Guidelines accordingly"); S. Rep. No. 98-225, at 151 (observing that appellate review, "in turn, will assist the Sentencing Commission in refining the Sentencing Guidelines as the need arises"). But these refinements will be limited to the first and second steps outlined above, not the third.

B. Fixing and Interpreting the Standard of Appellate Review is a Function Reserved for Congress and the Courts.

Congress also defined the standard of appellate review for federal sentences. Prior to 1984, there was virtually no appellate review of the sentences imposed. *See Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (stating "the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end"); S. Rep. No. 98-225, at 150 (1983) ("Appellate courts have long followed the principle that sentences imposed by district courts within legal limits should not be disturbed," adding that "sentencing judges have traditionally had almost absolute discretion to impose any sentence legally available in a particular case.").

The SRA provided for "limited practice of appellate review of "sentences," for "cases in which the sentences [1] are illegal, [2] are imposed as the result of an incorrect application of the sentencing guidelines, or [3] are outside the range specified in the guidelines and unreasonable." S. Rep. No. 98-225, at 150 (discussing 18 U.S.C. § 3742); *see also* 18 U.S.C. § 3557 (establishing that appellate review of a sentence "is governed by the provisions of Section 3742"). Shortly thereafter, Congress amended Section 3742 to require appellate courts to remand improper applications of the Guidelines for further proceedings. *See* Criminal Law and Procedure Technical Amendments Act of 1986, § 73, 100 Stat. 3617 (amending 18 U.S.C. § 3742(e)).

The responsibility to interpret federal statutes, including federal criminal statutes, falls on the courts. *See* The Federalist No. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts" and it "belong[s] to [judges] to ascertain . . . the meaning of any particular act proceeding from the [l]egislative body."). This Court has performed that traditional interpretive function in the context of the appellate review of federal sentences. For example, following the passage of the SRA, the Court clarified that, on appeal, a district court's imposition of an illegal or erroneous sentence is entitled to no deference, whereas departure decisions are subject to an abuse of discretion standard. *Koon v. United States*, 518 U.S. 81, 98–100 (1996).

Congress may respond to judicial interpretations of federal statutes through legislation. *See Neal v. United States*, 516 U.S. 284, 295 (1996) ("Congress is free to change this Court's interpretation of its legislation.") (internal quotes and citation omitted); *see also* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, app 1. at 1480–1515 (2014) (listing 286 statutory overrides of 275 Supreme Court statutory interpretation decisions). To continue the example above, after *Koon*, Congress tightened the abuse of discretion standard by requiring that departure decisions be reviewed *de novo*. 18 U.S.C. § 3742(e) (amended by the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub.L. 108-21,

§ 401(d)(1), 117 Stat. 670)). In 2005, this Court invalidated Section 3742(e), establishing that circuit courts now are to review sentences for reasonableness using an abuse of discretion standard. *Booker*, 543 U.S. at 260–61; *see also Gall*, 552 U.S. at 51 (explaining the procedural and substantive components of reasonableness review). As this dynamic makes clear, the standard of review on appeal is governed by Congress, through "statutory command," or by the courts, through "appellate practice." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

The statute and legislative history provide specific instructions on how the Commission is to discharge its responsibilities to produce the Guidelines. *See* Brent E. Newton & Dawinder S. Sidhu, *The History of the Original Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1210–11 (2017) (quoting two members of the first Commission observing that "[the SRA] was the most complete set of legislative directives that I have ever seen in a statute" and "we were told to develop this new system of justice, yet the statute told us how to do it") (internal quotes and citations omitted); *see also* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 284 (1993) (noting that the SRA "effectively mandates" the guidelines and corresponding policy choices). Nothing in the SRA or its legislative history authorizes the Commission to set or alter the standard of review that federal courts of appeals are to apply in federal sentencing cases. Nor do they disturb the bedrock

principle that such standards are to be fixed by Congress and interpreted by the courts.

C. The Commission Has Recommended Changes in Appellate Review to Congress and the Courts.

The Commission's own conduct demonstrates that Congress and the courts are the only effective actors with respect to standards of appellate review. First, the Commission has offered recommendations regarding appellate review of federal sentences to Congress and the courts. With respect to Congress, the Commission has proposed statutory changes through congressional testimony, *see*, *e.g.*, Testimony of The Honorable Patti B. Saris, Chair, U.S. Sent'g Comm'n, Before the Subcomm. on Crime, Terrorism, and Homeland Security, House Cmte. on the Judiciary 55 (Oct. 12, 2011), and formal reports, *see*, *e.g.*, U.S. SENT'G COMM'N, 2012 REPORT TO CONGRESS: CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, Pt. A, 111–12 (2012). In the courts, the Commission has participated as amicus curiae in cases before this Court concerning appellate review of federal sentences. *See* Br. of Amicus Curiae the U.S. Sent'g Comm'n., *Rita v. United States*, U.S. No. 06-5754, at *5 (Jan. 22, 2007). The advisory nature of the Commission's work is consistent with the limited role of the Commission in the context of defining appellate review.

Second, the Commission is expected to amend the Guidelines to resolve circuit splits involving guideline

provisions, *see* 28 U.S.C. § 994(o) ("The Commission periodically shall review and revise . . . the guidelines"), and a number of deep and conspicuous circuit splits have arisen concerning the appellate review of guidelines cases, *see*, *e.g.*, *United States v. Irey*, 612 F.3d 1160, 1259 n.84 (11th Cir. 2010) (en banc) (Tjoflat, J., concurring in part) ("The federal courts of appeals, including this court, approach substantive reasonableness review inconsistently. . . . Moreover, appellate courts and circuit judges across the country have openly expressed confusion about the appropriate role of appellate courts."); *see also* Lindsay C. Harrison, *Appellate Discretion and Sentencing After* Booker, 62 U. MIAMI L. REV. 1115, 1129–33 (2008) (detailing two such conflicts among the federal appeals courts). Yet in the entire history of the agency, the Commission has not amended the Guidelines a single time to address appellate review. *See* U.S.S.G., App'x C & Supp. to App'x C (listing the 813 amendments to the Guidelines).

The Commission's one-way engagement with Congress and the courts, and its inaction as to Guideline amendments, make clear that it can only indirectly influence the standard of appellate review for determinations of drug quantity at sentencing.

II. *Braxton* Does Not Preclude This Court from Resolving the Question Presented.

A. At Most, *Braxton* Supports Abstention When the Commission is Actively Resolving the Same Dispute and There is an Alternative Basis for the Decision.

This Court has repeatedly declined the opportunity to resolve clear circuit splits involving the federal sentencing guidelines, reasoning that, under *Braxton*, the Commission should resolve those splits in the first instance. *See*, *e.g.*, *Guerrant* (citing *Braxton*, 500 U.S. at 348); *Longoria* (citing *Braxton*, 500 U.S. at 348); *see also* Pet. at 15–16. Yet even if the Court were to construe the question presented as one that the Commission could resolve, *Braxton* would not support the proposition that the Court should or must abstain from exercising its certiorari power in the Guidelines context.

In *Braxton*, the Court agreed to address a split among the federal appeals courts as to whether a stipulation to a higher offense under U.S.S.G. § 1B1.2(a) required a formal plea agreement. 500 U.S. at 347. The Commission was simultaneously examining the same split. *See* 56 FED. REG. 1891 (1991) (requesting public comment as to whether § 1B1.2(a) should be amended to clarify that a qualifying "stipulation must be as part of a formal plea agreement"). The Court ultimately did not resolve the split, stating that "the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of § 1B1.2[.]" *Braxton*, 500 U.S. at 348–49. The Court held that, even if the

stipulation at issue was in its proper form for purposes of § 1B1.2, the contents of the stipulation did not establish a higher offense level. *Braxton*, 500 at 349–51.

At most *Braxton* suggests that the Court should decline petitions raising Guideline splits when the Commission is in the middle of amending the same guideline provision giving rise to the split. Such guidelines abstention would resemble other forms of abstention in which the Court avoids disturbing or interfering with active parallel state or administrative proceedings. *See generally Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814–15 (1976) (discussing the circumstances in which abstention is appropriate); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2403 (2019) (expressing preference for administrative agencies to "play the primary role in resolving regulatory ambiguities," as agencies are in a better position, relative to the courts, to understand the intent and meaning of the regulation and to consider and balance any political considerations).

Here, however, the Commission is not addressing—and indeed cannot address, *see supra* Part I.A-B.—the circuit split at issue in this case. Even if the Commission had the ability to change appellate standards of review, the agency has lacked a quorum since 2018 and has no pending amendments. *See* U.S. SENT'G COMM'N, 2019 ANNUAL REPORT 3 (2020) ("[T]he Commission has lacked the minimum of four affirmative votes required by statute to promulgate amendments to the federal sentencing guidelines[.]"). There simply

is no concurrent proceeding that the Court would be interrupting by granting review.

Second, any such abstention would apply not only when the Commission's amendment process is underway, but also when there is an alternative basis for the Court's resolution of the case raising the split. In announcing the *Braxton* opinion from the bench, Justice Scalia stated that the Commission was actively resolving these splits and that the Court "will defer to it here where we can resolve the case on another ground." Opinion Announcement at 2:46, *Braxton v. United States*, 500 U.S. 344 (1991) (No. 90-5358), https://www.oyez.org/cases/1990/90-5358. In *Braxton*, the Court disposed of the case on an alternative basis, specifically the conclusion that the stipulation did not establish a higher offense. Justice Scalia left no doubt that the Court declined to resolve the guideline split because another such standalone ground was available. Here, there is no alternative basis to resolve the question presented.

B. Any Language in *Braxton* Encouraging Abstention is *Dicta*.

Braxton noted that Congress authorized the Commission to resolve splits concerning the federal sentencing guidelines, and as such the Court was "more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts[.]" *Braxton*, 500 U.S. at 347. But because the Court in *Braxton* decided the case on the basis of the

inadequacy of the stipulation, any language suggesting whether and under what circumstances the Court will abstain from sentencing matters is *dicta*. That is, the Court's refusal to address the conflict as to the meaning of § 1B1.2(a), and any discussion thereof, was not part of the holding of the case and was not necessary to the resolution of the case. It is the textbook definition of *dicta* and should not be accorded any binding weight. *See United States v. Mun*, 41 F.3d 409, 412 (9th Cir. 1994) (stating that the "only question" considered in *Braxton* was whether the stipulation "specifically established" a higher offense).

In sum, *Braxton* properly read does not provide any reason for this Court to decline review.

CONCLUSION

For these reasons, and those presented by Petitioner, the opinion of the court of appeals should be reversed.

Respectfully submitted,

DAWINDER S. SIDHU
Counsel of Record
SHON R. HOPWOOD
KYLE SINGHAL
HOPWOOD & SINGHAL PLLC
1701 Pennsylvania Ave. NW
Washington, DC 20006
(202) 769-4080
sidhu@hopwoodsinghal.com

Counsel for Amici Curiae