No. 12-62

In the Supreme Court of the United States

MARVIN PEUGH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Ex Post Facto Clause required the district court to consult the version of the advisory Sentencing Guidelines in effect at the time of petitioner's offenses, rather than the version in effect at the time of sentencing, in determining the appropriate sentence under 18 U.S.C. 3553(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 675 F.3d 736.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2012. On June 13, 2012, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 10, 2012, and the petition was filed on July 16, 2012. The petition was granted on November 9, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND SENTENCING GUIDELINES INVOLVED

The relevant constitutional provisions and statutes are reprinted in an appendix to this brief. App., *infra*,

1a-3a. Relevant Sentencing Guidelines and amendments are reprinted at Pet. App. 44a-68a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on five counts of bank fraud, in violation of 18 U.S.C. 1344. Pet. App. 15a. The district court sentenced petitioner to 70 months of imprisonment, to be followed by three years of supervised release. *Id.* at 17a-18a. The court of appeals affirmed. *Id.* at 1a-13a.

1. Petitioner and his cousin were co-owners of two farming-related companies: the Grainery, Inc., which bought, sold, and stored grain; and Agri-Tech, Inc., which provided farming services to landowners and tenants. Pet. App. 2a. In 1999 and 2000, after the Grainery began to suffer cash-flow problems, petitioner and his cousin engaged in multiple fraudulent schemes to obtain additional capital. *Id.* at 2a-3a.

First, the two men secured loans, worth over $2.5 million, from the State Bank of Davis by falsifying the existence of valuable contracts for future grain deliveries from Agri-Tech to the Grainery. Pet. App. 2a-3a; J.A. 31-32. They never paid back most of the principal on those loans, causing losses of over $2 million. J.A. 32. Second, petitioner and his cousin artificially inflated the balances of certain bank accounts through a form of fraud known as "check kiting," in which they wrote bad checks between their personal and business accounts in order to trick the banks into thinking the receiving accounts had more funds. Pet. App. 3a; J.A. 119-120. That deception allowed them to overdraw an account with Savanna Bank by $471,000. Pet. App. 3a.

2. In 2009, a grand jury in the Northern District of Illinois charged petitioner in a superseding indictment with nine counts of bank fraud, in violation of 18 U.S.C. 1344. J.A. 114-118. The first three counts concerned the fraudulent contracts used to secure the loans, and the latter six counts concerned the check-kiting scheme. *Ibid.* At trial, the government offered substantial evidence of petitioner's frauds. Pet. App. 3a-4a. Petitioner testified in his own defense and denied any wrongdoing, offering testimony that conflicted with other witnesses'. *Id.* at 4a-5a. The jury convicted petitioner on one of the three loan-fraud counts and four of the five check-kiting counts, and it acquitted him of the remaining counts. *Id.* at 5a; J.A. 118.

3. a. Petitioner was sentenced in May 2010. J.A. 28-106. Pursuant to 18 U.S.C. 3553(a), a sentencing court's "overarching duty" is to impose a "'sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in [18 U.S.C.] 3553(a)(2)." *Pepper* v. *United States*, 131 S. Ct. 1229, 1242 (2011) (quoting 18 U.S.C. 3553(a)). In carrying out that responsibility, the court is to consult a variety of factors, including the Sentencing Guidelines promulgated by the United States Sentencing Commission. *Id.* at 1241. Since *United States* v. *Booker*, 543 U.S. 220 (2005), those Guidelines have been advisory, not mandatory: "although a sentencing court must 'give respectful consideration to the Guidelines, *Booker* permits the court to tailor the sentence in light of other statutory concerns as well.'" *Pepper*, 131 S. Ct. at 1241 (quoting *Kimbrough* v. *United States*, 552 U.S. 85, 101 (2007)).

Federal law generally requires courts to consult the advisory Guidelines range "in effect on

the date the defendant is sentenced." 18 U.S.C. 3553(a)(4)(A)(ii). Congress adopted that approach so that sentencing courts would have the benefit of the Commission's up-to-date views about appropriate sentencing ranges. See S. Rep. No. 225, 98th Cong., 1st Sess. 77 (1983) (*Senate Report*). In a pre-*Booker* provision adopted when the Guidelines were mandatory, the Commission has specified that "[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." Sentencing Guidelines § 1B1.11(b)(1) (2009).

b. Consistent with Section 3553(a)(4)(A)(ii), the presentence investigation report (PSR) prepared for petitioner's sentencing used the then-current 2009 version of the Sentencing Guidelines to calculate the advisory sentencing range. J.A. 123. The PSR determined that petitioner's base offense level was seven and added an 18-level enhancement because petitioner's fraud caused more than $2.5 million in losses, producing a total offense level of 25. J.A. 124-126; see Sentencing Guidelines §§ 2B1.1(a)(1), 2B1.1(b)(1)(J) (2009). That offense level, combined with petitioner's criminal history category of I, yielded an advisory Guidelines range of 57 to 71 months of imprisonment. J.A. 144. The PSR additionally informed the district court that the Guidelines in effect at the time of the offenses would have produced a total offense level of 19 and an advisory range of 30 to 37 months. J.A. 124, 148.

Petitioner objected to the PSR's Guidelines calculation, arguing (among other things) that use of the 2009 Guidelines to calculate his advisory range violated the Ex Post Facto Clause. 3:08-cr-50014 Docket entry No. 156, at 1-2 (N.D. Ill. Apr. 2, 2010). The district court rejected that argument, observing that, under governing circuit precedent, "a post-offense change in an advisory guidelines range does not create an ex post facto violation." J.A. 30 (citing *United States* v. *Demaree*, 459 F.3d 791 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007)). The court also overruled petitioner's other objections to the PSR's Guidelines calculation. J.A. 30-38.

The district court then agreed with the government that petitioner's offense level under the Guidelines should receive an additional two-level obstruction-of-justice enhancement, because petitioner had given perjured testimony at trial. JA. 38-42. This increased petitioner's offense level under the 2009 Guidelines to 27, resulting in an advisory sentencing range of 70 to 87 months. J.A. 42. Under the Guidelines in effect at the time of his offenses, the offense level would have been 21, resulting in an advisory range of 37 to 46 months. See JA. 124; Pet. App. 48a.

c. After calculating the Guidelines range, the district court turned to the "other 3553(a) considerations." J.A. 42. The court heard testimony from petitioner's minister and petitioner's wife, argument from counsel, and an allocution from petitioner. J.A. 43-87. It ultimately determined that "a sentence sufficient but not greater than necessary to comply with the purpose set forth in paragraph two of Section 3553(a)" was 70 months of imprisonment followed by three years of supervised release. J.A. 100. The court em-

phasized that, in arriving at that determination, it had considered not only the Guidelines but also "all of the other sentencing factors contained in Section 3553(a)," as well as "the presentence report and accompanying materials," "the arguments made by the government and [petitioner]," "the evidence that's been presented," and "[petitioner's] statement." J.A. 87-88.

The district court concluded that the "nature and circumstances of the offense indicate the need for a strong sentence, not a more lenient one." J.A. 93; see 18 U.S.C. 3553(a)(1) (sentencing court should consider "the nature and circumstances of the offense"); see also 18 U.S.C. 3553(a)(2)(A) (sentence should "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment for the offense"). The court found that petitioner "took a leadership role" in the loan fraud, JA. 88; perpetrated an "elaborate scheme" that "occurred over an extended period of time," *ibid.*; and "caused a loss of over 2.5 million to the banks that were unfortunate enough to do business with him," J.A. 93. The court also observed that "rather than owning up to his wrongdoing," petitioner "compounded his criminal activity by employing the check kiting scheme to keep the business afloat," thereby "knowingly put[ting] various banks at risk of losing substantial amounts of money." *Ibid.*

The district court noted several factors that might favor mitigating the sentence, including petitioner's history of "steady employment," his lack of prior arrests, and the strong family and community support evidenced by "numerous letters" describing petitioner's personal qualities. J.A. 88-89; 18 U.S.C. 3553(a)(1) (sentencing court should consider "the

history and characteristics of the defendant"). The court further noted that petitioner had "endured much public scrutiny and professional discredit" and that the loss amount was barely above the amount needed for an 18-level increase in the Guidelines calculation. J.A. 89. The court also saw "little need to protect the public from further crimes" that petitioner might commit. J.A. 91; see 18 U.S.C. 3553(a)(2)(C) (sentence should "protect the public from further crimes of the defendant"). But the court did see a "great and urgent need for the sentence in this case to be a general deterrence to other people that might be in a position to or consider doing these kinds of offenses." J.A. 90-91; see 18 U.S.C. 3553(a)(2)(B) (sentence should "afford adequate deterrence to criminal conduct").

The district court "carefully considered" and expressly addressed several specific arguments raised by petitioner in favor of a below-Guidelines sentence. J.A. 91. It stressed that, in doing so, it was "mindful of all the Section 3553(a) factors." *Ibid.* First, the court rejected petitioner's contention that "his fraud was not driven by desire for profit or for personal gain," finding that if the Grainery had "done well," petitioner "would have profited by that success." J.A. 91-93. Second, the court rejected petitioner's contention that "the fraud guidelines rely too much on the amount of loss in determining the advisory sentencing range." J.A. 93-96. The court recognized that "a sentencing judge can have his own penal philosophy at variance with that of the Sentencing Commission," although it noted that circuit precedent "has cautioned that as a matter of prudence and in recognition of the Commission's knowledge, experience, and staff resources, an individual judge should think long and

hard before" doing so. J.A. 94. Here, "considering the particular facts of this case," the court "d[id] not disagree with the policy of imposing a stricter punishment on defendants that cause significant amounts of loss," and thus decided to give the "advisory guidelines range the appropriate amount of deference" on that issue. J.A. 96.

Third, the district court agreed with petitioner that his age (56) and lack of prior criminal history made it unlikely that he would commit additional crimes, but found that those considerations were outweighed by "other Section 3553(a) considerations, including the seriousness of the offense and the need for general deterrence," which was "high in a case such as this one." J.A. 96-97. Fourth, the court disagreed with petitioner's characterization of his offenses as "aberrant behavior in an otherwise law-abiding life," observing that his "criminal conduct * * * was drawn out over a long period of time." J.A. 98. Fifth, the court found that a lower sentence would not significantly help to provide restitution to the victims of petitioner's crimes, because petitioner was unlikely ever to be able to make those victims whole. J.A. 98-99; see 18 U.S.C. 3553(a)(7) (sentencing court should consider "the need to provide restitution to any victims of the offense"). Finally, the court found that any disparity between petitioner's sentence and his cousin's sentence (of 12 months and a day) was "wholly warranted" because his cousin had a lesser role in the loan fraud, pleaded guilty, "acknowledged his culpability," and "did not obstruct justice by committing perjury during trial." J.A. 99; see J.A. 22; see also 18 U.S.C. 3553(a)(6) (sentencing court should consider "the need to avoid unwarranted sentence

disparities among defendants with similar records who have been found guilty of similar conduct").

4. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 1a-13a. As relevant here, that court adhered to its prior holding that "the advisory nature of the guidelines vitiates any ex post facto problem" that might otherwise arise from consulting the Guidelines in effect at the time of sentencing rather than the Guidelines in effect at the time of the offense. *Id.* at 8a-9a (citing *Demaree*, 459 F.3d at 795).

SUMMARY OF ARGUMENT

The Ex Post Facto Clause prohibits Congress from enacting an "ex post facto Law." U.S. Const. Art. I, § 9, Cl. 3. It does not prohibit a district court from considering the Sentencing Commission's most up-to-date, non-binding advice about best practices in federal sentencing.

A. The Ex Post Facto Clause was adopted in reaction to English parliamentary abuses that retroactively changed the legal framework for criminal punishment, including by attaching new harsher penalties to a preexisting crime. Updated advisory recommendations that inform a court's exercise of sentencing discretion lack two critical features of an ex post facto law: they do not "change[] the *legal* consequences of acts completed before [their] effective date," *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) (emphasis added; citation omitted), and they do not "increase[] the penalty by which a crime is punishable," *California Dep't of Corr.* v. *Morales*, 514 U.S. 499, 506 n.3 (1995). The government is unaware of any case in which this Court has applied the Ex Post Facto Clause to advisory provisions. To the contrary, in holding that binding

sentencing provisions that establish presumptive sentencing ranges are subject to the Ex Post Facto Clause, this Court distinguished non-binding regulatory parole guidelines that "simply provide flexible 'guideposts' for use in the exercise of discretion." *Miller*, 482 U.S. at 435.

B. The federal Sentencing Guidelines are exactly that sort of flexible-guidepost system. This Court explained in *United States* v. *Booker*, 543 U.S. 220 (2005), that imbuing the Guidelines with "the force and effect of laws" leads to Sixth Amendment violations in many of their applications. *Id.* at 234. The Court then cured the constitutional infirmity of the then-mandatory Guidelines system by severing certain statutory provisions in order to "make the Guidelines system advisory." *Id.* at 246.

Under the post-*Booker* framework, the Guidelines are one advisory factor that a district court must consider in selecting a sentence "sufficient, but not greater than necessary" to carry out Congress's general statutory sentencing goals. 18 U.S.C. 3553(a). In making that discretionary sentencing decision, the district court can and should consider information that post-dates the offense itself, such as evidence of the defendant's post-offense rehabilitation or recidivism. It may similarly consider post-offense penological data and sentencing-policy perspectives.

The Guidelines essentially synthesize information—mainly, sentences imposed by other courts and policy recommendations—that courts would already consider in deciding upon an appropriate sentence in a particular case. Petitioner accordingly acknowledges that a court may, consistent with the Ex Post Facto Clause, elect on its own to consult the most

recent version of the Guidelines, even if that version of the Guidelines recommends a higher sentence than the version at the time of the offense.

A district court's consultation of up-to-date Guidelines does not become an ex post facto violation simply because that consultation is required by Section 3553(a). Under Section 3553(a), the Guidelines remain "advisory only." *Kimbrough* v. *United States*, 552 U.S. 85, 91 (2007). This Court's holdings make clear that district courts may reject the recommendation provided by the Guidelines, based on either a generalized disagreement with the policy they express or a more particularized disagreement with the result they would suggest in a particular case. District courts cannot presume that a Guidelines-range sentence is appropriate; the justifications for a sentence different from the Guidelines range need not be proportional to the extent of the difference; and courts of appeals must apply the same deferential abuse-of-discretion review to all sentences, whether inside, just outside, or far outside the advisory Guidelines range.

The Ex Post Facto Clause's purposes—to provide adequate notice to defendants and to prevent legislative action that disfavors particular persons—are not implicated by changes to the Guidelines. As to notice, this Court has held that, under the now-advisory Guidelines, a defendant has no constitutionally protected expectation under the Due Process Clause of receiving any particular sentence within the range authorized by statute. It necessarily follows that the defendant has no constitutionally protected expectation under the Ex Post Facto Clause about the precise advice the judge will consider in deciding what sentence to impose. As to legislative targeting, the

Guidelines, while subject to congressional direction, in the main reflect the empirical and policy expertise of an independent agency located within the Judicial Branch. And, critically, the Guidelines will affect sentences in individual cases only to the extent that Article III sentencing judges independently agree with them.

C. Petitioner would approach the ex post facto question by asking whether the advisory Guidelines exert sufficient "influence" on judges' decisionmaking that an increase in the recommended Guidelines range creates a "significant risk" of a higher sentence. Pet. Br. 20. Contrary to petitioner's suggestion, this Court's decision in *Garner* v. *Jones*, 529 U.S. 244 (2000), does not endorse such a subjective inquiry into the susceptibility of judges to influence from advice. The ex post facto analysis in *Garner* instead focused on whether a binding legal rule had the effect of constraining the exercise of sentencing discretion. A similar analysis here leads to the conclusion that the Guidelines, which are neither binding legal rules nor constraints on a sentencing court's discretion, do not trigger the Ex Post Facto Clause.

Petitioner nevertheless urges the Court to infer an ex post facto problem with the Guidelines from national sentencing data showing that district courts often—but far from always—impose sentences within or near the advisory Guidelines range. But the advisory Guidelines do not raise ex post facto concerns simply because district courts find them to be good advice. To the extent that petitioner would read the data as showing that district courts are treating the Guidelines as a significant constraint on their sentencing discretion, he effectively asserts that the district

courts are disregarding this Court's *Booker* line of cases, under which the judge "may not presume that the Guidelines range is reasonable." *Gall* v. *United States*, 552 U.S. 38, 50 (2007).

If a district court gives the Guidelines undue weight in a particular case, the defendant may raise an individualized claim of statutory error. *Nelson* v. *United States*, 555 U.S. 350, 352 (2009) (per curiam) (summarily reversing on that basis). Petitioner, however, has never raised such a claim, and his far-reaching statistical ex post facto argument is an inappropriate substitute. His approach is also impracticable. The statistical likelihood that a defendant will receive a sentence within the Guidelines range varies greatly depending on the particular Guideline at issue and the particular judicial district in which the defendant is sentenced. An ex post facto approach based on an undifferentiated aggregation of sentencing data thus overlooks the individualized nature of sentencing. And because *Booker* already requires, as a statutory matter, that each individual sentence be the product of independent judicial discretion rather than rote adherence to the Guidelines, such sentences do not warrant separate examination under the Ex Post Facto Clause.

ARGUMENT

THE EX POST FACTO CLAUSE PERMITS A COURT TO CONSIDER THE MOST CURRENT ADVISORY GUIDELINES RANGE AS A FACTOR IN ITS EXERCISE OF SENTENCING DISCRETION UNDER 18 U.S.C. 3553(a)

Under 18 U.S.C. 3553(a), the Sentencing Guidelines inform a district court's sentencing discretion; they do not legally constrain its exercise. The district court's legal obligation is to impose a sentence, in light of all

the statutory considerations, that is sufficient but not greater than necessary to achieve the purposes of sentencing enumerated in Section 3553(a)(2). Advisory Guidelines cannot override that legal obligation. The Commission's recommendation of a higher sentence than the advisory Guidelines recommended at the time of the defendant's offense accordingly does not raise ex post facto concerns.

A. Non-Binding Provisions That Inform The Exercise Of Sentencing Discretion Are Not Ex Post Facto Laws

An advisory provision that informs, but does not control, the exercise of sentencing discretion differs from the traditional definition of a punishment-related ex post facto law in two critical ways: it is not a binding legal enactment, and it cannot be understood as increasing the previously prescribed penalty for an offense. This Court has distinguished provisions that merely provide guidance for the exercise of discretion from binding sentencing provisions that trigger ex post facto concerns.

1. The federal Constitution prohibits both Congress and the States from enacting any "ex post facto Law." U.S. Const. Art. I, § 9, Cl. 3; see U.S. Const. Art. I, § 10, Cl. 1. Although the Constitution itself does not define the phrase "ex post facto Law," this Court has explained that it "was a term of art with an established meaning at the time of the framing of the Constitution." *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990). The Court has accordingly looked to history, and its own precedents, for guidance in assessing whether a challenged provision falls within the constitutional prohibition. See, *e.g.*, *Carmell* v. *Texas*, 529 U.S. 513, 521-530 (2000); see also *Dobbert* v. *Florida*, 432 U.S. 282, 292 (1977) ("Our cases have not attempt-

ed to precisely delimit the scope of this Latin phrase, but have instead given it substance by an accretion of case law.").

Laws resulting in "increased punishments" for preexisting offenses "are not mentioned explicitly in the historical sources" that the Framers presumably consulted in drafting the Ex Post Facto Clause. *Youngblood*, 497 U.S. at 44. This Court has nevertheless adopted the broader definition of ex post facto laws in Justice Chase's seminal opinion in *Calder* v. *Bull*, 3 U.S. (Dall.) 386 (1798). See, *e.g.*, *Carmell*, 529 U.S. at 513 (citing cases that have adopted Justice Chase's definition). Justice Chase listed, as one of the four categories of ex post facto laws, a "law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed." *Calder*, 3 U.S. at 390; see *ibid.* (also listing a "law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action"; a "law that *aggravates a crime*, or makes it *greater* than it was, when committed"; and a "law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*").

The sole example that Justice Chase identified of such a punishment-increasing law was the Coventry Act, 1670, 22 & 23 Car. 2, ch. 1 (Eng.). *Calder*, 3 U.S. at 389 n.||. The Coventry Act was a parliamentary statute that (among other things) imposed certain conditions on the people who had attacked Sir John Coventry, a member of the House of Commons. Coventry Act ¶ I. Specifically, the Act provided that the

culprits should surrender themselves to the authorities on a certain day or suffer banishment; that if they returned to the country following such banishment, they would automatically be subject to a death sentence; and that they were ineligible for pardons except by specific Act of Parliament. *Id.* ¶¶ I, III-IV. As a leading legal scholar of the Founding era explained, the problem with the Coventry Act was that "the legislature" had "imposed a sentence *more severe* than could have been awarded by the inferior courts" before the Act's enactment. 2 Richard Wooddeson, *A Systematical View of the Laws of England; as Treated of in a Course of Vinerian Lectures, Read at Oxford, During A Series of years, Commencing in Michaelmas Term, 1777* at 639 (1792); see *Carmell*, 529 U.S. at 522-523 & nn.10-12 (considering Wooddeson an authoritative source on ex post facto laws).

Post-*Calder* decisions of this Court have likewise focused on legislative increases in the severity of punishment as the touchstone of a (punishment-related) ex post facto law. See, *e.g.*, *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (Marshall, C.J.) (describing an ex post facto law as "one which renders an act punishable in a manner in which it was not punishable when it was committed"); *Weaver* v. *Graham*, 450 U.S. 24, 28 (1981) (describing an ex post facto law as one "which * * * imposes additional punishment to that [previously] prescribed") (quoting *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 325-326 (1867)). The Court has recently made clear that a punishment-related law violates the Ex Post Facto Clause only if it "increases the penalty by which a crime is punishable." *California Dep't of Corr.* v. *Morales*, 514 U.S. 499, 506 n.3 (1995); see *Garner* v.

Jones, 529 U.S. 244, 255 (2000) (citing *Morales* for that proposition).

2. Consistent with the origins of the Ex Post Facto Clause as a reaction to parliamentary abuses in the enactment of laws, this Court has never, to the government's knowledge, applied the Clause to invalidate a provision that is merely advisory in nature. As the cases cited by petitioner illustrate, this Court's ex post facto cases have almost invariably concerned statutes that made a binding change in the governing legal framework.

Some of those statutes expressly authorized something that had not been authorized before. See *Carmell*, 529 U.S. at 516, 552 (ex post facto violation where statute authorized conviction based on uncorroborated testimony); *Morales*, 514 U.S. at 501-502 (no ex post facto violation where statute authorized increase in interval between parole hearings); *Youngblood*, 497 U.S. at 39 (no ex post facto violation where statute authorized reformation of improper jury verdict); *Beazell* v. *Ohio*, 269 U.S. 167, 168-171 (1925) (no ex post facto violation where statute authorized co-defendants to be tried jointly); see *Johnson* v. *United States*, 529 U.S. 694, 696 (2000) (avoiding ex post facto analysis by interpreting updated law to confer no greater authority than preexisting law). Others eliminated or limited something that had previously been available. See *Lynce* v. *Mathis*, 519 U.S. 433, 435 (1997) (ex post facto violation where statute eliminated early-release credits for prison inmates); *Weaver*, 450 U.S. at 25, 36 (ex post facto violation where statute limited availability of good-conduct credits for inmates); *Calder*, 3 U.S. at 397 (opinion of Chase, J.) (no ex post facto violation where non-penal

statute had effect of eliminating right to recover certain property); see also *Lindsey* v. *Washington*, 301 U.S. 397, 398-402 (1937) (ex post facto violation where statute replaced discretionary zero-to-15-year term of imprisonment with mandatory 15-year term). And one did a combination of the two. *Miller* v. *Florida*, 482 U.S. 423, 424-427 (1987) (ex post facto violation where statute increased the presumptive sentencing range from which sentencing court had little discretion to depart). But none involved an advisory provision.

The one case petitioner identifies (Pet. Br. 18-19) that presented an ex post facto challenge to a non-statutory provision—*Garner* v. *Jones*, *supra*—involved a parole-board rule to which the state legislature had given binding legal effect. 529 U.S. at 247 (observing that state law gave board the "authority to 'set forth . . . the times at which periodic reconsideration for parole shall take place'") (quoting Ga. Code. Ann. § 42-9-45(a) (1982)) (brackets omitted); see *id.* at 249-257 (concluding that inmate had not met his burden to show that permitting eight-year, rather than three-year, intervals between parole hearings violated the Ex Post Facto Clause). This Court has effectively incorporated the requirement that a provision make some binding change to the legal regime into its test "for determining whether a criminal law is *ex post facto*." *Miller*, 482 U.S. at 430. That test requires not only that the provision "disadvantage the offender" in a relevant way, but also that the provision "be retrospective" in the sense that it "changes the *legal* consequences of acts completed before its effective date." *Ibid.* (quoting *Weaver*, 450 U.S. at 29, 31) (emphasis added). An advisory provision, which does

not change the governing legal framework, cannot satisfy that requirement.

3. A non-binding advisory provision that informs the exercise of sentencing discretion also does not "increase[] the penalty by which a crime is punishable." *Morales*, 514 U.S. at 506 n.3. Instead, such a provision merely assists the decisionmaker in choosing among the various punishments it has always been free to impose. Contrary to petitioner's suggestion (Pet. Br. 19-20), this Court's decisions do not support the proposition that the Ex Post Facto Clause can be offended by a change in a factor that can simply "influence" a sentencing decision. See Part C.1, *infra*. Rather, the Court has identified the existence of overarching sentencing discretion as an important consideration that favors rejecting an ex post facto claim.

In *California Department of Corrections* v. *Morales*, *supra*, for example, the Court relied in part on a parole board's "broad discretion" to "tailor" its procedures based on "the particular circumstances of the individual prisoner" to conclude that a statute permitting a longer interval between parole hearings was not an ex post facto law. 514 U.S. at 511-512. The Court expanded upon that reasoning in *Garner*, where it made clear that a rule allowing for eight-year (rather than three-year) intervals between parole reconsiderations was constitutional, so long as the parole board retained and exercised discretion to deviate from the eight-year period when the case-specific circumstances suggested that an inmate deserved earlier reconsideration. 529 U.S. at 256-257.

The Court in *Garner* acknowledged that, at least with respect to parole, the "presence of discretion does not displace the protections of the *Ex Post Facto*

Clause," because one of the "danger[s]" that the Clause "guards against"—the "danger that legislatures might disfavor certain persons after the fact"—is "present even in the parole context." 529 U.S. at 253. But the Court reasoned that "to the extent there inheres in *ex post facto* doctrine some idea of actual or constructive notice to the criminal" of the penalty for his offense, "we can say with some assurance that where parole is concerned discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised." *Ibid.* "The idea of discretion," the Court explained, "is that it has the capacity, and the obligation, to change and adapt based on experience," including the availability of updated penological data. *Ibid.*

4. This Court's decision in *Miller* v. *Florida*, *supra*, reinforces, in the specific context of sentencing ranges, that a punishment-related provision violates the Ex Post Facto Clause only if it makes a binding legal change that alters the conditions under which a more lenient punishment is available. In *Miller*, a State had superimposed narrowed presumptive sentencing ranges, which took account of particularized offense-related and offender-related circumstances, atop the statutory sentencing ranges for particular crimes. 482 U.S. at 425-426. If a judge imposed a sentence within that narrower presumptive range, he did not need to give a written explanation of his reasons for selecting that sentence, and the sentence was not subject to appellate review. *Id.* at 426. At the same time, the sentencing scheme foreclosed the judge from imposing a sentence outside the presumptive range unless he could provide "clear and convincing reasons," based "on facts proved beyond a reason-

able doubt," why considerations not already accounted for in the presumptive range itself warranted a departure. *Id.* at 425-426, 432, 435.

This Court concluded that the Ex Post Facto Clause barred application of a legislative increase in a defendant's default sentencing range (from 3½ to 4½ years of imprisonment to 5½ to 7 years of imprisonment) that had taken effect only after the defendant had committed his offense. *Miller*, 482 U.S. at 424-425, 427. In reaching that conclusion, the Court emphasized that the presumptive range placed a substantial legislative constraint on the judge's exercise of sentencing discretion. *Id.* at 434-435. In particular, the Court distinguished the state scheme from the then-effective United States Parole Commission Guidelines on the ground that the state scheme imposed important legal limits on the sentences that courts could impose. *Ibid.*

The Parole Commission's Guidelines, promulgated as federal regulations, "establish[ed] a 'customary range' of confinement for various classes of offenders." *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 391 (1980). But rather than limiting the Parole Commission's authority to impose a sentence outside that range, the parole guidelines "operate[d] only to provide a framework for the Commission's exercise of its statutory discretion." *Portley* v. *Grossman*, 444 U.S. 1311, 1312 (1980) (Rehnquist, J., in chambers); see, *e.g.*, 28 C.F.R. 2.20 (1974) ("Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered. For example, cases with exceptionally good institutional program achievement [could] be considered for earlier release."). A number of court of appeals deci-

sions, in accord with an in-chambers decision by then-Justice Rehnquist, had "upheld the retrospective application of federal parole guidelines" on one of several grounds: that they were "not 'laws' for purposes of the *Ex Post Facto* Clause"; that they "merely rationalize[d] the exercise of statutory discretion"; or that they did "not result in a more onerous punishment." *Miller*, 482 U.S. at 434; see *ibid.* (citing *Portley*, 444 U.S. at 1311; *Wallace* v. *Christensen*, 802 F.2d 1539 (9th Cir. 1986) (en banc); *Yamamoto* v. *United States Parole Comm'n*, 794 F.2d 1295 (8th Cir. 1986); *Dufresne* v. *Baer*, 744 F.2d 1543 (11th Cir. 1984), cert. denied, 474 U.S. 817 (1985); *Warren* v. *United States Parole Comm'n*, 659 F.2d 183 (D.C. Cir. 1981), cert. denied, 455 U.S. 950 (1982)).

The State in *Miller* relied on the parole-guidelines decisions to argue that its scheme likewise should be seen to "'merely guide and channel' the sentencing judge's discretion," or to "operate[] only as a 'procedural guidepost' for the exercise of discretion within * * * statutorily imposed sentencing limits." 482 U.S. at 434. This Court rejected that argument, based on its determination that the state scheme did not, in fact, work that way. *Id.* at 434-435. The Court reasoned that increasing the presumptive state sentencing range "directly and adversely affect[ed] the sentence [the defendant] receives," and it stressed that such an increase would have the binding legal effect of depriving the sentencing court of discretion it had previously possessed. *Id.* at 435. The Court observed that "the revised sentencing law is a law enacted by the Florida Legislature, and it has the force and effect of law," and the Court explained that the State's presumptive sentencing ranges did not "simply provide

flexible 'guideposts' for use in the exercise of discretion," but instead "create[d] a high hurdle that must be cleared before discretion can be exercised." *Ibid.*

B. An Increase In An Advisory Federal Sentencing Guidelines Range Is Not An Ex Post Facto Law

Before *United States* v. *Booker*, 543 U.S. 220 (2005), the federal Sentencing Guidelines (unlike the former parole guidelines) were mandatory. Thus, like the presumptive sentencing ranges at issue in *Miller*, the federal Sentencing Guidelines "ha[d] the force and effect of laws," *id.* at 234, and significantly constrained sentencing courts' discretion to impose sentences outside of the Guidelines range. See 18 U.S.C. 3553(b)(1) (2000 & Supp. III 2003). Courts of appeals had therefore uniformly held that, under *Miller*, the Ex Post Facto Clause precluded sentencing a defendant under revised Guidelines that provided for a more severe sentence than was authorized by the Guidelines in effect when the defendant committed the offense. See, *e.g.*, *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994).

This Court's recent decisions explaining the role of the Guidelines in post-*Booker* sentencing, however, have made clear that the Guidelines are now only advisory and do not limit the discretion of sentencing courts in the manner that the presumptive sentencing ranges at issue in *Miller* did. The Court has underscored that the advisory Guidelines range is just one of the factors to be considered under Section 3553(a) and that the sentencing court's "overarching duty," after considering *all* of the factors, is to select a sentence that is "'sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in [18 U.S.C.] 3553(a)(2)." *Pepper* v. *United States*, 131

S. Ct. 1229, 1242 (2011) (quoting 18 U.S.C. 3553(a)). The Sentencing Commission's promulgation of new Guidelines that increase a defendant's advisory range thus neither divests the sentencing court of its discretion to impose a lower sentence nor relieves it of the obligation to do so, if its independent judgment dictates that such a sentence would be the most appropriate. An increase in an advisory Guidelines range accordingly cannot be considered an ex post facto law.

1. Seeking advice from the most current Sentencing Guidelines is consistent with the longstanding and unchallenged tradition of relying on post-offense information at sentencing

a. The selection of an appropriate sentence is quintessentially a discretionary judgment. This Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *Booker*, 543 U.S. at 233 (citing, *inter alia*, *Williams* v. *New York*, 337 U.S. 241, 246 (1949)). And the Court has emphasized the "uniform and constant * * * federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Pepper*, 131 S. Ct. at 1239-1240 (quoting *Koon* v. *United States*, 518 U.S. 81, 113 (1996)).

In the federal system, 18 U.S.C. 3553(a) frames the sentencing process by "specifying various factors that courts must consider in exercising their discretion." *Pepper*, 131 S. Ct. at 1241. A sentencing judge has an "overarching duty under § 3553(a) to 'impose a sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in

§ 3553(a)(2)." *Id.* at 1242 (quoting 18 U.S.C. 3553(a)). Those purposes are that the sentence should "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment for the offense," 18 U.S.C. 3553(a)(2)(A); "afford adequate deterrence to criminal conduct," 18 U.S.C. 3553(a)(2)(B); "protect the public from further crimes of the defendant," 18 U.S.C. 3553(a)(2)(C); and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," 18 U.S.C. 3553(a)(2)(D). The set of factors that the court "shall consider" in exercising its judgment about what sentence would best accomplish those purposes are "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. 3553(a)(1); "the need for the sentence imposed" to satisfy the purposes set forth in Section 3553(a)(2), 18 U.S.C. 3553(a)(2); "the kinds of sentences available"; 18 U.S.C. 3553(a)(3); "the kinds of sentence and the sentencing range" contained in the most recent version of the Sentencing Guidelines, 18 U.S.C. 3553(a)(4); "any pertinent policy statement * * * issued by the Sentencing Commission," 18 U.S.C. 3553(a)(5)(A); "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. 3553(a)(6); and "the need to provide restitution to any victims of the offense," 18 U.S.C. 3553(a)(7).

b. A court's exercise of discretion in selecting an appropriate sentence under Section 3553(a), no less than a state board's exercise of discretion with respect to parole, "has the capacity, and the obligation, to change and adapt based on experience." *Garner*, 529

U.S. at 253. A number of the Section 3553(a) factors are usefully informed by events that post-date the offense itself: for example, a defendant's post-offense behavior can shed light on the need to "protect the public from further crimes of the defendant," 18 U.S.C. 3553(a)(2)(C), and sentences imposed by other courts since the date of the offense can affect "the need to avoid unwarranted sentence disparities," 18 U.S.C. 3553(a)(6). This Court's decisions make clear that consideration of such factors need not be frozen in time, but can and should be informed by any and all information that is available at the time of sentencing. See, *e.g.*, *Pepper*, 131 S. Ct. at 1229 (recognizing that a court, in a resentencing proceeding, can consider evidence of defendant's post-sentencing rehabilitation or recidivism); *Gall* v. *United States*, 552 U.S. 38, 57 (2007) (recognizing that post-offense behavior was relevant to determining risk of recidivism for purposes of initial sentencing); *United States* v. *Dunnigan*, 507 U.S. 87, 97 (1993) (recognizing that defendant's perjury at trial can inform the sentencing goals of retribution and incapacitation).

A court's ability to consider post-offense information in deciding on an appropriate sentence necessarily includes the ability to consider not only factual developments, but policy developments as well. Like a decision about parole, a decision setting an initial sentence can and should incorporate "[n]ew insights into the accuracy of predictions about the offense and the risk of recidivism consequent upon the offender's release, along with a complex of other factors." *Garner*, 529 U.S. at 253. A sentencing court accordingly does not run afoul of the Ex Post Facto Clause, or any other constitutional provision, when it examines (and,

potentially, adopts) the policy-related reasoning in sentencing opinions issued after the date of the defendant's offense. Cf. *Rogers* v. *Tennessee*, 532 U.S. 451, 464 (2001) (rejecting due process claim based on retroactive change to common-law rule and observing that common-law courts "frequently look to the decisions of other jurisdictions in determining whether to alter or modify a common law rule in light of changed circumstances, increased knowledge, and general logic and experience"). Nor would the Constitution prohibit a sentencing judge from reading or relying on an academic study or policy paper suggesting that longer sentences for certain crimes reduce recidivism rates, even if its publication post-dated the particular crime at issue.

c. Indeed, petitioner himself sees no problem with a district court taking counsel from an updated version of the federal Sentencing Guidelines *themselves*, so long as the court, for official purposes, also calculates and considers the outdated Guidelines range under Section 3553(a)(4). Petitioner acknowledges that the approach described by the First Circuit in *United States* v. *Rodriguez*, 630 F.3d 39 (2010)—under which sentencing judges "can turn to post-offense Guidelines revisions to help select reasonable sentences that (among other things) capture the seriousness of the crimes and impose the right level of deterrence," *id.* at 42—creates no "constitutional question." Pet. Br. 32 n.11; see *United States* v. *Deegan*, 605 F.3d 625, 632 (8th Cir. 2010) (explaining that a district court is "free to consider" the "policy view" expressed by the updated Guidelines), cert. denied, 131 S. Ct. 2094 (2011); see also *United States* v. *Gilmore*, 599 F.3d 160, 165-166 (2d Cir. 2010) (af-

firming a sentence above the advisory Guidelines range at the time of the offense, when the sentencing judge had relied in part on the higher advisory range in a later version of the Guidelines).

It is natural that sentencing courts would, even if not required to do so, seek advice from the Sentencing Guidelines, just as they might seek guidance from a survey of sentences imposed on similar defendants or from a policy paper. The Guidelines are essentially a combination of those two things. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 212, 98 Stat. 1987, instructs the Sentencing Commission to promulgate Sentencing Guidelines that reflect the "same basic § 3553(a) objectives" that a district court's individualized sentencing decision also must promote. *Rita* v. *United States*, 551 U.S. 338, 348 (2007); see *id.* at 348-349; 28 U.S.C. 991(a) (Supp. V 2011) and (b), 994(f) and (m). In crafting the Guidelines, the Commission "took an 'empirical approach,' beginning with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past and then modifying and adjusting past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like." *Rita*, 551 U.S. at 349 (citing Sentencing Guidelines § 1A1.1, comment. (n.3) (2007)); see *ibid.* (noting that the Commission "worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill [its] statutory mandate").

The Commission's mission is an "ongoing" process, in which the Commission continues to "collect and examine" sentencing decisions, and to consult with "prosecutors, defenders, law enforcement groups, civil

liberties associations, experts in penology, and others," in a constant effort to assure that the Guidelines reflect the best sentencing practices possible. *Rita*, 551 U.S. at 350; see *Deegan*, 605 F.3d at 632 ("The 2007 guidelines simply represent another policy view—different from the view embodied in the 1997 guidelines—of the appropriate sentence under § 3553(a)."). Seeking advice from the most up-to-date version of the Guidelines is thus not only a permissible, but also a beneficial, practice, aiding district courts in fulfilling their "obligation" to "change and adapt" the exercise of their sentencing discretion "based on experience." *Garner*, 529 U.S. at 253.

2. Section 3553(a) permissibly lists the most current Guidelines range as one advisory factor that should inform a court's exercise of sentencing discretion

The same reasoning that motivates courts themselves to consult the most up-to-date Guidelines also motivated Congress to instruct, as a categorical matter, that sentencing courts should consult the Guidelines "in effect on the date the defendant is sentenced" in determining the appropriate sentence under Section 3553(a). 18 U.S.C. 3553(a)(4)(A)(ii). The Senate Report accompanying the enactment of that provision observed that "the guidelines are designed to structure the exercise of discretion in making decisions, primarily to accommodate increased knowledge as to how differences among offenses or offenders should affect sentences." *Senate Report* 78. Application of the most current Guidelines, the Report explained, was consistent "with the philosophy embodied in this legislation, that the Sentencing Commission can and should continually revise its guidelines and policies to assure that they are the most sophisticated state-

ments available and will most appropriately carry out the purposes of sentencing." *Id.* at 77.

A district court's consideration of the most current Guidelines range in the manner directed by Section 3553(a)—namely, as an explicit factor that informs the exercise of sentencing discretion, see 18 U.S.C. 3553(a)(4)—does not make a post-offense increase in the Guidelines range into an "ex post facto Law," U.S. Const. Art. I, § 9, Cl. 3. This Court's decisions make clear that even within the framework of Section 3553(a), the Guidelines are "advisory only." *Kimbrough* v. *United States*, 552 U.S. 85, 91 (2007).

a. In its original form, the Sentencing Reform Act "direct[ed] that the court '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases." *Booker*, 543 U.S. at 234 (quoting 18 U.S.C. 3553(b) (2000 & Supp. IV 2004)). This Court's decision in *Booker* identified a Sixth Amendment problem with such a "mandatory and binding" Guidelines scheme, *id.* at 230-244, because, under it, "the judge, not the jury, * * * determined the upper limits of sentencing," *id.* at 236. If, after trial, the judge were to find additional facts (say, that the defendant had a leadership role in the offense) that increased the Guidelines range (say, from 21 to 27 months to 33 to 41 months), the ultimate sentence could impermissibly exceed the maximum the defendant could have received based solely on the facts found by the jury. *Id.* at 230-235; see *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000).

The Court's remedy for this constitutional infirmity was to "make the Guidelines system advisory," rather than mandatory. *Booker*, 543 U.S. at 246. The Court

emphasized that the constitutional problem had arisen only because the Guidelines had "the force and effect of laws." *Id.* at 234. "If the Guidelines * * * could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts," the Court explained, "their use would not implicate the Sixth Amendment." *Id.* at 233. The Court thus "sever[ed] and excise[d] two specific statutory provisions: the provision that require[d] sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure) * * * and the provision that set[] forth standards of review on appeal," which likewise treated the Guidelines as binding. *Id.* at 259 (citing 18 U.S.C. 3553(b)(1) and 3742(e) (2000 & Supp. IV 2004)).

b. Under "the advisory system the *Booker* Court had in view," sentencing courts are "free to exercise their 'discretion to select a specific sentence'" anywhere in the statutory range. *Cunningham* v. *California*, 549 U.S. 270, 292 (2007) (quoting *Booker*, 543 U.S. at 233). The principal difference between pre-*Booker* sentencing and post-*Booker* sentencing is that the Guidelines, "formerly mandatory," are now "advisory only" and just "one factor among several courts must consider in determining an appropriate sentence." *Kimbrough*, 552 U.S. at 90-91. After *Booker*, "district courts may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in § 3553(a), subject to appellate review for 'reasonableness.'" *Pepper*, 131 S. Ct. at 1241.

This Court's decisions since *Booker* make clear that the Guidelines no longer have constraining legal ef-

fect.[1] First, the Court has emphasized that the Guidelines "are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." *Nelson* v. *United States*, 555 U.S. 350, 352 (2009) (per curiam). A district court, in considering how the factors in 18 U.S.C. 3553(a) apply to a particular case, "may not presume" that a sentence within the Guidelines range is appropriate, but must instead "make an individualized assessment" of the appropriate sentence "based on the facts presented." *Gall*, 552 U.S. 50; see *Rita*, 551 U.S. at 351 ("In determining the merits of [sentencing-related] arguments, the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."). A sentencing court that considered the Guidelines a legal constraint on its sentencing authority would thus effectively be doing what this Court has forbidden,

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[1] In the immediate wake of *Booker*, the courts of appeals developed rules—including, for example, a proportionality principle that required stronger justifications the more a sentence varied from the Guidelines range, see, *e.g.*, *Gall*, 552 U.S. at 45—that continued to give the Guidelines substantial legal weight in determining a defendant's sentence. As a result, the government initially took the position that the Ex Post Facto Clause continued to apply to the Sentencing Guidelines in the same manner as when they were mandatory. See, *e.g.*, U.S. Br. in Opp. 5, *Demaree* v. *United States* (No. 06-8377). For reasons explained in the text, the Court's post-*Booker* decisions have made clear that the Guidelines have a different role than the government and most courts of appeals initially believed. In light of this Court's clarification in those decisions that the Guidelines are purely advisory, the government has since August 2008 taken the position that the Ex Post Facto Clause does not bar a sentencing court from considering the current version of the advisory Guidelines, even when the version in effect at the time of the offense provided for a lower advisory sentencing range.

namely, applying a presumption that must be rebutted in order to justify imposition of a sentence outside the Guidelines range.

Second, this Court has explained that a sentencing court may impose a sentence different from what the Guidelines advise "not simply based on an individualized determination that [the Guidelines] yield an excessive sentence in a particular case," but also "based on *policy* disagreement" with the Guidelines themselves. *Spears* v. *United States*, 555 U.S. 261, 264 (2009) (per curiam). In other words, a sentencing court has discretion to conclude, as a categorical matter, that the advice provided by the Guidelines would "yield[] a sentence 'greater than necessary' to achieve § 3553(a)'s purpose, *even in a mine-run case*." *Id.* at 263 (quoting *Kimbrough*, 552 U.S. at 110); see *Pepper*, 131 S. Ct. at 1247 ("[O]ur post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views."). The Guidelines thus impose neither a generalized nor a specific legal constraint on a court's authority to select the sentence that, in its independent judgment, is the most appropriate. Cf. *Miller*, 482 U.S. at 425-426, 432, 435 (selecting sentence outside presumptive range required clear and convincing reasons, not already taken into account in setting the presumptive range itself, based on facts proved beyond a reasonable doubt).

Third, this Court's decision in *Gall* v. *United States*, *supra*, holds that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." 552 U.S. at

41. The Court in *Gall* rejected a "rule requiring 'proportional' justifications for departures from the Guidelines range," *id.* at 46; rejected a requirement that sentencing courts identify "'extraordinary' circumstances to justify a sentence outside the Guidelines range," *id.* at 47; and rejected a "mathematical" approach to appellate review that used the percentage by which a sentence varied from the Guidelines range "as the standard for determining the strength of the justifications required" for the sentence, *ibid.* The Court explained that an extraordinary-circumstances or mathematical-proportionality approach would "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Ibid.* By requiring the same deferential standard of review no matter what sentence the district court ultimately selects, *Gall* reinforces that the district court's independent judgment, not the Guidelines, is what should determine a defendant's sentence. Cf. *Miller*, 482 U.S. at 426 (no appellate review at all for sentences within the presumptive range).

c. Petitioner's assertion (Pet. Br. 20) that the Guidelines "continue to have the force and effect of law" cannot be squared with this Court's *Booker* jurisprudence. The Court explained in *Booker* that a Guidelines system with "the force and effect of law[]" would, in many applications, infringe a defendant's Sixth Amendment rights by increasing the sentence above the relevant statutory maximum. *Booker*, 543 U.S. at 234; see *id.* at 230-244. In contending that Section 3553(a)(4)'s requirement to *consider* the now-advisory Guidelines is the functional equivalent of a legal directive to *follow* the Guidelines in any signifi-

cant respect, petitioner misunderstands—and would largely undo—the *Booker* remedy. See *Kimbrough*, 552 U.S. at 113-114 (Scalia, J., concurring) ("If there is any thumb on the scales; if the Guidelines *must* be followed even where the district court's application of the § 3553(a) factors is entirely reasonable; then the 'advisory' Guidelines would, over a large expanse of their application * * * violate the Sixth Amendment.").

Petitioner first observes (Pet. Br. 20-21) that district courts are required to correctly calculate the Guidelines range as a prerequisite to determining the appropriate sentence under Section 3553(a). See, *e.g.*, *Gall*, 552 U.S. at 49. But assuring that sentencing courts have the correct advice (*i.e.*, a properly calculated advisory range that accurately reflects the empirical determinations and policy conclusions reflected in the current Guidelines) available to them does not transform that advice into any sort of binding constraint on a district court's sentencing discretion.

Petitioner next highlights (Pet. Br. 22) this Court's instruction that a sentencing court treat the Guidelines range as "the starting point and the initial benchmark" for its consideration of the appropriate sentence. *Gall*, 552 U.S. at 49. That instruction, however, cannot be read to require sentencing courts to give the Guidelines any sort of substantive deference. Any such deference would be at odds with the Court's repeated directive that a sentencing court may not consider the Guidelines range to be presumptively appropriate. See *Nelson*, 555 U.S. at 352; *Gall*, 552 U.S. 50; *Rita*, 551 U.S. at 351. The instruction that the Guidelines be a "starting point" and a "benchmark" instead reflects the nature of the Guidelines as

a distillation of a vast array of information (*e.g.*, the sentences imposed by other courts) that bears directly on the Section 3553(a) factors and that would be infeasible for the district court to gather on its own. Beginning with the Guidelines range ensures that the court has the benefit of that information, see *Rita*, 551 U.S. at 348-350, but it says nothing about what sentence the court should ultimately arrive at. The court remains free to reject the Guidelines' recommendation for either case-specific or policy-related reasons. See, *e.g.*, *Gall*, 552 U.S. at 49-50 (emphasizing that "[t]he Guidelines are not the only consideration" and that a sentencing court should "consider all of the § 3553(a) factors" and "make an individualized assessment based on the facts presented"); see also *Spears*, 555 U.S. at 264 (emphasizing that sentencing courts may disagree with the Commission's policy conclusions); *Pepper*, 131 S. Ct. at 1247 (same).

Petitioner also points (Pet. Br. 22-23) to the Court's statements in *Gall* that a district judge who "decides that an outside-Guidelines sentence is warranted" must "ensure that the justification is sufficiently compelling to support the degree of the variance" and that "a major departure should be supported by a more significant justification than a minor one." 552 U.S. at 50. Contrary to petitioner's suggestion, those statements—which come immediately after the Court's reiteration that a district court "may not presume that the Guidelines range is reasonable," *ibid.*—do not anchor the judge's sentencing discretion to the Guidelines range. As noted above, *Gall* expressly rejected a "rule requiring 'proportional' justifications for departures from the Guidelines range," *id.* at 46, and petitioner errs in reading the quoted statements to rein-

troduce that very rule only a few pages later. Rather, the statements reflect only the "uncontroversial," *id.* at 50, proposition that the district court must have sufficient reasons for whatever it does. If the court agrees that the reasons animating the Guidelines are correct and applicable to the current case, it will, for those reasons, impose a sentence within the Guidelines range. If, however, the court finds the reasons supporting an outside-range sentence more persuasive, it will impose such a sentence, and the extent of the difference between the sentence it imposes and the Guidelines range will reflect the extent to which the reasons adopted by the court differ from those suggested by the Commission. Although the district court may need to give a more thorough explanation of its sentence in cases where its reasoning differs from the already-familiar reasoning underlying the Guidelines, *id.* at 50-51, that explanation requirement places no legal constraint on the reasoning that the sentencing court may adopt. See *ibid.* (noting that explanation of outside-Guidelines sentences "allow[s] for meaningful appellate review and * * * promote[s] the perception of fair sentencing"); *Rita*, 551 U.S. at 357-358 (noting that explanation of outside-Guidelines sentences helps the Commission to adjust the Guidelines); see also 18 U.S.C. 3553(c).

Petitioner likewise misreads *Gall* when he suggests (Pet. Br. 34) that "more searching appellate review" applies to "larger deviations" from the Guidelines range. *Gall* expressly instructs that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." 552 U.S. at 41. It further instructs that in re-

viewing an outside-Guidelines sentence, the appellate court must give "due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* at 51. And it illustrates by example the wide latitude that district courts should receive, upholding a district court's decision to impose only probation notwithstanding that the Guidelines had recommended a sentence of 30 to 37 months. *Id.* at 43, 56-60.[2]

Petitioner additionally focuses (Pet. Br. 25-26) on the Court's holding in *Rita* v. *United States*, *supra*, that an appellate court can choose to—but is not required to—adopt a presumption, solely for purposes of appellate review, that a district court has acted reasonably when its sentence falls within the Guidelines range. 551 U.S. at 347-356. But the Court explained in *Rita* that the presumption it endorsed, "rather than having independent *legal* effect, simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view

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[2] Petitioner notes in passing (Pet. Br. 34) that the Court has left open the question whether "closer review may be in order" when the district court's reasoning is based on broad-based policy disagreement with the Guidelines, rather than the individual circumstances of a particular case. *Kimbrough*, 552 U.S. at 109; see *Pepper*, 131 S. Ct. at 1254 (Breyer, J., concurring in part and concurring in the judgment) (noting that *Kimbrough* raised, but did not answer, that question). Even if "closer review" were warranted in such circumstances, however, that would not be because the Guidelines themselves have any legal force. It would instead reflect that a district court's institutional advantages extend only to individualized factors, *Kimbrough*, 552 U.S. at 109, and appellate courts thus have more reason to defer to decisions based on those factors than decisions based on more generalized considerations.

of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Id.* at 350-351 (emphasis added). Even if petitioner were correct in speculating (*e.g.*, Pet. Br. 25, 30) that the presumption causes sentencing courts to disregard their best sentencing judgment in favor of imposing sentences less likely to get reversed, that would not demonstrate that the presumption has any legally binding effect for ex post facto purposes.

d. Nor can petitioner show such a legally binding effect by presenting (*e.g.*, Pet. Br. 27-30) data about the correlation between the sentences judges impose and the ranges that the Guidelines recommend. See also Illinois Ass'n of Criminal Defense Lawyers (IACDL) Amicus Br. 8-12. Even assuming an examination of such data were an appropriate mode of analysis under the Ex Post Facto Clause, see Part C, *infra*, petitioner "mistakes correlation for causation." *Woodford* v. *Ngo*, 548 U.S. 81, 94 n.4 (2006). A judge's decision to impose a sentence within or close to the Guidelines range most plausibly suggests that the Guidelines are persuasive, not that district courts are disregarding this Court's instruction to treat them as purely advisory. See *Rita*, 551 U.S. at 351 (allowing appellate courts to presume that a within-Guidelines sentence reflects a "discretionary decision" that "accords with the Commission's view"); cf. *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 386 (2008) (appellate court should not presume that district court's discretionary decision rested on an incorrect legal premise).

As discussed above, see pp. 28-29, *supra*, courts have good reason to find the Guidelines helpful, irrespective of Section 3553(a)'s requirement to consider

them. The "sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other, at wholesale." *Rita*, 551 U.S. at 348. The Guidelines are designed to provide good, expert advice, and the Commission is constantly adjusting them in an effort to improve that advice. See *id.* at 348-350. *Booker* expressly anticipated that Commission would "continue to collect and study" judicial decisions and "to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices." 543 U.S. at 263. If courts begin regularly disregarding the Commission's advice, even in mine-run cases, the Commission may well "revise the Guidelines" to reflect those courts' reasoning. *Rita*, 551 U.S. at 350.

The Commission's work thus "promote[s] uniformity in the sentencing process" not by placing constraints on district courts, but by offering them recommendations and engaging in an ongoing dialogue about best sentencing practices. *Booker*, 543 U.S. at 263. Updates to the Guidelines, which can reflect that ongoing dialogue, neither bind sentencing courts nor "increase[] the penalty by which a crime is punishable," *Morales*, 514 U.S. at 506 n.3, and thus do not meet the constitutional definition of an ex post facto law.

3. The purposes of the Ex Post Facto Clause do not apply to an amendment that increases an advisory Guidelines range

The purposes of the Ex Post Facto Clause reinforce the conclusion that an amendment to the Guidelines is not an ex post facto law. This Court has explained that the "central concerns" of the Ex Post

Facto Clause are "'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'" *Lynce*, 519 U.S. at 441 (quoting *Weaver*, 450 U.S. at 30). A change to an advisory Guidelines range does not raise either concern.

a. This Court has held that, after *Booker*, a defendant no longer has "[a]ny expectation subject to due process protection" that he will receive a sentence within the Guidelines range and thus has no entitlement to notice of a court's intent to impose a sentence outside that range. *Irizarry* v. *United States*, 553 U.S. 708, 713 (2008). It necessarily follows that he has no due process entitlement to notice when the advisory range itself changes, and the same would also be true under the Ex Post Facto Clause. Although the protections of the Due Process Clause and the Ex Post Facto Clause are not congruent in all respects, see *Rogers*, 532 U.S. at 456-462, the Ex Post Facto Clause creates no greater entitlement to notice than the Due Process Clause does. Compare *id.* at 459 (describing the "core due process concepts of notice, foreseeability, and * * * fair warning"), with *Weaver*, 450 U.S. at 28 (describing ex post facto "fair warning" interest).

Petitioner has effectively acknowledged that the notice-related purpose of the Ex Post Facto Clause does not support his argument.[3] His response to the

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[3] In particular, petitioner has never raised, and has therefore forfeited, any individualized notice-related argument based on the happenstance that his particular crimes were committed before *Booker*, while the Guidelines were still mandatory. See, *e.g.*, Pet. 21 (representing that this case would be a "perfect vehicle" for resolving the general question whether amendments increasing

government's citation of *Irizarry* in its brief in opposition to certiorari was simply to assert that "the Ex Post Facto Clause requires more than just notice" and to note the Clause's other central concern, "'vindictive legislation.'" Cert. Reply Br. 5 (quoting *Weaver*, 450 U.S. at 29).

b. But that concern likewise provides no meaningful support for petitioner's view that Guidelines amendments can be ex post facto laws. This Court has recognized that the Commission "is an independent agency in every relevant sense," *Mistretta* v. *United States*, 488 U.S. 361, 393 (1989); that it is located in a "nonpolitical Branch," rather than within Congress or the Executive Branch, *id.* at 396; and that its "independence" is "safeguard[ed] * * * from executive control" by the requirement that Commission members be removed only for good cause, *id.* at 410. The Commission's "empirical approach" to crafting the Guidelines is informed to a considerable degree by actual judicial sentencing decisions that are themselves entirely insulated from political concerns. *Rita*, 551 U.S. at 349; see *id.* at 349-350; see also *Butz* v. *Economou*, 438 U.S. 478, 512 (1978) (recognizing the "insulation of the judge from political influence").

Congress does exert some direct control over the Guidelines. Amendments by the Commission do not become effective for at least 180 days, so that Congress can have the opportunity to modify or disapprove them. 28 U.S.C. 994(p). Congress sometimes

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the advisory Guidelines range are ex post facto laws). In any event, courts of appeals have uniformly rejected the argument that retroactive application of the *Booker* remedy itself is generally unconstitutional. See *United States* v. *Waseta*, 647 F.3d 980, 985 & n.5 (10th Cir. 2011).

amends the Guidelines directly. See, *e.g.*, Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, Tit. IV, § 401(b), (g) and (i), 117 Stat. 668, 671, 672. And Congress sometimes provides direction to the Commission about factors to be considered in potentially adjusting the Guidelines. See, *e.g.*, Identity Theft Enforcement and Restitution Act of 2008, Pub. L. No. 110-326, Tit. II, § 209, 122 Stat. 3564-3565.

But Congress "placed the Commission in the Judicial Branch precisely because of the Judiciary's special knowledge and expertise," *Mistretta*, 488 U.S. at 396, and it generally defers to that expertise. In the main, Congress leaves the details of the Guidelines to the Commission—as it did with the amendments to the particular Guidelines under which petitioner himself was sentenced. See Sentencing Guidelines App. C, amend. 617 (effective Nov. 1, 2001) (explaining that amendment was "the result of Commission study of economic crime issues over a number of years"); Sentencing Guidelines App. C, amend. 653 (effective Nov. 1, 2003) (explaining that amendment responded to general congressional directive "to consider" whether fraud guidelines "'were sufficient to deter and punish'" particular offenses, in light of increases to statutory maximum penalties for certain fraud crimes other than bank fraud) (quoting White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. 107-204, Tit. IX, § 905(b)(2), 116 Stat. 805).

Even when Congress does legislate Guidelines changes itself, such legislation does not have a direct effect on criminal sentences. Instead, it becomes incorporated into a framework that is itself only advisory. The independent judgment of the sentencing

judge thus provides a buffer against the "danger that legislatures might disfavor certain persons after the fact." *Garner*, 529 U.S. at 253; cf. *Mistretta*, 488 U.S. at 365 ("If a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.") (quoting *United States* v. *Brown*, 381 U.S. 437, 443 (1965)) (brackets omitted).

c. In describing the purposes of the Ex Post Facto Clause, petitioner observes (Pet. Br. 18) that *Carmell* v. *Texas*, *supra*, noted the existence of "a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." 529 U.S. 533. *Carmell* additionally explains, however, that this "principle of unfairness * * * is not a doctrine unto itself, invalidating laws under the *Ex Post Facto* Clause by its own force." *Id.* at 533 n.23. In any event, the principle by its own terms is not at issue when the "rules of law" themselves remain unchanged, *id.* at 533, as is the case with a modification to the advisory Sentencing Guidelines.

C. Petitioner's Approach To Ex Post Facto Analysis Is Flawed

Petitioner appears to contend that, even if the Guidelines impose no binding constraint on a sentencing judge's discretion, an amendment that increases a Guidelines range is nevertheless an ex post facto law, because it will "influence" the mind of the sentencing judge and thereby create a "'significant risk'" that the judge will decide to impose a higher sentence. Pet.

Br. 20 (quoting *Garner*, 529 U.S. at 255); see *e.g.*, *id.* at 23-24 (arguing that judges will be drawn to the Guidelines); see also IACDL Amicus Br. 6-12 (making similar argument). That subjective approach to ex post facto analysis finds no support in this Court's decisions and makes little sense as an original matter.

1. Petitioner errs in relying on *Garner* for the proposition that ex post facto analysis turns on "whether the 'practical implementation' of [a] rule may influence a decisionmaker's 'exercise of discretion' so as to lengthen incarceration." Pet. Br. 20 (quoting *Garner*, 529 U.S. at 255) (brackets omitted). The word "influence" appears nowhere in *Garner*, and neither *Garner* nor any other ex post facto decision of this Court cited by petitioner endorses an amorphous judicial inquiry into how a particular provision might "influence" discretionary sentencing decisions.

As previously discussed (see pp. 19-20, *supra*), *Garner* presented an ex post facto challenge to a parole-board rule, imbued with binding legal force by the state legislature, that gave the board new authority to increase the waiting period between parole hearings. 529 U.S. at 246-247. Citing *Morales*, the Court explained that the critical question was "whether the amended Georgia Rule creates a significant risk of prolonging respondent's incarceration." *Id.* at 251 (citing *Morales*, 514 U.S. at 509). The Court ultimately concluded that the rule "d[id] not by its own terms show a significant risk," but it remanded for further proceedings in which the inmate might "demonstrate" the existence of such risk as applied to his particular case, through evidence of "the rule's practical implementation by the agency charged with exercising discretion." *Id.* at 255; see *id.* at 254-257.

The "significant risk" to which the Court referred was not, as petitioner suggests, a risk that the new rule would "influence" the parole board's discretionary decisionmaking. The Court declined to treat the ex post facto claim in *Garner* as a claim "that discretion has been *changed* in its exercise." 529 U.S. at 254 (emphasis added). Such a change, the Court suggested, would not present significant ex post facto concerns. *Id.* at 253 ("The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience."). Rather, the Court construed the ex post facto claim in *Garner* as a claim "that, in the period between parole reviews, [discretion] will not be exercised *at all*." *Id.* at 254 (emphasis added). The "significant risk" that the inmate had to demonstrate in order to prevail was thus a risk that the board would *fail* to exercise discretion, not a risk that the board would exercise its discretion in a particular *manner*. *Garner* accordingly does not support petitioner's contention that updated advice can violate the Ex Post Facto Clause by influencing the thinking of judges when they make discretionary sentencing decisions.[4]

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[4] Petitioner's suggestion (Pet. Br. 16) that the Court should look to generalized "empirical data" to determine whether the Guidelines categorically exert a "gravitational pull" on sentencing decisions resembles the approach of the dissent in *Garner*, which the Court did not adopt. The *Garner* dissent pointed out that, under statistics presented by the State itself, 70% of prisoners in the previous year had been required to wait the full, newly expanded period for reconsideration of parole. 529 U.S. at 264 n.4 (Souter, J., dissenting). The dissent also pointed to the parole board's official statement that offense severity was the "'overriding factor'" in parole determinations as evidence that individualized consideration of "changed circumstances or new information would

2. The identification of ex post facto laws is, of course, a "matter of degree," *Morales*, 514 U.S. at 509 (internal quotation marks and citation omitted), and *Garner*'s "significant risk" test could thus appropriately encompass a binding legal provision that effectively divests a sentencing court of a significant portion of its sentencing discretion. See, *e.g.*, *Miller*, 482 U.S. at 435. But even assuming the test could be applied to non-binding advice like the federal Sentencing Guidelines, petitioner's claim here would still fail the test. As in *Garner*, the "requisite risk is not *inherent* in the framework" being challenged, 529 U.S. at 251 (emphasis added), because district courts retain independent sentencing discretion under the law and should be presumed to "exercise[] [that] discretion in accordance with" the circumstances of individual cases, *id.* at 256.

Nor can petitioner (or any other defendant) show "that as applied to his own sentence," a Guidelines amendment "create[s] a significant risk of increasing his punishment." *Garner*, 529 U.S. at 255. Petitioner contends (Pet. Br. 38-41) that the district court here gave undue deference to the Guidelines. But even assuming that contention were correct, all it would mean is that the district court committed *statutory* error in his sentencing. As previously discussed, this

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rarely make a difference" to the length of a prisoner's sentence. *Id.* at 264 n.5 (Souter, J., dissenting) (citation omitted). Petitioner's arguments here are similar in kind but weaker in substance to the ones the majority apparently found unpersuasive in *Garner*. See, *e.g.*, Pet. Br. 27 (noting that 54.5% of defendants were sentenced within the Guidelines range); *id.* at 24 (noting that 75% of surveyed district court judges think an advisory Guidelines system "best achieves the purposes of sentencing"). They do not warrant a different result.

Court's post-*Booker* decisions interpreting Section 3553(a) prohibit a district court from treating the Guidelines as a constraint on its sentencing discretion. See, *e.g.*, *Gall*, 552 U.S. at 46, 50 (courts cannot either "presume that the Guidelines range is reasonable" or "requir[e] 'proportional' justifications for departures" from that range). A violation of that prohibition would provide the basis for a claim that the district court has *misapplied* the framework that governs federal sentencing. See *Nelson*, 555 U.S. at 350-352. It would not, however, provide the basis for a claim that the framework *itself* violates the Ex Post Facto Clause.

Petitioner here has not challenged his sentence on statutory grounds. The Court should accordingly review this case on the premise that the sentencing was consistent with this Court's instructions in *Booker* and subsequent cases. See *Irizarry*, 553 U.S. at 717 (Thomas, J., concurring) (concluding, in case where "the issue" of the *Booker* remedy's correctness was "not currently before" the Court, that Fed. R. Crim. P. 32(h) did not require notice of a non-Guidelines sentence imposed pursuant to the *Booker* remedy). And a sentence imposed in accordance with those instructions, in which the Guidelines have a purely advisory role, does not violate the Ex Post Facto Clause.

3. Petitioner's proposed "influence"-based inquiry into sentencing judges' psychology is also methodologically unsound. Statistics about the frequency with which judges impose within-Guidelines sentences say nothing about whether judges who do so are independently agreeing with the Guidelines or impermissibly adhering to them. And any attempt to set a statistical threshold at which advisory Guidelines

transform into ex post facto laws would be inherently arbitrary and create the possibility that the Guidelines' ex post facto status would fluctuate with each new set of data from the Sentencing Commission.

More fundamentally, petitioner's reliance on broad-brush sentencing statistics cannot be reconciled with the inherently individualized nature of sentencing. For one thing, the Guidelines are composed of many different provisions. Viewing the data only in aggregate fails to capture that judges apparently find certain Guidelines to be particularly unpersuasive. For example, for child-pornography sentencings in the last reported fiscal year, judges imposed within-Guidelines sentences only 34.9% of the time and imposed non-government-sponsored below-Guidelines sentences 44.9% of the time. See U.S. Sentencing Comm'n, *2011 Sourcebook of Federal Sentencing Statistics* Tbl. 27a, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table27a.pdf (*2011 Sentencing Statistics*). Similarly, for tax-crime sentencings in the last reported fiscal year, judges imposed within-Guidelines sentences only 37.4% of the time and imposed non-government-sponsored below-Guidelines sentences 42.3% of the time. *Ibid.* And for sentencings under a particular drug Guideline (§2D1.11, which applies to offenses involving chemicals used to make drugs) in the last reported fiscal year, judges imposed within-Guidelines sentences only 19.9% of the time and imposed non-government-sponsored below-Guidelines sentences 39.1% of the time. *2011 Sentencing Statistics* Tbl. 28, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table28.pdf.

The frequency of within-Guidelines sentences can also vary over time. If judges ten years from now were to find the Guidelines system as a whole to be much less helpful than judges today do, it would be anomalous to conclude that such a change in judicial mindset would affect the analysis of whether a Guidelines amendment can be an ex post facto law. Cf. *Rogers*, 532 U.S. at 456 (observing that the Ex Post Facto Clause "does not of its own force apply to the Judicial Branch of government"). Moreover, judges need not engage in groupthink, and agreement with the Guidelines can vary by judicial district or by individual judge. For example, while the District Court for the Southern District of Ohio and the District Court for the Southern District of Georgia each sentenced about 750 defendants in the last reported fiscal year, judges in the former imposed within-Guidelines sentences 34.4% of the time, while judges in the latter imposed within-Guidelines sentences 80.2% of the time. U.S. Sentencing Comm'n, *Statistical Information Packet, Fiscal Year 2011, Sixth Circuit* Tbl. 9 at 14, 16, http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2011/6c11.pdf. Although some of that gap is the result of differences the number of government-sponsored departures (which say little one way or the other about what the judge would otherwise have done), the difference also reflects that non-government-sponsored below-range sentences were over four times as common in the Southern District of Ohio. *Id.* Tbl. 9 at 15, 17.

These distinctions not only reinforce the inference that judges are, in fact, applying their own independent judgment at sentencing, but they also demon-

strate the flaws in petitioner's statistical approach to the Ex Post Facto Clause. It makes little sense to treat various different Guidelines, along with the past, present, and future judges who consider them, as a single undifferentiated mass. Nor does it make sense for the ex post facto analysis to vary by offense, time, location, and/or other factors. Such circumstance-specific variance would create a patchwork quilt of ex post facto law; would burden courts with collecting appropriately localized data as a prerequisite to determining which version of the Guidelines to consult; and would be impossible in cases where statistically significant data about a new Guidelines amendment do not yet exist. Nothing warrants adoption of such an unwieldy constitutional analysis for the advisory Sentencing Guidelines, which function solely as advice to an Article III court independently charged with imposing an appropriate sentence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, provides:

No Bill of Attainder or ex post facto Law shall be passed.

2. Section 3553(a) of the United States Code provides:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of

whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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[1] So in original. The period probably should be a semicolon.