No. 15-8544

In the Supreme Court of the United States

TRAVIS BECKLES, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE UNITED STATES

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Contrary to the arguments presented by the Court-Appointed Amicus, the advisory Sentencing Guidelines are subject to "the Constitution's prohibition of vague criminal laws," *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015). The calculation of the benchmark Guidelines range serves as the lodestar of the sentencing process, including appellate review, and exerts a substantial effect on the actual sentences imposed in most cases. The federal sentencing system gives the Guidelines range that role precisely because the range is understood to reflect the considered judgment of the expert Sentencing Commission, informed by congressional policy, about the appropriate range of punishment in light of a defendant's offense conduct and criminal history. But if a guideline is so "shapeless" that it is impossible to "derive meaning" from it, *id.* at 2560, the resulting range reflects nothing more than the judge's "guesswork" about what the

Commission recommended, *ibid.* (citation omitted). Using such an arbitrarily derived numerical range in the sentencing process, with the substantial effect the range typically exerts on the sentence imposed, denies a defendant due process in his sentencing proceeding.

In arguing that the Guidelines are exempt from vagueness scrutiny, amicus makes two main arguments, but neither has merit. First, amicus argues that because due process permits a purely discretionary sentencing scheme, it must also permit a scheme in which the judge's discretion is anchored at the outset to an arbitrarily determined benchmark range. That does not follow. An inscrutably vague guideline injects an element of arbitrariness into the sentencing process that is not found in a discretionary sentencing system that relies on individualized judicial judgment exercised in light of particular facts. In the advisory Guidelines system, a sentencing judge is legally compelled to treat the Guidelines range as the view of the expert Sentencing Commission, and to consider that range in the sentencing process. When a fatally vague guideline makes it impossible to know what the Sentencing Commission recommended, that process becomes arbitrary. Just as it would violate due process to choose the benchmark range by flipping a coin, calculating that range on the basis of a legal text from which it is impossible to "derive meaning" offends the right to a procedurally fair sentencing proceeding.

Second, amicus argues that this Court has struck down as vague only laws that "regulate private conduct" (Br. 12), by which he appears to mean laws that define crimes. This Court held in *Johnson*, however, that the vagueness doctrine applies equally to "statutes fixing sentences," 135 S. Ct. at 2557, so that dis-

tinction is incorrect. More importantly, this Court has never considered the procedural problem presented here: not that the statute fails to clearly define what conduct is proscribed or what the statutorily authorized sentencing range is, but rather that a vague guideline infects the sentencing process with a numerical range that the judge must consider as the Commission's expert view although it is calculated based on an incurably indeterminate legal provision. Amicus never explains how a sentencing proceeding that unfolds from such an arbitrarily determined starting point—a starting point that in most cases exerts a significant effect on the actual sentence imposed—can satisfy due process.

A. A Vague Guideline Violates Due Process Because An Important Sentencing Factor Is Determined Arbitrarily

1. As the government has explained in its opening brief (at 40-46), two intrinsic features of the advisory Sentencing Guidelines give rise to the due process problem with applying a vague guideline. First, the calculation of the advisory Guidelines range anchors and structures the sentencing process. The district court must correctly calculate the range—a miscalculation is a "significant procedural error"—and the parties' arguments largely key off of the range. *Gall* v. *United States*, 552 U.S. 38, 51 (2007). Because that range is understood to reflect the Sentencing Commission's expert recommendation in light of the defendant's offense conduct and criminal history, a district court must provide a greater justification for a sentence imposed outside the range, and an appellate court may presume that a within-Guidelines sentence is reasonable. *Ibid.* The Guidelines range thus "anchor[s] both the district court's discretion and the

appellate review process." *Peugh* v. *United States*, 133 S. Ct. 2072, 2087 (2013).

Second, calculating the Guidelines range does not involve an exercise of traditional sentencing discretion by the district court. The court does not at the Guidelines-range-calculation stage determine an appropriate sentence in light of all the relevant factors. Rather, calculating the starting benchmark range requires applying a legal text to particular facts. Defendants with the same offense conduct and the same criminal history are supposed to be assigned the same benchmark range. In that respect, calculation of the Guidelines range differs fundamentally from the district court's ultimate exercise of sentencing discretion under 18 U.S.C. 3553(a), which sets out the full array of general factors relevant to discretionary sentencing.

In light of those two features of the sentencing regime in place since *United States* v. *Booker*, 543 U.S. 220 (2005), a vague guideline violates a defendant's due process right to a procedurally fair sentencing proceeding. The reason that the range anchors the sentencing process is that courts understand it to reflect the considered judgment of the Sentencing Commission, informed by congressional policies. But when a guideline's text is so indeterminate that it cannot satisfy the criminal-law vagueness standard, it is impossible for the court to determine what in fact the Commission recommended—whether, for example, the Commission intended a particular offense to qualify as a "crime of violence." As a result, a Guidelines range based on a vague guideline reflects linguistic "guesswork," not reasoned application of factors relevant to determining a just and reasonable

sentence. *Johnson*, 135 S. Ct. at 2560 (citation omitted). And that procedural unfairness is magnified by the substantial effect that the Guidelines range exerts on the ultimate sentence imposed in most cases. See *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1346 (2016). For those reasons, anchoring the sentencing proceeding to such an arbitrarily determined factor offends due process.

2. Amicus seems to acknowledge (Br. 20-22) that the Court's established sentencing framework, under which the Guidelines range is the "lodestar" of the sentencing process and appellate review, *Molina-Martinez*, 136 S. Ct. at 1346, gives rise to a significant procedural problem when a vague guideline is used to calculate the range. But his response to that problem is to suggest that this Court's "post-*Booker* structure" has been ill-conceived, because "no particular sequence" is "prescribed by the statute or the *Booker* remedial opinion" and "*Booker* placed no specific emphasis on the Guidelines over any other factor." Amicus Br. 21-22. Amicus questions whether "these refinements would exist had the vagueness argument presented itself first," and for that reason deems it "remarkable" that the government relies on those features of the established sentencing regime to show why a vague guideline creates fundamental procedural unfairness. *Id.* at 22.

Amicus's attack on this Court's settled sentencing framework should be rejected. For nearly a decade this Court has held that the Guidelines range plays a procedural role of overriding importance in the sentencing process. See *Gall*, 552 U.S. at 49-50. That recognition flows from the emphasis in *Booker* itself on the role that the Commission's expertise, and the

advisory Guidelines system, would play in achieving Congress's objective of "avoid[ing] excessive sentencing disparities." 543 U.S. at 264-265. Although amicus sees the advisory range as no different from any other factor that a sentencing judge considers, this Court has reached the opposite conclusion, explaining that "[t]he federal system adopts procedural measures intended to make the Guidelines the lodestone of sentencing." *Peugh*, 133 S. Ct. at 2084. The Guidelines serve that central role because they reflect the views of the Sentencing Commission and congressional policy. But when a guideline's text is so vague that the Commission's recommendation cannot be ascertained, structuring the sentencing proceeding around a judge's guess at the provision's meaning creates an intolerable risk that the sentence imposed is the product of "unfair and arbitrary judicial action," which the Due Process Clause forbids. *Rogers* v. *Tennessee*, 532 U.S. 451, 466-467 (2001).

3. Amicus contends (Br. 28-30) that this Court's decision in *Peugh* lacks legal relevance here because *Peugh* applied the "significant risk" standard developed in this Court's Ex Post Facto Clause precedents. *Peugh*, 133 S. Ct. at 2088. While it is true that *Peugh* applied the "significant risk" standard, amicus misses the broader import of the Court's analysis. The Court concluded that creating a "significant risk" of a higher Guidelines sentence based on a retroactive provision would violate basic notions of "fundamental justice," even though the Guidelines are merely advisory, and even though the retroactive guideline could not change the statutorily authorized range of punishment. *Id.* at 2084, 2088 (citation omitted).

A similar analysis applies here. Like the bar on ex post facto laws, the vagueness doctrine is founded on "ordinary notions of fair play and the settled rules of law." *Johnson*, 135 S. Ct. at 2556-2557 (citation omitted). The lesson of *Peugh* is that violating such fundamental legal norms in promulgating Guidelines provisions, in a way that is likely to increase the typical defendant's sentence, can be unconstitutional even if the statutory range of punishment is not increased. In this context, when a court applies a Guidelines provision that is so vague that it would be declared void on its face if it were a criminal statute, and that application is likely to increase the sentences that most defendants subject to it would otherwise receive, the process offends "fundamental justice."[1]

Amicus also seems to dispute (Br. 23) the proposition that the Guidelines range in fact exerts a significant effect on actual sentences imposed, despite this Court's recognition just seven months ago of the "real and pervasive effect" that the Guidelines have on sentences. *Molina-Martinez*, 136 S. Ct. at 1346. He notes that last year slightly fewer than half of federal sentences fell within the Guidelines range. But that is not the proper measure of the effect of the Guidelines on sentencing. This is not only because the majority of below-range sentences are government-sponsored and thus authorized by the Guidelines; it is because the

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[1] Although amicus contends (Br. 28-29) that *Peugh* rested on the concern with legislative vindictiveness against disfavored groups, that consideration was mentioned only by the plurality, which suggested that it was not "directly implicated," 133 S. Ct. at 2085, while the majority relied on the interest in "fundamental justice," *id.* at 2088 (citation omitted).

range affects even out-of-range sentences. A judge who believes that a defendant is atypical may choose to impose a sentence outside the Guidelines range, but the starting point still has substantial influence on the ultimate sentence. As this Court has repeatedly explained, "when a Guidelines range moves up or down, offenders' sentences [tend to] move with it." *Ibid.* (brackets in original) (quoting *Peugh*, 133 S. Ct. at 2084). That direct relationship between the Guidelines range and the sentences actually imposed underscores the procedural unfairness of calculating the range based on a provision that is so "shapeless" that it cannot satisfy the criminal-law vagueness standard. *Johnson*, 135 S. Ct. at 2560.

4. Amicus relies (Br. 24-26) on this Court's holding in *Irizarry* v. *United States*, 553 U.S. 708 (2008), that the Due Process Clause does not entitle a defendant to notice that the district court will vary from the advisory Guidelines range. *Id.* at 713-714. But he does not seriously address the government's explanation (U.S. Br. 47) of why the due process problem generated by a vague guideline differs from the notice issue discussed in *Irizarry*.

The problem with a vague guideline is not that a defendant lacks notice that he could be sentenced anywhere within the statutorily authorized range of punishment. After *Booker*, he clearly has such notice, which is why *Irizarry* held that no further notice is required. 553 U.S. at 713. A defendant always knows to make arguments based on the particular facts of his case in light of the Section 3553(a) factors because the judge must always consider those factors. A vague guideline, in contrast, hinders procedural fairness on two levels. First, it makes it difficult or impossible to

frame logical arguments to influence the judge's calculation of the range. And second, it skews the framework for sentencing because it produces a starting range that the judge will assume reflects the expert views of the Sentencing Commission. But in reality, the fatal indeterminacy of the guideline text means that the range was calculated arbitrarily, based on the judge's guess at what the language means, or how it applies to the case at hand, rather than on any consideration of relevance to criminal sentencing. That kind of procedural unfairness was not at issue in *Irizarry*. No inconsistency exists in concluding that a defendant has no due process right to case-specific notice that the judge may vary from the Guidelines range, but that he does have a due process right to have the judge calculate the Guidelines range in a non-arbitrary manner.

B. A Vague Guideline Injects Potential Arbitrariness Into The Sentencing Process In A Manner That Is Not Found In Purely Discretionary Sentencing

Amicus contends (Br. 12-14) that because a system of "pure discretionary sentencing is constitutional," due process permits a district court to anchor the sentencing process around a range derived from a vague guideline. That contention is incorrect.

1. In a traditional discretionary sentencing system, the sentencing judge considers the full range of relevant aggravating and mitigating facts and circumstances, as well as her view of proper sentencing policy, and then exercises sentencing discretion in light of those relevant considerations. As a leading Nineteenth Century treatise explained, when "the punishment is discretionary with the tribunal," the sentencer "listen[s] to the aggravating and mitigating facts, and

place[s] it where justice and sound policy for the particular instance dictate." 1 Joel Prentiss Bishop, *New Commentaries on the Criminal Law* § 601, at 371 (8th ed. 1892) (cited in *Apprendi* v. *New Jersey*, 530 U.S. 466, 519 (2000) (Thomas, J., concurring)). That system draws on individualized judicial judgment to determine the appropriate sentence in light of particular facts, reflecting the unique considerations that bear on the sentence in each case. See *Koon* v. *United States,* 518 U.S. 81, 113 (1996) ("It has been uniform and constant in the 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."). Courts have exercised that sort of individualized judgment for centuries, *Apprendi*, 530 U.S. at 481 (citing *Williams* v. *New York*, 337 U.S. 241, 246 (1949)), and the reliance on judicial judgment to frame reasoned sentences within broad ranges has never been thought to reflect the sort of arbitrariness that violates due process.[2]

An inscrutably vague advisory guideline, however, injects arbitrariness into the sentencing process that

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[2] Arbitrary action is action "with no purpose or objective." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 73 (1995). An individualized discretionary sentencing, by contrast, relies on "conscientious judgment, not arbitrary action," and is conducted in accord with "familiar principles governing the exercise of judicial discretion." *Burns* v. *United States*, 287 U.S. 216, 222-223 (1932) (discussing discretionary probation revocation). The judge "takes account of the law and the particular circumstances of the case and is 'directed by the reason and conscience of the judge to a just result.'" *Id.* at 223 (quoting *Langnes* v. *Green*, 282 U.S. 531, 541 (1931)).

is not found in the exercise of unguided discretion in a traditional sentencing system. Lower courts have consistently recognized, for example, that a court's reliance on material factual misinformation at sentencing may violate due process.[3] Reliance on an arbitrarily calculated range raises similar concerns. A vague guideline requires the sentencing judge to take into account an erroneous consideration: namely, that the expert Sentencing Commission recommended a particular range for the defendant based on his offense characteristics and criminal history, even though no one knows what the Commission recommended. The district judge must nevertheless treat the range as reflecting the considered views of the Commission; indeed, the judge would commit procedural error by failing to take into account that range in her sentencing determination or by failing to offer a sufficiently detailed explanation for varying from it. And likewise, if the defendant appeals a within-Guidelines sentence, the appellate court must also deem the sentence consistent with the recommendation of the Sentencing Commission and may for that reason apply a presumption of reasonableness even though, in reality, the Commission's views cannot be discerned.

That violates due process. To require a sentencing judge and an appellate court to treat a numerical range as the recommendation of an expert commis-

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[3] See, *e.g.*, *Hili* v. *Sciarrotta*, 140 F.3d 210, 215 (2d Cir. 1998) ("It is well established that a defendant has a due process right not to be sentenced on the basis of information that is materially false."); *United States* v. *Pellerito*, 918 F.2d 999, 1002 (1st Cir. 1990) (same); *United States* v. *Reid*, 911 F.2d 1456, 1463-1464 (10th Cir. 1990) (same), cert. denied, 498 U.S. 1097 (1991).

sion, when the text of the provision renders it impossible to know what the commission actually concluded, infringes "ordinary notions of fair play," *Johnson*, 135 S. Ct. at 2556-2557 (citation omitted). The result is that the sentencing process will be skewed by misinformation about the Commission's views on the appropriate sentence, because the judge must calculate and consider the range based on a legal text from which it is impossible to "derive meaning." *Id.* at 2560.

A sentence imposed under a purely discretionary sentencing system does not produce that type of arbitrariness. The system is simply individualized. For generations, legislatures have relied on individual judicial judgment to balance case-specific equities in order to impose a fair sentence. That system will not generate uniformity, see *Mistretta* v. *United States*, 488 U.S. 361, 365-366 (1988) (noting "[s]erious disparities" in the discretionary system), but vesting judges with responsibility to fix sentences based on unique facts is not arbitrary. In contrast, it is arbitrary to require judges to guess about the meaning of text that amounts to a linguistic "black hole," *Johnson*, 135 S. Ct. at 2562 (citation omitted), and then calculate a numerical range derived from that guess as the "lodestar" of sentencing, *Molina-Martinez*, 136 S. Ct. at 1346; see also 18 U.S.C. 3553(a)(6) (directing judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); *Gall* 552 U.S. at 54 (consideration of the advisory range helps to "avoid unwarranted disparities"). Such a legal regime is arbitrary because the court is forced to employ a sentencing benchmark that cannot rationally

be determined because the text that governs it is hopelessly vague.

2. A hypothetical example illustrates the point. Suppose that a sentencing judge were required to flip a coin to determine a starting benchmark range—a range that shapes the ensuing sentencing process by "inform[ing] and instruct[ing] the district court's determination of an appropriate sentence," *Molina-Martinez*, 136 S. Ct. at 1346, and that would entitle any sentence within that range to a "presumption of reasonableness" on appellate review, *Gall*, 552 U.S. at 51. Heads would produce a starting range of 262 to 327 months, tails a range of 360 months to life. Cf. Pet. Br. 6. Such a sentencing regime would produce arbitrary and unfair results that do not exist in a purely discretionary system that relies on good-faith judicial judgment informed by the relevant facts. When a coin flip dictates radical differences in the starting point and initial benchmark for sentencing, the sentencing process and likely outcome would be determined entirely by chance.

Applying a fatally vague guideline is not as arbitrary as a coin flip, but its effect on the sentencing process is similar. *Johnson* held that the language at issue here is "a black hole of confusion and uncertainty" and described how lower courts had reached widely divergent rulings about particular categories of predicate offenses based on "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." 135 S. Ct. at 2560, 2562 (citation omitted). Such "unavoidable uncertainty and arbitrariness of adjudication" *id.* at 2562, means that in many cases, the starting benchmark for a defendant's sentencing

proceeding will be determined based on a judge's "guesswork and intuition," *id.* at 2559, about the applicability of an indeterminate phrase. For example, enhanced sentencing ranges for violent recidivists may be wrongly or randomly assigned to defendants who should not bear that treatment in the Commission's judgment. Judges will of course struggle in good faith to apply vague language. But when the language reaches the level of inscrutability for criminal vagueness, they cannot avoid arbitrary results.

Amicus is therefore wrong that a vague guideline "does not make things worse" (Br. 14) than purely discretionary sentencing. Discretionary sentencing is individualized, not arbitrary. In contrast, a vague guideline requires judges to treat a numerical range that was derived through conjecture about the meaning of a critical phrase as reflecting the considered views of the Sentencing Commission, and to accord that benchmark a central role in the sentencing process.

3. In its opening brief, the government explained (at 43-44) that, in the Eighth Amendment context, this Court has recognized that a jury's consideration of a vague aggravating factor is unconstitutional, even if the jury's role is only to recommend a sentence to the judge and the judge does not directly consider the vague factor but merely gives weight to the jury's recommendation. *Espinosa* v. *Florida*, 505 U.S. 1079, 1082 (1992) (per curiam). That holding is relevant here because it illustrates the "potential for arbitrariness," *ibid.*, when a vague standard informs one consideration that the sentencer must take into account.

Amicus states (Br. 19-20 & n.2) that the opening brief "lifted" *Espinosa* out of context because "pure

discretionary sentencing" is not permitted in the capital-sentencing context, so *Espinosa*'s invalidation of a vague indirect factor is not relevant to non-capital sentencing, where discretionary sentencing is permissible. That argument reflects a misunderstanding of Eighth Amendment doctrine. It is true that at the first, "eligibility" phase of capital sentencing, "a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty." *Loving* v. *United States*, 517 U.S. 748, 755 (1996) (citations and internal quotation marks omitted). But once it is determined that the defendant falls within a narrower category of offenders (either through aggravating elements of the offense or an eligibility-phase sentencing proceeding, see *ibid.*), the sentencer then may consider the full range of relevant considerations during the "selection" phase. See *Buchanan* v. *Angelone*, 522 U.S. 269, 275-276 (1998). The Constitution thus permits the jury to have "unbridled discretion" to consider relevant evidence at that phase. *Ibid.*

Espinosa concerned the second, "selection" phase of capital sentencing. See 505 U.S. at 1083 (Scalia, J., dissenting) ("Since the Florida courts found several constitutionally sound aggravating factors in this case, Espinosa's death sentence unquestionably comports with the 'narrowing' requirement of *Furman* v. *Georgia*, 408 U.S. 238 (1972)."). The Court held that the invalid aggravating factor had, through the jury's nonbinding recommendation to the judge, skewed the judge's "weighing [of] aggravating and mitigating circumstances." *Id.* at 1081-1082. The Court explained that the weighing of a factor that that "is so vague" that it does not provide "sufficient guidance for determining the presence or absence of the factor"

creates a fatal "potential for arbitrariness," even if the factor serves only as one consideration in a non-binding recommendation to the ultimate sentencer. *Ibid.* *Espinosa* therefore illustrates that even where the Constitution permits discretionary sentencing, incorporating an impermissibly vague factor into a non-binding recommendation, to which the decisionmaker must accord "great weight," *id.* at 1082, can render the ultimate sentencing determination unconstitutionally arbitrary.

C. A Vague Guideline Gives Rise To Fundamental Procedural Unfairness Even Though It Does Not "Regulate Private Conduct"

Amicus also contends that the vagueness doctrine applies only to "measures that directly regulate private conduct" and that for that reason the Guidelines are not subject to the vagueness doctrine. Br. 14 (capitalization altered). That argument lacks merit.

1. As an initial matter, amicus is incorrect (Br. 17) that "[t]he common thread" weaving through all of this Court's vagueness decisions "is that measures were void because the public could not know what was proscribed." Although most of this Court's vagueness decisions have concerned provisions drawing the line between lawful and unlawful conduct, this Court has also concluded that statutory provisions delineating the punishment for indisputably unlawful conduct are subject to the vagueness doctrine. Indeed, *Johnson* itself held as much: "[Vagueness] principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." 135 S. Ct. at 2557 (citing *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979); see *United States* v. *Evans*, 333 U.S. 483, 487-488 (1948) (holding that a statute that prescribed "no

penalty" for an offense was impermissibly vague). Although amicus claims (Br. 16) that *Johnson* applied the vagueness doctrine to the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), only because the ACCA "define[s] a separate crime," this Court has never held that ACCA defines a separate crime. It is a sentencing provision.

2. In any event, amicus's "private conduct" argument fails to grapple with the basic reason that a vague guideline violates due process: not because it leaves uncertainty about what conduct is unlawful, or about the statutorily authorized range of punishment for that conduct, but because it fundamentally distorts the process of sentencing by anchoring the judge's exercise of discretion to an arbitrarily determined range.

It is true that the problem here is different from the problem in other cases in which this Court has declared a statute void for vagueness. In those cases, the challenged statute gave rise to a *substantive* problem: A person of ordinary intelligence could not determine what conduct was prohibited or what range of punishment was prescribed for the offense. That is why those holdings applied retroactively on collateral review. See *Welch* v. *United States*, 136 S. Ct. 1257, 1263-1268 (2016).

By contrast, a vague advisory guideline gives rise to a *procedural* problem: The sentencing process is anchored to a starting benchmark determined arbitrarily, based on a court's conjecture about the meaning of an impenetrable text, not based on the reasonably discernible views of the Sentencing Commission or any other criteria relevant to the sentencing process. Yet the federal sentencing framework requires the

court to treat that range as reflecting the considered judgment of the Commission. It is that procedural problem, in conjunction with the Guidelines' significant effect on sentences actually imposed, that offends due process.

Amicus does not seriously address that argument. He merely argues (Br. 15-17) that this Court has never held a provision akin to an advisory guideline void for vagueness. That is true, but it is equally true that the Court has never held that such a provision is immune from vagueness scrutiny. It is not an issue that has previously arisen, because nothing quite like the advisory Guidelines existed for federal sentencing before *Booker*. The question to resolve here, therefore, is whether the basic guarantee of the Due Process Clause against "unfair and arbitrary judicial action," *Rogers*, 532 U.S. at 466-467, is implicated when a district court is legally required to consider a range calculated based on a "hopeless[ly] indetermina[te]" provision of the Guidelines, *Johnson*, 135 S. Ct. at 2558. For the reasons discussed above, that procedural unfairness violates due process.

3. Amicus relatedly argues (Br. 20) that the government has "offer[ed] no principle to determine when a non-binding measure becomes 'binding enough' to risk being unconstitutionally vague." That argument misses the point. The Guidelines range is not substantively binding in any sense; a judge has authority to impose a sentence anywhere within the statutorily authorized range. That is why a judge's fact-finding in calculating the range does not violate the Sixth Amendment. *Booker*, 543 U.S. at 233. And contrary to amicus's suggestion (at 32-33), applying vagueness principles to advisory Guidelines no more risks recre-

ating a Sixth Amendment problem than applying the *Ex Post Facto* Clause, see *Peugh*, 133 S. Ct. at 2087-2088. The due process problem arises from the vital *procedural* role that the Guidelines range plays in the sentencing process and in appellate review. Though not binding, the starting benchmark must be taken by the parties and the courts to reflect the considered recommendation of the Sentencing Commission. If that range was instead determined through the judge's "guesswork and intuition," *Johnson*, 135 S. Ct. at 2559, the ensuing process is unfair.

D. Subjecting The Guidelines To Vagueness Scrutiny Will Not Impede The Work Of The Sentencing Commission

Amicus contends (Br. 30-35) that subjecting the Guidelines to vagueness scrutiny would "threaten[] the work of the Commission and could wreak havoc on the states that use sentencing guidelines." *Id.* at 33. That concern is groundless. Applying the vagueness doctrine here is highly unlikely to invalidate other guidelines currently in force. And more importantly, where a guideline is so unclear that it would be facially void for vagueness, it does not serve the Commission's interests to have federal judges continue to engage in the "failed enterprise" of attempting to apply it. *Johnson*, 135 S. Ct. at 2560.

1. Amicus contends (Br. 31-33) that many other provisions of the Guidelines would be vulnerable to a vagueness challenge. That is incorrect. The problem with the residual clause of the ACCA and the former residual clause of Section 4B1.2(a)(2) arises from a confluence of "uncertainties": applying a risk standard to the ordinary case of an offense; the requirement that judges consider conduct that might occur after

completion of the offense; the confusing list of enumerated crimes; and the long history of failed efforts by this Court to construe that language and the widespread confusion among lower courts. *Johnson*, 135 S. Ct. at 2560; see *id.* at 2557-2560. It was the "sum" of those problems that led the Court to conclude that the ACCA's language was unconstitutionally vague, *id.* at 2560 (citation omitted), and that requires the same result here.

No reason exists to believe that other provisions of the Guidelines raise comparable vagueness concerns. Indeed, the Ninth Circuit has held for at least 25 years that the Guidelines are subject to vagueness scrutiny, see *United States* v. *Helmy*, 951 F.2d 988, 993 (9th Cir. 1991), cert. denied, 504 U.S. 945 (1992), yet that court has never held that a guideline is unconstitutionally vague. The former residual clause of Section 4B1.2(a)(2) stands alone.

Amicus's lead example of a provision that would be in jeopardy under vagueness doctrine is the vulnerable-victim guideline, § 3A1.1, which increases a defendant's offense-conduct score by two levels "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim," defined in the commentary to include, *inter alia*, a victim "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." Sentencing Guidelines § 3A1.1 & comment. (n.2). Unlike the residual clause, however, that provision calls for a case-specific evaluation of whether the victim was particularly vulnerable to the criminal scheme, with the commentary giving the examples of "a fraud case in which the defendant marketed an ineffective cancer cure," or "a rob-

bery in which the defendant selected a handicapped victim," *ibid.* Although different judges might disagree in borderline cases over whether a victim was especially susceptible to particular offense conduct, that provision does not involve basic uncertainty about "the nature of the inquiry" that courts must undertake, *Johnson*, 135 S. Ct. at 2560. And disagreements about close cases under an intelligible, if qualitative, standard do not make a provision vague. *United States* v. *Williams*, 553 U.S. 285, 305-306 (2008). Indeed, *Johnson* itself did "not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct," 135 S. Ct. at 2561, and the vulnerable-victim guideline is just such a provision.

The same is true of the other provisions that amicus cites. They bear no similarity either to the categorical risk analysis that *Johnson* found problematic or to other statutes that this Court has held unconstitutionally vague, which often relied on subjective value judgments open to a wide range of interpretation. See, *e.g.*, *Coates* v. *City of Cincinnati*, 402 U.S. 611, 615-616 (1971) (holding unconstitutionally vague ordinance prohibiting "annoying" conduct); *United States* v. *L. Cohen Grocery*, 255 U.S. 81, 89 (1921) ("unjust or unreasonable rate or charge").

Furthermore, no sound basis exists to believe that the Commission would draft unconstitutionally vague guidelines in the future. Apart from Section 4B1.2(a)(2)'s former residual clause, which was borrowed from the ACCA, and which this Court declared unconstitutional only after a decade of efforts to construe it, amicus has pointed to no evidence that the Commission has struggled to draft guidelines that are

sufficiently clear to satisfy the minimal standard of the vagueness doctrine. Moreover, as explained in the government's opening brief (at 53-57), any ambiguity in the text of a guideline can be eliminated or reduced through the Commission's authoritative commentary.

2. Amicus also contends (Br. 30-31) that if the Guidelines are subject to the vagueness doctrine, the statutory sentencing factors set forth at 18 U.S.C. 3553(a) would also be invalid. As explained in the government's opening brief (at 42), that is incorrect. The Section 3553(a) factors essentially capture the general set of considerations relevant to a sentencing determination. Just as traditional discretionary sentencing regimes do not raise due process problems, a statutory command to consider a set of general factors in sentencing is not unconstitutionally vague. The Guidelines are different because they require a court to decide whether the facts of the case satisfy a legal standard in order to derive a specific numerical range. That range reflects the expert recommendation of the Sentencing Commission, and for that reason it structures the sentencing process and appellate review, and it exerts a substantial effect on the sentences actually imposed. The general Section 3553(a) factors have none of those characteristics.

3. Finally, amicus argues (Br. 33-35) that applying the vagueness doctrine to the Guidelines will impede the work of the Sentencing Commission. The opposite is true. If the Commission drafts a guideline that is so indefinite that it would be subject to facial invalidation for vagueness, then courts necessarily would struggle and fail to ascertain the Commission's true recommendation. Requiring courts to continue engaging in a "task * * * which at best could be only guesswork,"

Johnson, 135 S. Ct. at 2560 (citation omitted), does not vindicate the Commission's important role.

Amicus also asserts (Br. 33) that the "Commission is charged with addressing the same questions that this Court is asking in this case," such as whether a guideline is "still fit for its intended purpose and, if not, [whether] an amendment eliminating it [should] be retroactive." Those are not the questions posed by a vagueness challenge like this. Rather, the question is whether the Commission has expressed its meaning with sufficient clarity that a court can apply the guideline in a non-arbitrary manner. Nor is a vagueness challenge, as amicus characterizes it (Br. 34), "an attempt to obtain judicial second-guessing of the Commission's expert decisions." It instead is an argument that the Commission's recommendation cannot be discerned. As amicus himself puts it (Br. 30), "[b]y definition," when a provision is unconstitutionally vague, "no one knows what it means." If "no one knows" what a Guidelines provision means, it is hard to see how continuing to enforce that provision respects the Commission's work.

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For the reasons stated in the government's opening brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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