No. 07-330

IN THE
Supreme Court of the United States

MICHAEL J. GREENLAW,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

Kassius O. Benson
LAW OFFICES OF
KASSIUS O. BENSON, P.A.
2915 Wayzata Blvd. S.,
Ste. 101
Minneapolis, MN 55405

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814
(301) 941-1913

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

RULES AND REGULATIONS

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

This case presents the question whether the court of appeals was authorized *sua sponte* to increase petitioner's sentence by fifteen years notwithstanding the Government's decision not to file any appeal. As the opening briefs of petitioner and the United States demonstrated, the answer to that question is "no." *Amicus* nonetheless contends that once petitioner appealed his sentence, 18 U.S.C. § 3742 not only authorized but in fact obligated the court of appeals to go beyond the issues raised by the parties and to examine the record to review whether the sentence was unlawful in any respect. That novel interpretation – which, to the best of petitioner's knowledge, has never been advanced by any court or commentator, much less by the Eighth Circuit in this case – would transform courts of appeals in sentencing cases from neutral arbiters in an adversarial system into administrative overseers with free-ranging power to revise sentences. Such a result would be contrary to the text, structure, and history of the governing statute, would turn traditional principles of appellate jurisdiction on their head, and would threaten a profound waste of judicial resources.

This case is instead governed by the settled principle that a judgment can be enlarged only in favor of a party that files a notice of appeal. It makes no difference on the facts of this case whether that principle is labeled "jurisdictional" or a "rule of practice." Even if the principle is simply a rule of practice, it is controlling so long as it is properly

invoked, as it was here through petitioner's request for rehearing.

I. 18 U.S.C. § 3742 Reflects Traditional Principles Of Appellate Jurisdiction.

Amicus's entire argument depends on his construction of 18 U.S.C. § 3742(e) as conferring plenary power to review a defendant's sentence. That position ignores the historical backdrop against which Section 3742 was enacted, as well as the structure of the section itself.

1. In 1796, this Court held that it lacked the power to modify a judgment in favor of a non-appealing party, *McDonough v. Dannery*, 3 U.S. (3 Dall.) 188, 198 (1796), a principle that equally precludes modifying the judgment so as to "lessen[] the rights of" the appealing party, *see, e.g.*, *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924). In the more than two centuries since that decision, this Court has never questioned the validity of, nor recognized an exception to, the cross-appeal requirement, which is grounded in the equally well-established rule that those portions of the judgment decided in an appellant's favor are not before the court unless the appellee files a cross-appeal. *See, e.g.*, *Buckingham v. McLean*, 54 U.S. (13 How.) 150, 151 (1852) ("By this appeal all the questions are brought before us, which were decided to the prejudice of the appellants."); *Mail Co. v. Flanders*, 79 U.S. (12 Wall.) 130, 135 (1870) ("inasmuch as that part of the decree was in favor of the appellants, and the respondent did not appeal, the error, if it be one,

cannot be corrected"); *Loudon v. Taxing Dist.*, 104 U.S. 771, 774 (1882) ("An appeal brings up for review only that which was decided adversely to the appellant."). Such a rule, this Court has explained, "is meant to protect institutional interests in the orderly functioning of the judicial system, by putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 481-82 (1999) (per curiam).

Acting against the backdrop of this "inveterate and certain" rule, *see Morley Constr. Co. v. Md. Cas. Co.*, 300 U.S. 185, 191 (1937), as well as this Court's precedents narrowly construing the availability of government appeals in criminal cases, *see Carroll v. United States*, 354 U.S. 394, 400 (1957), in 1984 Congress enacted the Sentencing Reform Act (SRA). Among other things, that Act provides both the government and criminal defendants with "a limited practice of appellate review of sentences." S. Rep. No. 98-225, at 149 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3332.

The operation of 18 U.S.C. § 3742 is straightforward, reflecting traditional principles of appellate jurisdiction. First, as this Court has recognized, *see United States v. Ruiz*, 536 U.S. 622, 627-28 (2002), the appellate court's jurisdiction over a sentencing appeal arises from subsections (a) through (c). Those sections limit who can appeal a sentence, and under what conditions. The two parties entitled to appeal are the defendant and the Government. Either one can initiate an appeal by filing a notice of

appeal. Subsections (a) through (c) also identify the types of sentencing claims that can be brought on appeal. Three of these claims – sentences imposed in violation of law, sentences resulting from a misapplication of the guidelines, and plainly unreasonable sentences not governed by the guidelines – are identical for both the defendant and the Government. The other kinds of sentencing claims that the defendant and Government may bring on appeal are mirror images of one another: the defendant may appeal upward departures from the guidelines and sentences that exceed the sentence set forth in a plea agreement, while the Government may appeal downward departures and sentences that are lower than the one provided in a plea agreement. Significantly, Congress declined to permit the parties to challenge other aspects of a sentence, such as the district court's failure to grant a departure, *see Ruiz*, 536 U.S. at 627, and its decision to impose a sentence consistent with a plea agreement, *see* 18 U.S.C. § 3742(c). Of particular salience to this case, Section 3742 expressly conditions appeals by the Government: once the Government has filed an initial notice of appeal, it may further prosecute the appeal only with the "personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." *Id.* § 3742(b).

While subsections (a) through (c) of Section 3742 identify who can bring an appeal and under what circumstances, subsection (e) sets out the responsibilities of the court of appeals with respect to those appeals. *See United States v. Booker*, 543 U.S.

220, 259 (2005) (describing Section 3742(e) as "set[ting] forth standards of review on appeal"). The language of subsection (e) parallels the language of subsections (a) through (c), thereby presupposing that the court of appeals is addressing the claims raised by the parties.

The final subsection of Section 3742, subsection (f), outlines the remedies available when the court of appeals concludes that an error has been established. This subsection also parallels the classes of errors that the court can review. Thus, it provides first that "[i]f the court of appeals determines that . . . the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. § 3742(f)(1). Because both the defendant and the Government can appeal an unlawful sentence or an incorrect application of the sentencing guidelines, subsection (f)(1) does not distinguish between appeals by the defendant and the Government.

When a defendant or the Government has challenged a departure from the applicable guideline range, subsection (f)(2) repeats the distinction – made in subsections (a)(3) and (b)(3) – between the different kinds of departures that defendants and the Government are entitled to appeal. Thus, it begins by providing that if the sentence is outside the applicable guideline range and the court finds the sentence in error for one of several enumerated

reasons, the court of appeals "shall state specific reasons for its conclusion." 18 U.S.C. § 3742(f)(2). Then, "if it determines that the sentence is too high" and the appeal has been filed by the defendant, "it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate." *Id.* § 3742(f)(2)(A). If, by contrast, the court determines "that the sentence is too low" and the appeal has been filed by the Government, then it is also required to "set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate." *Id.* § 3742(f)(2)(B).

It is thus clear that the sentencing appeal process outlined in Section 3742 mirrors the ordinary appellate process by allowing a party aggrieved by a judgment to seek relief by filing a notice of appeal. The statute then contemplates that the court of appeals will consider the errors alleged by the appealing party and provides a remedy for those that the court finds meritorious. The only difference between Section 3742 and the general appellate process is that Congress in Section 3742 limited the grounds for appeal to a discrete subset of alleged errors – limitations that are reflected at each stage of the process, from the provisions that authorize a notice of appeal to the list of issues the court may consider and the relief authorized. The repeated iterations of the various grounds simply reflect Congress's decision to limit the scope of sentencing appeals to a narrow set of issues selected by the appellant from a list authorized by Congress, not to

eliminate the basic boundaries of the appellate process that had been in place for nearly two centuries by the time Congress enacted the statute.

2. *Amicus* proffers a very different construction of the statute that ignores its structure. His argument rests on the premise that the text of subsection (e), by providing that "the court of appeals shall determine whether the sentence" meets the four criteria outlined, obligates the court of appeals to make each of these determinations, regardless of which party appealed or on what ground. He goes on to conclude that once an error is identified, the court of appeals is required to remedy it, pointing to the language in subsection (f) which provides that "[i]f the court of appeals determines that" one of the specific errors has occurred, "the court *shall* remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. § 3742(f) (emphasis added).

The Court need not linger long over subsection (f). By its plain terms, it requires a remedy only if the court of appeals "determines that" there has been an error. It has nothing to say on the critical question of which aspects of a sentence the court may consider and which potential errors it may determine. That question is the subject of subsection (e), but that provision provides no better support for *amicus*'s theory.

As an initial matter, *amicus*'s argument fails because this Court in *Booker* required subsection (e) to be "severed and excised" from the remainder of the

statute as unconstitutional, 543 U.S. at 245, such that – even if *amicus*'s construction were otherwise correct – courts of appeals are no longer required to make the determinations outlined in subsection (e).

But even to the extent that subsection (e) is relevant as illustrative of Congress's intent in enacting Section 3742, this view of subsection (e) misapprehends the provision's function in the statute. Subsection (e) does not serve as a freestanding provision setting out the court of appeals' jurisdiction. Instead, as this Court has recognized, *see Booker*, 543 U.S. at 259-61, it merely specifies the scope of review for claims that are already properly before it – *viz.*, an error that either a defendant or the Government has challenged by filing a notice of appeal pursuant to subsections (a) through (c).

To be sure, subsection (e) does not itself expressly limit an appellate court's review of a sentencing appeal to those issues with regard to which a party has filed a notice of appeal. But by the same token, it does not expressly require that the court have jurisdiction over an appeal before determining the lawfulness of the sentence. That limitation quite literally goes without saying. So does the equally settled (and, as we argue *infra* pp. 18-20, equally jurisdictional) limitation that an appeal by one party brings to the court for review only those aspects of the judgment detrimental to the appellant. While all seem to agree that this limitation has applied for decades in every other context, *amicus* is unable to cite even a single statute

in which the traditional limitation has been expressly codified.

Notably, *amicus* does not dispute the long-standing general rule that an appellate court may not enlarge a judgment in a party's favor unless that party has filed a notice of appeal. Nor does he challenge the applicability of this rule to criminal cases, which if anything are – both by their nature and by constitutional design – more adversarial. The only question, then, is whether Congress in enacting the SRA intended not only to depart from the settled traditions of our judicial system, but also to replace the pre-1984 system, under which the right to appeal sentences was extremely limited, with an expansive and free-ranging sentencing appeals system. But this simply cannot be the case. Rather, as noted above, *see supra* at 3, Congress merely intended to create an appellate process that mirrored customary appellate process, but which if anything provided for more limited appellate review than normal appellate procedure. Moreover, nothing in the text or history of the statute reflects any intent by Congress to deviate from the general cross-appeal rule. Nor does *amicus* suggest that there is anything peculiar to sentencing cases that would undermine the general applicability of the cross-appeal rule.[1] To the contrary, Congress's

[1] Indeed, although *amicus* asserts that "the linear progression of section 3742's text makes clear that an illegally low sentence must be remanded regardless of whether the appeal is taken by the defendant or the government," *Amicus* Br. 10, its clarity has apparently escaped the notice of every court in the nation and every treatise and law review article ever written on the federal sentencing regime.

rejection of a scheme that would have expressly permitted appellate courts to increase a sentence based solely on the defendant's appeal, *see* S. Rep. No. 98-225, at 151 n.370 (1983),[2] along with its intent to provide only "a *limited* practice of appellate review of sentences," *id.* at 149 (emphasis added), and this Court's cases narrowly construing the availability of government appeals in criminal cases, *see Carroll*, 354 U.S. at 400, all suggest that the cross-appeal rule applies fully to sentencing appeals.

Amicus's reliance on language governing appeals of sentences imposed under "special dangerous offender" statutes is misplaced. Those statutes indicated that "a sentence may be made more severe only on review of the sentence taken by the United States and after hearing." Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, § 3576, 84 Stat. 922, 950-51, *repealed by* SRA § 212(2), 98 Stat. 1987 (1985). The statute thus followed the well-settled principle that a judgment could not be enlarged in the Government's favor unless the Government appealed. Congress had good reason to make clear in these statutes that it did not intend to depart from the settled rule in this respect because the statute *did* depart from ordinary practice in another closely related area. That is, the OCCA

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[2] *Amicus* argues that, although Congress rejected the scheme in part because it would "place[] an undesirable strain on the defendant's right to seek sentence review," S. Rep. No. 98-225, at 151 n.370 (1983), no such strain would in fact result. *See Amicus* Br. 25 n.11. However, the fact that *amicus* disagrees with Congress's rationale for rejecting the scheme does not make the rejection of the scheme any less compelling.

expressly provided that when the United States filed an appeal of a sentence under the "dangerous special offender" provision, the appeal was deemed also to be one by the defendant of his conviction and sentence, even if the defendant did not actually file a notice of appeal. *See* OCCA § 3576. The language on which *amicus* relies thus served to make clear that although the statute departed from ordinary appellate practice in one respect (*i.e.*, allowing relief to a defendant who had not actually appealed), Congress did not intend to permit an equal and opposite departure for the Government (*i.e.*, allowing relief to the Government when it had not filed its own notice of appeal). When Congress subsequently enacted the SRA, it abandoned the practice of treating an appeal by the Government as an appeal by the defendant as well. Hence, there was no need to specifically state that ordinary appellate principles would govern increases to a criminal defendant's sentence.

Moreover, *amicus*'s construction is implausible because it would impose substantial burdens on the courts of appeals and subvert express congressional intent that appellate review of criminal sentences be limited. Taken to its logical conclusion, *amicus*'s expansive reading would mean that whenever one party filed a notice of appeal, the reviewing court would be required to make *all* of the findings described in subsection (e). That is, if *amicus* is right that subsection (e) *authorizes* a court of appeals to consider every potential error that might affect the lawfulness of a sentence, even in the absence of a cross-appeal, the plain text of the statute must then

also *require* the court to undertake this roving independent inquiry: the provision states, in no uncertain terms, that "[u]pon review of the record, the court of appeals *shall* determine whether the sentence . . . was imposed in violation of law." 18 U.S.C. § 3742(e)(1) (emphasis added). *Amicus*'s view thus would require a substantial increase in the resources committed by both parties (who would feel compelled to brief every conceivable issue that might arise) as well as the courts of appeals, which would not only have to review longer briefs but would also have to scour the entire record to identify any potential problem with the sentence, regardless of whether a party has raised it.

Amicus's reading of subsection (e) would also be inconsistent with Congress's decision, implemented in subsection (b), to allow senior Department of Justice officials to determine whether to pursue an appeal on the Government's behalf. As the Government explained in its opening brief, the approval requirement was intended "to ensure that the government has made a considered decision to draw upon appellate resources before an appellate court considers sentencing rulings that harm the government's interests." Gov't Br. 19. But the approval requirement (along with the purposes it was intended to serve) would be thwarted if courts of appeals were required to consider sentencing errors harming the government, even if – as in this case – the government had affirmatively decided not to appeal the errors. It would require the Government to expend resources far beyond those necessary to respond directly to the defendant's claims on appeal,

to make sure that a court of appeals does not erroneously enlarge a defendant's sentence in a way deleterious to the Government's broader interests.

In an effort to mitigate the problems that his expansive interpretation of subsection (e) would create, *amicus* suggests that courts would have no "obligation to independently research sentencing issues that are not raised by the parties." *Amicus* Br. 11 n.3. Instead, he contends only that courts would have "to remand an illegally low sentence in the absence of a government cross-appeal at least where that sentence is plainly illegally low."[3] *Id.* Similarly, he does not specifically contend that once either party has filed a notice of appeal, courts must determine whether any of the errors specified in subsection (e) are present in the defendant's sentence. Instead, he contends (at 9) only that "[o]nce either party challenges a sentence's legality, that issue is squarely before the court of appeals." However, if *amicus*'s construction of subsection (e) as an empowering provision is correct, there is no basis for reading such limitations into the statute. Once *amicus* concedes that the word "shall," as used in Section 3742, does

[3] This proposed construction of Section 3742 would introduce a significant amount of arbitrariness into the federal sentencing system, as the question whether a defendant's sentence is increased in the absence of a government appeal would depend on various factors such as whether local Assistant U.S. Attorneys adverted to the errors in their briefs or whether federal appellate judges or their clerks had particular expertise in sentencing law, such that an error was "plain" to them even if it would not be to others. Such arbitrariness would fly in the face of the goals of uniformity and predictability that, according to *amicus*, Congress was trying to achieve.

not mean "in every circumstance," his construction collapses on itself.

3. *Amicus*'s effort (at 14-15) to draw a negative inference between Sections 3742(f)(2) and (f)(1) fares no better. *Amicus* notes that only the latter provision expressly refers to whether an "appeal has been filed," supposedly suggesting that the court of appeals can correct an error under subsection (f)(1) to favor the Government without regard to whether it has appealed.

That argument is misguided for four reasons. First, it misreads the significance of the language of Section 3742(f)(2), which includes two subsidiary provisions that correspond to the appealing party. When the court of appeals "determines that the sentence is too high," it may correct the error if "the appeal has been filed under subsection (a)" – *i.e.*, if the defendant has appealed. *Id.* § 3742(f)(2)(A). If "the sentence is too low," it may correct the error if "the appeal has been filed under subsection (b)" – *i.e.*, if the government has appealed. The statute's references to whether an appeal had been filed under subsections (a) or (b) thus merely identify the kind of appeal – *i.e.*, individual or government – at issue in the particular subsection.

Section 3742(f)(1), by contrast, has a unitary structure. It is not divided into subsections that correspond to whether the sentence is too high or too low. Instead, the court may correct a sentence "imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines."

Unlike the subdivisions of Section 3742(f)(2), it therefore was not necessary for Congress to include a clause in Section 3742(f)(1) that looked to whether "the appeal has been filed under" a particular subsection of the statute.

Second, it is entirely implausible to suggest that Congress would express its intent to depart from such a foundational and well-settled rule of appellate practice in anything less than completely clear and unambiguous language. Indeed, when Congress did depart from normal appellate practice in the OCCA, it did so expressly. *See supra* at 10-11. And certainly, the indirect evidence of such intent on which *amicus* relies (a negative inference, and an obscure one at that) is more than outweighed by the much stronger evidence, described above, that Congress intended the normal rules of appellate practice to apply to sentencing appeals under Section 3742.[4]

Third, such a construction would cause the statute to operate illogically. For example, in a case in which only the defendant had appealed, a court of appeals could increase a sentence if it was too low because the trial court misapplied the guidelines to the defendant's circumstances ((f)(1)), but not if the sentence was too low because the district court gave the defendant an unreasonable downward departure

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[4] Indeed, Congress made clear that it intended sentencing appeals under the SRA to be governed by traditional rules of appellate practice. *See* S. Rep. No. 98-225, at 155 (noting that "the Committee intends that the Federal Rules of Appellate Procedure be applicable to a proceeding under [Section 3742]").

((f)(2)). *Amicus* offers no explanation for why Congress would have wanted the statute to create such an incongruity. Moreover, such a result would be directly at odds with *amicus*'s repeated contention that Congress eliminated the cross-appeal requirement in cases such as petitioner's to ensure that inadequate and inconsistent sentences would be uniformly corrected.

The anomalies do not end there. Under *amicus*'s view, the identity of the appealing party only matters under subsections (f)(2)(A) and (f)(2)(B), which address the relief for certain out-of-guideline sentences, allowing the court to "set aside the sentence and remand the case" if a sentence is too high and the defendant appealed, or if the sentence is too low and the Government appealed. *See* 18 U.S.C. § 3742(f)(2)(A), (B). But prior to making this distinction between defendant and government appeals, subsection (f)(2) requires – importantly, without any qualification of which party appealed – that the court determine whether "the sentence is outside the applicable guideline range" and "state specific reasons for its conclusion." Under *amicus*'s view, then, the statute issues an exceedingly strange command when a district court has erroneously departed from the guideline range, but the disadvantaged party has not appealed: under subsection (e)(3), the court is required to determine whether the departure is erroneous; under subsection (f)(2), it is required to declare that determination and then "state specific reasons for its conclusion," but under subsections (f)(2)(A) and (B), having made such a declaration, it is ultimately precluded from setting

aside the sentence and remanding the case because the disadvantaged party has not appealed.[5]

This absurd result arises from *amicus*'s misconstruction of both subsections (e) and (f). Congress has not required the court of appeals to determine whether an out-of-guidelines sentence is unduly high unless the defendant has made that claim of error through his own properly noticed appeal. Nor has Congress required the courts of appeals to make vain pronouncements of error in cases in which Congress has withheld the power to provide a remedy. The far more reasonable interpretation of Section 3742 is one consistent with traditional principles of appellate jurisdiction – *viz*., that subsection (e) permits the court of appeals to consider a departure to the extent that the affected party has appealed the departure and the departure is thus properly before it. And subsection (f) allows the court to provide a remedy to the appealing party if it agrees with the party's contention of error.

Fourth, as with his construction of subsection (e), the negative inference that *amicus* would have this Court draw would vitiate Congress's decision to entrust senior Department of Justice officials with

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[5] *Amicus* could avoid this problem by agreeing with petitioner that subsection (f) only addresses the court's response to errors it has been authorized to review under subsection (e), and then to read subsection (e)(3) as implicitly limited to review of sentencing departures detrimental to the appealing party. But if *amicus* is willing to go that far, there is no reason to resist extending that reading to subsection (e) in its entirety and understanding it to assume that the issue to be considered has been appealed by the disadvantaged party.

the power to determine whether to appeal sentences unduly favorable to a defendant. *See* 18 U.S.C. § 3742(b). That policy decision prevents line government attorneys from advancing interpretations of the sentencing laws that are contrary to DOJ policy without formally "appealing." It also empowers the Government to negotiate with defendants over the limited scope of appellate issues. Both of these important policies would be undercut substantially if the courts of appeals could effectively enlarge a sentence without the Government appealing.

II. The Cross-Appeal Requirement Is Jurisdictional, But In Any Event Must Be Enforced When Timely Invoked.

1. *Amicus*'s argument that the cross-appeal requirement is not jurisdictional boils down to two main points: first, that the timely filing of an initial notice of appeal by either party will "vest the court of appeals with plenary jurisdiction over a case," *Amicus* Br. 27; and, second, that there is no basis for distinguishing between the failure to file a *timely* cross-appeal – which does not deprive a court of jurisdiction – and the failure to file *any* cross-appeal at all. But both of these arguments largely ignore this Court's longstanding precedent.

First, although *amicus* is obviously correct that the filing of an initial notice of appeal gives the appellate court jurisdiction over the issues decided adverse to the appellant, nothing in this Court's jurisprudence suggests that the initial filing should

be treated as conferring plenary review of every single aspect of a judgment. To the contrary, this Court has repeatedly indicated that it lacks the power – that is, the jurisdiction – to review issues decided in favor of the appellants when the appellees have not filed their own appeal. *See Flanders*, 79 U.S. at 135 ("[I]nasmuch as *that part* of the decree was in favor of the appellants, and the respondents did not appeal, the error . . . *cannot* be corrected.") (emphasis added); *Morley*, 300 U.S. at 187.[6] Indeed, if *amicus*'s construction were correct, then there would be no need for cross-appeals at all, because once any party has taken an appeal, every party should be free to argue – and the court of appeals should be free to decide – any issue determined by the district court.

Second, *amicus*'s efforts to conflate timeliness and waiver overlook that cross-appeals are simply appeals that are subject to special timing provisions

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[6] *Amicus* cites this Court's decision in *Langnes v. Green*, 282 U.S. 531, 538 (1931), to support its argument that the cross-appeal requirement is not jurisdictional. But this Court's discussion of whether the cross-appeal requirement was jurisdictional or a rule of practice was merely dicta, as the respondent in that case did not seek to modify the judgment below but instead simply raised additional grounds on which the Court could affirm the decision below. *Id.* at 538. And although amicus attempts to downplay the significance of this Court's reference in *Morley* to the "power of an appellate court" by explaining that "[t]he *Morley* Court never again referred to the 'power of an appellate court,'" *Amicus* Br. 30, Justice Cardozo's opinion makes clear that "[t]he power of an appellate court to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal" was in fact the very question before the Court in that case. *Morley*, 300 U.S. at 187.

under the Federal Rules. That is, the general statutes governing the filing of appeals in civil and criminal cases make no distinction between "appeals" and "cross-appeals." What are referred to in the Federal Rules and common parlance as "cross-appeals" are simply appeals filed after another party has already filed a prior notice of appeal. Thus, the requirement that a cross-appellant file his own notice of appeal in a criminal case is not, as *amicus* implies (at 35), an extra-statutory judicial invention. It is the command of Section 3742(b). And when a party fails to file a cross-appeal, it is as if he had failed to file a notice of appeal at all. Thus, even if the *time* limits for filing a notice of appeal are not jurisdictional in a criminal case, there can be no question that the requirement that an appealing party file *a* notice of appeal is statutorily derived and jurisdictionally required.

Next, *amicus* posits in the alternative that the cross-appeal requirement cannot be jurisdictional because Section 3742 requires a court of appeals to correct an unlawful sentence regardless of which party has appealed. *See Amicus* Br. 35. But that argument is entirely circular, as it assumes the validity of *amicus*'s flawed construction of Section 3742.

3. In any event, this Court need not decide whether the cross-appeal requirement is jurisdictional. In "more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of [this Court's] holdings has ever recognized an exception to the rule." *Neztsosie*, 526

U.S. at 480. *Amicus*'s assertion that this Court should recognize an exception to the rule in this case is entirely unwarranted here.

First, as petitioner explained in his opening brief, *see* Pet. Br. 26, an exception to the general cross-appeal rule would be particularly inappropriate for cases involving sentencing errors in light of the inflexible nature of the provisions governing appeals and cross-appeals of sentences: Section 3742(b) specifically requires the Government to file a notice of appeal if it wishes to appeal a sentence, while the Federal Rules of Appellate Procedure require a party to file a notice of appeal and preclude any exceptions to the time requirements for taking appeals. *See* Fed. R. App. P. 3(a)(1), 26(b). Moreover, the fact that this case involves an erroneously low criminal sentence weighs against, rather than in favor of, finding an exception, as Congress for many decades did not provide any way for the Government to appeal such sentences. When it did finally provide for appellate review, it both limited the kinds of errors that the Government could appeal and required approval from senior Department of Justice officials.

Second, although *amicus* argues that there was "good reason to deviate from" the cross-appeal rule in petitioner's case, *see Amicus* Br. 36 (citing *Langnes*, which as noted above did not involve a cross-appeal at all), that argument rests largely on the very premises that he seeks unsuccessfully to establish in Part I of his brief – *i.e.*, that "[p]etitioner put the lawfulness of his sentence in play when he challenged it as 'unreasonable,'" *id.*; that petitioner

was somehow "on notice that the mandatory consecutive sentence lingered as an issue," *id.*; and that any claim of prejudice by petitioner is "seriously undermine[d]" by his failure to file a reply brief, *id.* at 37.

Third, even if this Court were to conclude that an exception to the cross-appeal rule might be warranted, there is no basis for *amicus*'s "good reason" standard. Indeed, elsewhere he notes that the courts of appeals which regard the cross-appeal bar as a rule of practice rather than as jurisdictional require "exceptional circumstances" before finding an exception warranted. *See Amicus* Br. 36 n.14 (citing *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 33 (D.C. Cir. 1990) (Ginsburg, R.B., J.)).[7] And the factors that *amicus* cites as illustrative of those that the courts of appeals consider in determining whether to find an exception to the cross-appeal rule, *see id.*, weigh in petitioner's favor in this case: the United States declined to file a notice of appeal at all; the Government's appellate brief demonstrated that it was well aware of the need to file a cross-appeal if it wished to challenge the district court's failure to sentence petitioner to the twenty-five-year minimum required by 18 U.S.C. § 924(c); and the Eighth Circuit's *sua sponte* increase in petitioner's sentence deprived him not only of the opportunity to brief the merits of the Section 924(c) issue and the court's authority to increase his sentence absent a cross-

[7] As the petition for certiorari notes, the majority of circuits regard the rule as jurisdictional and thus not subject to exception. Pet. Br. 6-12.

appeal, but also of the opportunity to dismiss his appeal to avoid having his sentence increased.

Finally, even if the cross-appeal requirement were open more broadly to exceptions as a type of claims-processing rule "adopted . . . for the orderly transaction of . . . business," *Schacht v. United States*, 398 U.S. 58, 64 (1970), this Court's decisions in *Kontrick v. Ryan*, 540 U.S. 443, 456-60 (2004), and *Eberhart v. United States*, 546 U.S. 12, 15-19 (2005), make clear that the judgment below must be reversed because petitioner timely invoked the rule in both his petition for rehearing and his petition for certiorari to this Court.[8] *Amicus*'s efforts to portray petitioner's invocation of the rule as "casual references" are unpersuasive[9]: petitioner "state[d] with particularity

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[8] As petitioner explained in his opening brief, the requirement that the party wishing to rely on a claims-processing rule must timely invoke the rule makes little sense in cases, such as this one, in which the court of appeals acts *sua sponte*. *See* Pet. Br. 31 n.18. At a minimum, however, petitioner timely invoked the protection of the rule by filing his petition for certiorari with this Court.

[9] Neither *Kontrick* nor *Eberhart* suggested that the party invoking a claims-processing rule needed to provide a detailed argument regarding the rule's applicability. Rather, both framed the invocation of the rule in terms of the need for the party seeking to rely on the rule to raise the rule in a timely fashion. *See, e.g.*, *Kontrick*, 540 U.S. at 447 ("[W]e hold that a debtor forfeits the right to rely on Rule 4004 if the debtor does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge."); *Eberhart*, 546 U.S. at 19 ("Here, where the Government failed to raise a defense of untimeliness until after the District Court had reached the merits, it forfeited that defense."). Moreover, the cases that *amicus* cites deal with whether an issue has been

each point of law or fact that [he believed] the court has overlooked or misapprehended," Fed. R. App. P. 40(a)(2), and clearly brought the cross-appeal requirement to the Eighth Circuit's attention. To be sure, the primary focus of the petition for rehearing was the Eighth Circuit's reliance on the plain error doctrine, but the body of the petition contained repeated references not only to the fact that the court of appeals increased petitioner's sentence in the absence of a Government appeal,[10] but also that it lacked the authority to do so.[11]

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preserved *on appeal* to a higher court, which petitioner has clearly done in his appeal to this Court.

[10] *See, e.g.*, J.A. 90 ("The United States government did not appeal the sentencing."); *id.* ("The panel also decided, sua sponte, to vacate Appellant's sentence and to remand the case for the purpose of resentencing Appellant to an additional term of 180 months (15 years)."); *id.* ("[T]he panel decision has subjected Appellant to a 15 year increase in sentence where the government did not appeal the district court's 442 month sentence."); *id.* at 92 ("Despite the fact that the government did not appeal the sentencing of 442 months, the panel addressed the issue . . . ."); *id.* at 93 ("The panel decided the relevant sentencing issue in this case on its own motion. The government did not appeal the district court sentence.").

[11] *See, e.g.*, J.A. 95-96 ("Here, the panel in the instant case could have, and should have, elected to take the same route as *Rivera*. Because the government did not raise an appeal or cross-appeal, Appellant's sentence should have been left alone."); *id.* at 96 ("The error was not raised by the government on appeal. The issue was therefore forfeited.").

III. Neither Section 2106 Nor Rule 52(b) Authorized The Eighth Circuit To Increase Petitioner's Sentence In The Absence Of An Appeal By The Government.

1. In 1948, Congress enacted 28 U.S.C. § 2106 to consolidate various sections in the U.S. Code relating to the power of this Court.[12] As commentators have explained, the "supervisory power" authorized by Section 2106 was clearly intended to mirror the "inherent power" of appellate courts, *see* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3938 (2d ed. 1996), and is also subject to traditional rules limiting appellate power, including the prohibition on modifying a judgment in favor of a non-appealing party. *See Carlisle v. United States*, 517 U.S. 416, 426 (1996) ("Whatever the scope of [a court's] 'inherent power,' . . . it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure."); *see also* FEDERAL PROCEDURE, LAWYER'S EDITION § 3:866 (2007) (noting that Section 2106 would neither authorize an appellate court to "overturn a jury verdict in violation of the Seventh Amendment" nor permit an appellate court to "modif[y] . . . a judgment in favor of the nonappealing

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[12] *See* 28 U.S.C. § 344 (1940); 28 U.S.C. § 876 (1940); 28 U.S.C. § 877 (1940). Congress included appellate courts after the decision in *United States v. Ill. Sur. Co.*, 226 F. 653, 664 (7th Cir. 1915), *aff'd on other grounds*, *Ill. Sur. Co. v. John Davis Co.*, 244 U.S. 376 (1917), which held that Section 2106 also applied to the courts of appeals.

party") (internal citations omitted); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 402 n.4 (2006) (noting that Section 2106 "must be exercised consistent with the requirements of the Federal Rules of Civil Procedure as interpreted by [the] Court"). Indeed, none of this Court's cases on which *amicus* relies involve a scenario in which an appellate court has modified the judgment in favor of a non-appealing party.

2. Nor did Federal Rule of Criminal Procedure 52(b) authorize the court of appeals to sua sponte increase petitioner's sentence. As the United States noted in its opening brief (at 39), nothing in either the text or history of Rule 52(b) indicates that it somehow creates an exception to the cross-appeal requirement. Rather, as this Court explained in *United States v. Olano*, 507 U.S. 725 (1993), Congress intended that "established appellate practice" would continue even after the adoption of Rule 52. *Id.* at 735. Moreover, allowing a "plain error" exception to the cross-appeal rule would be directly contrary to the principles of our adversarial system, which "is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief," *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring), and would instead effectively transform appellate courts from neutral arbiters of the parties' claims into administrative overseers.

And this Court's precedents make clear that the prohibition against modifying a judgment in favor

of a non-appealing party applies even when a portion of the judgment favoring appellants is erroneous: this Court has never applied the plain error doctrine to the detriment of an appellant. Indeed, in *Strunk v. United States*, 412 U.S. 434, 437 (1970), this Court specifically declined to correct a lower court finding favoring the petitioner because the United States had failed to file a cross-petition for certiorari. In *Strunk*, the court of appeals had found that petitioner was denied his right to a speedy trial, but it ultimately held that petitioner was entitled only to a reduction in his sentence rather than the dismissal of the charges against him. The petitioner sought review of the latter holding, but the United States did not seek review of the determination that petitioner had been denied a speedy trial. This Court found it "clear that petitioner was responsible for a large part of the 10-month delay which occurred and that he neither showed nor claimed that the preparation of his defense was prejudiced by reason of the delay," *id.* at 436, but it concluded that, "in the absence of a cross-petition for certiorari, questioning the holding that petitioner was denied a speedy trial, the only question properly before us for review is the propriety of the remedy fashioned by the Court of Appeals," *id.* at 437.

Moreover, the concerns for notice and repose that animate the general cross-appeal requirement apply with even greater force in the criminal sentencing context to weigh against the sua sponte application of the plain error rule to the detriment of the appealing party. For example, in this case, although petitioner concedes that the district court

erred in failing to sentence him to the twenty-five-year minimum required under Section 924(c), the Eighth Circuit's sua sponte action deprived him of the opportunity to brief the issues of the Eighth Circuit's authority to increase his sentence by fifteen years in the absence of a government appeal and whether the district court's error affected substantial rights and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." And if, deprived of the "crucible of meaningful adversarial testing," *United States v. Cronic*, 466 U.S. 648, 656 (1984),[13] the court of appeals errs with regard to any of the inquiries that it undertakes sua sponte, the aggrieved party may lack any meaningful recourse – a consequence with particularly grave effects in criminal cases.

The notice problem is particularly grave when a court of appeals sua sponte increases a defendant's sentence even if the court of appeals limits that activity to cases in which a panel (and perhaps a divided panel at that) thinks an error is "plain." Without providing notice to the defendant and the government, a court may in fact err in thinking a sentence to reflect "plain error." The federal sentencing laws are often complex and abstruse and whether a particular sentence is erroneous may often depend on complex factors. If a court of appeals strikes down a sentence without briefing or oral

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[13] *Amicus* contends (at 48) that petitioner had "ample notice that the lawfulness of his sentence was in question," but that assertion rests on the very premise that he seeks to prove – viz., that the court of appeals had the authority to increase his sentence when the Government had not filed its own appeal.

argument, there are few available avenues for correction. Petitions for rehearing will consume additional defendant and government resources. And an error in determining a particular defendant's sentence is unlikely to involve the kind of issue that will prompt either review *en banc* or by this Court, even if the panel opinion is incorrect.

CONCLUSION

For the foregoing reasons, as well as those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Thomas C. Goldstein
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Kassius O. Benson
LAW OFFICES OF KASSIUS O. BENSON, P.A.
2915 Wayzata Blvd. S., Ste. 101
Minneapolis, MN 55405

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814
(301) 941-1913

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

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