No. 07-330

In the Supreme Court of the United States

MICHAEL J. GREENLAW, AKA MIKEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE UNITED STATES

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The amicus curiae appointed by this Court offers two central submissions in support of the contention that the court of appeals correctly increased petitioner's sentence, despite the absence of a government appeal or cross-appeal challenging his sentence. Each of those submissions is flawed.

First, amicus submits (Br. 5-7) that the statute governing sentencing appeals, 18 U.S.C. 3742 (2000 & Supp. V 2005), by using the word "shall" in its remedial provisions, *requires* a court of appeals to determine whether a sentence was "imposed in violation of law," and to remand for correction of any such error, whenever *any* party on appeal challenges the sentence. But amicus places far too much weight on the word "shall," and the text of Section 3742 does not support amicus's claim that this section overrides normal principles of appellate jurisdiction and review. The far better reading of the text

indicates that Congress adopted, in 18 U.S.C. 3742(a) and (b), restrictions on appellate power to correct sentencing errors that require *the aggrieved party*—the government or the defendant—to notice an appeal in order for the court to have jurisdiction over issues aggrieving that party. See U.S. Br. 13-23.

Second, amicus invites this Court more broadly to recognize a wide-ranging freedom for appellate courts to dispense with the bar on modifying a judgment in favor of a non-appealing appellee and to grant such relief whenever the court of appeals "ha[s] 'good reason' to deviate from the rule in th[e] [particular] case," after weighing a variety of factors. Br. 36 & n.14 (citation omitted). But in *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479-481 (1999), this Court emphatically stated that the rule against the award of relief in favor of a non-appealing party is "firmly entrenched," "inveterate and certain," and without recognized exception in more than two centuries of jurisprudence. The rule and its purposes are fully implicated in the context of this case. Indeed, recognition of an exception for plain sentencing errors that harm the government would circumvent Congress's decision to vest in a limited set of high-ranking Justice Department officials the authority to make the determination whether to challenge a sentencing ruling in the court of appeals.

Amicus's various other contentions, including his reliance on supervisory power under 28 U.S.C. 2106, the plain-error provision in Federal Rule of Criminal Procedure 52(b), and the mandatory nature of sentencing under 18 U.S.C. 924(c) (2000 & Supp. V 2005), see Br. 8-9, all fail to overcome the fundamental point that the government did not invoke the court of appeals' power to address the district court's sentencing error. Appellate

courts need not and should not adopt a roving authority to reverse sentencing errors when the aggrieved party has not appealed.

I. THE COURT OF APPEALS LACKED JURISDICTION TO ORDER AN INCREASE IN THE SENTENCE IN THE ABSENCE OF A NOTICE OF APPEAL BY THE GOVERNMENT UNDER SECTION 3742

A. Section 3742's Standard-Of-Review And Remedial Provisions Do Not Answer The Jurisdictional Question

Amicus argues that, once a defendant appeals his sentence, 18 U.S.C. 3742 "mandates" the court of appeals to consider "any" illegality in the sentence and remand "any illegal sentence regardless of whether the remand hurts or helps the appealing party." Amicus Br. 9; see *id.* at 9-26. Amicus bases (Br. 10-12) this purported mandatory obligation on Congress's use of "shall" in the standard-of-review and remedial provisions of Section 3742, subsections (e) and (f).[1]

Both subsections (e) and (f), however, address the action that a court should take *if* it has jurisdiction over a claim. Subsection (e) begins by noting what the court should do "[u]pon review of the record," and subsection (f) refers to what the court should do "[i]f the court of

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[1] *United States* v. *Booker*, 543 U.S. 220, 259-262 (2005), purported to excise subsection (e) in its entirety, and one member of the Court has suggested that the "inextricably intertwined" provisions of subsection (f) similarly must be severed, *Rita* v. *United States*, 127 S. Ct. 2456, 2483 (2007) (Scalia, J., concurring). Cf. Amicus Br. 10 n.2. Even if those provisions survive (or would, if severed, nevertheless inform the meaning of subsections (a) and (b) of Section 3742), nothing in them casts doubt on Congress's jurisdictional scheme that required separate appeals by the defendant and the government in order to place before the appellate court an issue aggrieving the particular party.

appeals" makes specified determinations. Each of those directions logically depends on the antecedent issue of what claims the court has jurisdiction to review and determine. That question is addressed not in the remedial subsections, but in the earlier subsections (a) and (b) that describe the claims that the defendant or the government may appeal.

If the review and remedial provisions have the meaning ascribed to them by amicus, they would impose on courts of appeals "an unequivocal mandate" (Amicus Br. 11 n.3) to scour the record in every criminal case in which either the defendant or the government appeals a sentence for any of the types of sentencing errors delineated in Section 3742(a) and (b), regardless of which party appealed and regardless of which errors that party chose to present to the court of appeals. This would be an extraordinary obligation to impose on courts of appeals, and a radical departure from normal appellate practice. Nothing in the statute suggests that Congress had such radical innovation in mind; to the contrary, the history of the statute and criminal appeals in general refute any such suggestion. See U.S. Br. 13-23.

Amicus attempts to avoid this logical implication of his textual argument, by focusing solely on appeals that allege "violation[s] of law" and on those violations that are "plainly" erroneous. See Amicus Br. 11 & n.3 (citation omitted). But under amicus's reading of the statute, there is no statutory basis for either limitation. Shall, after all, means shall. As to the first, subsection (e) is not limited to claims that the sentence was "imposed in violation of law." Subsection (e) contains the same mandatory language—"[u]pon review of the record, the court of appeals shall determine"—with re-

spect to every type of sentencing claim that can be raised by either the defendant or the government. Under amicus's reading of that "shall determine" clause, the court of appeals' duty would thus necessarily extend to determining whether the district court committed any errors that could have been appealed.

Similarly, there is no basis in the text of subsections (e) or (f) to limit the purported obligation to errors that are "plain." The language simply states that the court "shall determine whether the sentence," *e.g.*, "was imposed in violation of law," 18 U.S.C. 3742(e) (2000 & Supp. V 2005), and if the court so determines, it "shall remand" the case for further sentencing proceedings, 18 U.S.C. 3742(f) (Supp. V 2005). Neither subsection indicates that the sentencing error must be "plain" to trigger the court of appeals' supposed "unequivocal mandate." See Amicus Br. 11 n.3. Thus, amicus's reading of subsections (e) and (f) would impose exactly the burden on courts of appeals that he attempts to disavow, namely, "an obligation to independently research sentencing issues that are not raised by the parties." *Ibid.*

Amicus's felt need to attempt to pare back on the "mandatory" obligation he finds in the text of subsections (e) and (f) results from his insistence that those provisions do work that they were never designed to do. That a statute sets forth in mandatory terms what a court must do *if* issues are properly before it does not illuminate *whether* those issues are properly before it. Amicus's reading of the statute begs the essential question: whether subsections (a) and (b) of Section 3742 require that a party file a notice of appeal before the court of appeals has jurisdiction to correct an error that aggrieves that party. Jurisdiction is the threshold question; it is not conferred by provisions describing an ap-

pellate court's remedial authority. To the contrary, "[w]ithout jurisdiction the court cannot proceed at all in any cause." See, *e.g.*, *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)).[2]

B. The Text And Structure Of Section 3742(a) And (b) Demonstrate That Each Party Must File A Notice Of Appeal

Critically, amicus has no explanation for Congress's creation of two separate subsections—one for notices of appeal by the defendant and one for notices of appeal by the government. See 18 U.S.C. 3742(a) and (b). Instead, he simply asserts that the textual structure is "beside the point." Amicus Br. 14. But, as this Court has held, Section 3742(a)'s delineation of the grounds for a defendant's appeal is jurisdictional, *United States* v.

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[2] Amicus makes the same error in contending that only the initial notice of appeal, and not a notice of cross-appeal, has jurisdictional significance. Br. 27-28; see also *id.* at 34-36. Whatever the rule in cases governed by 28 U.S.C. 1291, the threshold question in this case is whether Section 3742(a) and (b) require separate, party-specific notices of appeal in order to invoke the jurisdiction of the court of appeals over sentencing errors that aggrieve that party. While amicus asserts (Br. 28) that "the court of appeals relied on the controlling principle that an appellate court with jurisdiction over the issues and the parties before it is not deprived of the authority to afford a specific measure of relief to a nonappealing party simply because that party did not file a cross-appeal," that assertion does nothing to answer the government's contention that Section 3742(a) and (b) in fact establish a *jurisdictional* dichotomy for sentencing errors, requiring the aggrieved party to appeal. In any event, amicus's "controlling principle" has not yet been settled: in *Neztsosie*, this Court expressly declined to resolve whether the cross-appeal requirement is "strictly jurisdictional" under more general appeal provisions, 526 U.S. at 480, and, because this case arises under Section 3742, that general question is not presented. See U.S. Br. 26-29.

Ruiz, 536 U.S. 622, 626-628 (2002), and the similar provisions of Section 3742(b) presumably must be as well. Congress's choice to separate by party the only two subsections of the statute that define an appellate court's jurisdiction clearly indicates that a notice (or cross-notice) of appeal by the particular party aggrieved is a prerequisite to the court's power to address that issue.

Amicus acknowledges that this Court's decision in *Ruiz* establishes that Section 3742 is "jurisdictional," but amicus suggests (Br. 13) it is jurisdictional only "in the limited sense that it delineates the types of sentencing claims that appellate courts have the authority to hear." But the text and structure of subsections (a) and (b) indicate that the jurisdictional limitations go beyond that. The text of each subsection sets forth not just the types of claims, but which party may "file a notice of appeal" as to which particular types of claims. 18 U.S.C. 3742(a) and (b). It is true, as amicus points out (Br. 13 n.6), that three of the four types of appealable claims delineated in subsection (a) are identical to those in subsection (b), see 18 U.S.C. 3742(a)(1), (2), (4) and (b)(1), (2), (4), and that the fourth type of defendant claim is the mirror image of the fourth type of government claim, see 18 U.S.C. 3742(a)(3) and (b)(3). But that overlap demonstrates that Congress could easily have written a single "notice of appeal" provision that—like the review and remedial provisions in subsections (e) and (f)—placed in one provision the delineation of claims. Instead, and in stark contrast to the review and remedial provisions (but consistently with normal rules of appellate practice), Congress separated the jurisdictional provisions into two subsections. Congress's decision to do so, and to provide separately for notices of appeal by defendants and notices of appeal by the gov-

ernment, should be given effect. See *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 515 n.11 (2006) (recognizing that federal-court jurisdiction can be limited to specific parties and particular types of claims).

Although amicus suggests otherwise (Br. 14-15), the language in 18 U.S.C. 3742(f)(2) (Supp. V 2005) is not to the contrary. In subsection (f)(2), as in the other remedial provisions, Congress included in one provision the remedies for appeals by either the defendant or the government. The fact that subsection (f)(2) provides for varying remedies depending on whether the appeal was filed under subsection (a) or under subsection (b) reflects nothing more than that the claims in subsections (a)(3) and (b)(3) are, as amicus recognizes (Br. 13 n.6), mirror images of one another. In other words, the "imposed in violation of law" and "incorrect application of the sentencing guidelines" claims are worded identically and have the same scope in subsections (a) and (b), and therefore have the same remedy in subsection (f)(1). Compare 18 U.S.C. 3742(a) and (b) with 18 U.S.C. 3742(f)(1) (Supp. V 2005). For sentences outside the Guidelines, however, the types of claims available to the parties in fact differ. For example, for sentences outside the Guidelines range, a defendant can appeal an upward departure as excessive, but the government cannot appeal that same upward departure as insufficient. Compare 18 U.S.C. 3742(a)(3) with 18 U.S.C. 3742(b)(3). The remedy provision is therefore worded differently. 18 U.S.C. 3472(f)(2) (Supp. V 2005). But to read more into subsection (f)(2), as amicus does, would make little sense. As a policy matter, it is hard to imagine why Congress would provide for "an incorrect application of the sentencing guidelines" to be corrected under subsection (f)(1) even if the party harmed by the error did not

file its own notice of appeal, but would have required each party to file a notice of appeal for departure errors under subsection (f)(2).

Amicus relies (Br. 12-13) on the fact that two earlier and more limited sentencing-appeal provisions expressly provided that a court of appeals could not increase a defendant's sentence absent the government's appeal of the sentence. See U.S. Br. 15 n.5, 20 n.9. He concludes (Br. 12-13) that Congress intentionally abrogated that prohibition by failing to include similar "limiting language" in Section 3742 and instead mandated the review and correction of illegal sentences. But those earlier statutes also expressly provided that any appeal by the government of a sentence should be "deemed the taking of a review of the sentence and an appeal of the conviction by the defendant."[3] It therefore made sense for Congress to clarify that the opposite "deeming" rule did not exist. Section 3742 contains no express "deeming" language and Congress thus had no need to clarify that a defendant's appeal did not expose the defendant to an increased sentence when the government did not appeal. Amicus would attribute to Congress the intent that any appeal by the government *or* the defendant would be deemed to be an appeal by the other as well. He provides no support, however, for such an unusual appellate regime.

Party-specific jurisdictional provisions like the separate provisions in Section 3742(a) and (b) are not un-

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[3] Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1001(a), 84 Stat. 950 (enacting 18 U.S.C. 3575 and 3576 (1970)), repealed by Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, § 212(2), 98 Stat. 1987; Controlled Substances Act, Pub. L. No. 91-513, Tit. II, § 409(h), 84 Stat. 1269 (21 U.S.C. 849(h) (1970)), repealed by SRA § 219, 98 Stat. 2027.

known in criminal law. See U.S. Br. 21-22 (discussing 18 U.S.C. 3731 (2000 & Supp. V 2005), which provides for government appeals, *inter alia*, of dismissals of indictments, new trials, and suppression rulings, but provides no jurisdiction for a defendant's interlocutory appeal). Amicus dismisses the analogy to Section 3731 on the ground that Section 3742, unlike Section 3731, "allows both defendants and the government to appeal." Amicus Br. 15 n.7. But the fact that Section 3742 *permits* either party to appeal does not mean that one party's decision to appeal vests the court of appeals with jurisdiction over appeals that the other party could have brought, but did not. Indeed, subsections (a) and (b) are structured just like Section 3731 in the relevant sense, in that just as Section 3731 specifies that it allows for "Appeal by United States," subsection (a) of Section 3742 allows for "Appeal by a Defendant" and subsection (b) allows for "Appeal by the Government." Compare 18 U.S.C. 3731 (2000 & Supp. V 2005) with 18 U.S.C. 3742(a) and (b).

C. Section 3742(b)'s Approval Provision Bolsters The Conclusion That The Government Must File Its Own Appeal

As the government explained, Congress conditioned the prosecution of a sentencing appeal on the approval of the Attorney General, the Solicitor General, or a designated deputy solicitor general, and a defendant's decision to appeal does not do service for the government's determination on when to invoke appellate resources. U.S. Br. 19-20. Amicus asserts (Br. 22) that, once a defendant challenges his sentence on appeal, the absence of high-level Justice Department approval to challenge a sentencing error is "irrelevant." And he suggests (*id.* at 23-24) that concluding otherwise is tantamount to

allowing the government to stipulate to the governing law, or requiring the court of appeals to ignore the law on an issue within its cognizance. But the jurisdictional scheme in Section 3742 does not speak to the applicable law; rather, it speaks to *who* decides whether to bring an issue before the court of appeals in the first instance. Cf. *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984) ("While the Executive Branch must of course defer to the Judicial Branch for final resolution of questions of * * * law, the former nonetheless controls the progress of Government litigation through the federal courts.").

For sentencing errors that aggrieve the government, Section 3742(b) expressly answers that question. Congress required that one of only several specified high-ranking Department of Justice officials *personally* approve each and every sentencing appeal the government presses. 18 U.S.C. 3742(b). While other provisions of the United States Code place restrictions on the government's litigating prerogatives, few contain a comparably stringent combination of personal and case-by-case approval.[4] That this special provision arises in the context of government sentencing appeals is consistent with the important role that prosecutorial discretion plays in the criminal justice system. Such exercises of prosecutorial discretion mean that courts routinely consider cases in

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[4] See, *e.g.*, 18 U.S.C. 3731 (2000 & Supp. V 2005) (requiring case-by-case certification for interlocutory government appeals, but only by "the United States attorney"); 28 U.S.C. 515(a) (requiring Attorney General to "specifically direct[]" who may conduct legal proceedings on behalf of the United States, but not on a case-by-case basis); 28 U.S.C. 519 (requiring all United States litigation to be supervised by the Attorney General, but neither personally nor on a case-by-case basis); cf. 28 U.S.C. 510 (permitting Attorney General to delegate such authority "as he considers appropriate").

which the legal and factual issues are circumscribed by the government's decisions. In this context, Congress expressly mandated that the balancing of the government's competing interests and the decision to draw upon limited appellate resources be left in the hands of the Executive Branch. The happenstance of a defendant's appeal on other sentencing issues should not allow (much less require) courts of appeals to arrogate that decision to themselves.

The required authorization governs the conduct of litigation by the Executive Branch; proof of authorization is therefore not a prerequisite to the courts' exercise of jurisdiction over a government sentencing appeal.[5] Nevertheless, the requirement of Executive Branch approval that Congress imposed on government sentencing appeals demonstrates that Congress did not envision appellate review of sentencing errors that aggrieve the government absent a considered determination *by the government* that the error warranted an appeal. Amicus's position would thwart that process.

Nor is amicus correct to suggest that the concerns underlying the approval provision "have no relevance once the defendant has independently chosen to challenge his sentence's legality." Amicus Br. 25. Amicus's argument seems based on the assumption that the interests of the government (and, by extension, the public) will never be harmed by *sua sponte* appellate consideration of sentencing issues that the government could have appealed, but did not. But as the government explained (U.S. Br. 42-44), a myriad of factors informs a decision to appeal a sentencing error—including the

[5] See, *e.g.*, *United States* v. *Ruiz-Alonso*, 397 F.3d 815, 818 (9th Cir. 2005); *United States* v. *Zamudio*, 314 F.3d 517, 520 (10th Cir. 2002); *United States* v. *Gonzalez*, 970 F.2d 1095, 1102 (2d Cir. 1992).

incremental benefit, the burden of resentencing, and the possibility that the case is an unfavorable vehicle for developing the law. Those concerns transcend an appellate panel's perception that a particular error is plain.

D. Historical Limitations Support The Conclusion That The Government Must File Its Own Notice Of Appeal

Any doubt about the scope of Section 3742 should be resolved by considering the historical limitations on government appeals in criminal cases. See U.S. Br. 13-15. This Court has repeatedly stated that "the United States has no right of appeal in a criminal case, absent explicit statutory authority." *United States* v. *Scott*, 437 U.S. 82, 84-85 (1978); see, *e.g.*, *United States* v. *Sanges*, 144 U.S. 310, 323 (1892). Even when Congress has "plainly provided" appellate jurisdiction over government claims in criminal cases, this Court has applied "a close restriction of its uses to those authorized by the statute." *Carroll* v. *United States*, 354 U.S. 394, 400 (1957).

Rather than address this principle, amicus asserts (Br. 21) that Congress's passage of Section 3742 makes "reliance on standard appellate doctrines that shy away from reviewing judgments not challenged by those they harm and on more specific rules disfavoring challenges to sentences * * * wholly misplaced." That might be a fair point if Section 3742 made explicit the particular radical change in appellate practice that amicus ascribes to it. But in the absence of such explicit direction, general statements that Congress's purpose was to expand the scope of appellate review of sentences and to achieve greater uniformity in sentencing (see Amicus Br. 16-21) fall far short of supporting the innovation in appellate practice that amicus advocates.

Although Section 3742 did expand appellate jurisdiction, Section 3742(a) and (b) are unquestionably more limited in scope than general appellate jurisdictional provisions. See, *e.g.*, 28 U.S.C. 1291; see also U.S. Br. 16. Most notably, Congress did not permit the aggrieved party to appeal every sentencing error. *Ruiz*, 536 U.S. at 627. That limitation makes it implausible to suggest that "[t]he only way" to effectuate Congress's objectives is by "obligating appellate courts" to determine whether the district court committed any sentencing errors that *could* have been appealed "regardless of whether the determination helps or hurts the appealing party." Amicus Br. 21. Interpreting Section 3742 to require appellate courts *sua sponte* to correct errors harming the government once the defendant has appealed is especially implausible because giving the government the right to appeal was itself controversial. See, *e.g.*, S. Rep. No. 225, 98th Cong., 1st Sess. 65 (1983) ("Another frequent criticism leveled at the bill is that it should not provide the government with the power to appeal a sentence."); *id.* at 151. Amicus's proposal would also contradict the Senate Report's concern that a system in which a sentence could be increased as a result of a defendant's appeal would "place[] an undesirable strain on the defendant's right to seek review." *Id.* at 151 n.370. Under the government's interpretation, a defendant faced with a government cross-appeal is on early notice of the risk of a harsher sentence and can decide whether to continue his appeal or to negotiate a dismissal of the competing appeals; under amicus's interpretation, the defendant would appeal at his own peril, with no notice of a potential sentencing increase until the court of appeals issues its opinion.

Contrary to amicus's suggestion (Br. 31-32), a jurisdictional requirement that each party file its own notice of a sentencing appeal does not create procedural complexity or needless paperwork. In the sentencing context, the government and the defendant can easily distinguish between "seeking to alter the judgment in [his] favor," which requires a notice of appeal, and "defending a judgment on new grounds," which does not. *Id.* at 32 (citation omitted). Nor does the jurisdictional bar unfairly preclude relief for a defendant who failed to appeal, but whose sentence is obviously "unlawfully long." NACDL Amicus Br. 16; Amicus Br. 33. A court of appeals need not *sua sponte* grant such relief because a criminal defendant may be able to obtain relief under 28 U.S.C. 2255, which allows, *inter alia*, a claim "that the sentence was imposed in violation of * * * laws of the United States" or "that the sentence was in excess of the maximum authorized by law." See *Carlisle* v. *United States*, 517 U.S. 416, 436 (1996) (Ginsburg, J., concurring) (noting that "[i]t bears emphasis * * * that the Government recognizes legal avenues still open to [the defendant] to challenge the sufficiency of the evidence to warrant his conviction," including "a postconviction motion, under 28 U.S.C. § 2255"); see also *Glover* v. *United States*, 531 U.S. 198 (2001) (additional jail time constitutes prejudice in a challenge under Section 2255 to the effectiveness of counsel's litigation of sentencing claims).

II. EVEN IF NOT STRICTLY JURISDICTIONAL, THE FILING OF A TIMELY NOTICE OF CROSS-APPEAL IS A MANDATORY CLAIM-PROCESSING RULE THAT MUST BE ENFORCED WHEN PROPERLY INVOKED

A. Courts Have A Duty To Enforce The Cross-Appeal Requirement When It Is Properly Invoked

1. Amicus relies (see Br. 29) on *Langnes* v. *Green*, 282 U.S. 531 (1931), to suggest that the cross-appeal requirement is merely a "rule of practice" that may be discarded whenever the court "deems there is good reason to do so." *Id.* at 538. But this Court's subsequent unanimous decision in *Neztsosie* emphatically endorsed a strict application of the cross-appeal requirement. *Neztsosie*, 526 U.S. at 480; see U.S. Br. 29-37. The statement in *Langnes* on which amicus relies is only dicta—and dicta that has been undercut by this Court's subsequent decisions. See *Morley Constr. Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 187 (1937) (holding that a court of appeals lacks the "power * * * to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal"); *Neztsosie*, 526 U.S. at 480 n.3 (suggesting that this Court's cross-petition requirement—which was the subject of the dictum in *Langnes*—is not one subject to exception) (citing *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 365 n.8 (1994)).

Amicus argues that *Morley*'s reference to a lack of "power" does not suggest that the cross-appeal requirement is "an unqualified bound on the jurisdiction of the courts of appeals." Amicus Br. 30 (quoting *Neztsosie*, 526 U.S. at 480). *Morley*, however, did not treat the cross-appeal requirement as merely a "flexible 'rule of practice'" that can be dispensed with for any "good rea-

son." See Amicus Br. 29-30 (citation omitted). This Court similarly used the terms "power" and "authority" in *Carlisle* in holding that a district court lacked authority to grant a postverdict motion for judgment of acquittal filed one day outside the time limit prescribed by the Federal Rules. See *Carlisle*, 517 U.S. at 421-422, 433. While this Court has since explained that the holding in *Carlisle* was not a "jurisdictional" one, the Court has made clear that such non-jurisdictional claim-processing rules are mandatory and inflexible when properly invoked. See *Eberhart* v. *United States*, 546 U.S. 12, 18-19 (2005) (per curiam); *Kontrick* v. *Ryan*, 540 U.S. 443, 454-456 (2004).

Similarly, the relevant timing deadlines for criminal sentencing appeals do not have jurisdictional significance (see Amicus Br. 34-36; U.S. Br. 24-26), but those rigid time restrictions nevertheless foreclosed the court of appeals' action here. See U.S. Br. 33-37. Parties may cross-appeal after the deadline for filing a notice of appeal. See, *e.g.*, Fed. R. App. P. 4(b)(1)(A)(ii) and (B)(ii). But that additional period for filing a cross-appeal has a definite limit, including a restriction on the court's authority to provide extensions. Fed. R. App. P. 4(b)(4), 26(b)(1). Under this Court's cases, these time limits must be enforced when properly invoked. They should not be circumvented by *sua sponte* action of the court. See, *e.g.*, *Carlisle*, *supra*. A rule permitting such action could only give parties who missed the cross-appeal deadline an incentive to hint at claims of error in hopes that the court of appeals would correct the error on its own.

2. Amicus asserts (Br. 30) that "[v]arious circuits have adhered to the rule-of-practice position for decades," but even if that were true, *Neztsosie* viewed the

matter otherwise. While *Neztsosie* did not resolve the circuit conflict over the "theoretical status" of the rule as "strictly jurisdictional" or not, the Court made clear that the "firmly entrenched rule" was subject to few, if any, exceptions. 526 U.S. at 480 & n.2. And, although amicus cites post-*Neztsosie* courts of appeals' decisions, see Amicus Br. 30, none of those decisions discusses how a "flexible rule of practice" approach can be squared with *Neztsosie*. The one decision that, despite citing *Neztsosie*, relaxed the rule did so because the law had changed after the time for cross-appeal had lapsed. *Lee* v. *Burlington N. Santa Fe Ry.*, 245 F.3d 1102, 1107 (9th Cir. 2001). If such an exception were justified, it would hardly mean that the cross-appeal rule disappears whenever the court sees plain error under existing law.[6]

B. There Is No Warrant For Creating An Exception To The Cross-Appeal Requirement In This Case

Even assuming that a timely cross-appeal is not strictly jurisdictional and that sufficiently extraordinary circumstances might justify an exception to that re-

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[6] *Spann* v. *Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir.) (R.B. Ginsburg, J.), cert. denied, 498 U.S. 980 (1990), upon which amicus also relies (Br. 36 n.14), predates *Neztsosie*, and in any event is very different from the situation here. In that case, the district court had failed to enter its judgment in a separate document as required by the Federal Rules, and there was thus uncertainty as to whether the appellants' appeal was premature and whether any notice of cross-appeal was even yet required. *Spann*, 899 F.2d at 31-33. In that context, the D.C. Circuit allowed both the appellants' appeal and the appellee's cross-appeal (despite the lack of a notice), *ibid.*, concluding that neither appellants nor the appellee "should be trapped by the confusion that existed over the timing of the [appellants'] appeal." *Id.* at 33.

quirement, no sound basis supports an exception in this case. See U.S. Br. 39-47.

1. *Langnes*. Again invoking the dicta from *Langnes*, amicus suggests that "[t]he relevant question is * * * whether the court of appeals had 'good reason' to deviate from the [cross-appeal] rule in this case." Amicus Br. 36 (quoting *Langnes*, 282 U.S. at 538). Perhaps recognizing that a "good reason" standard does not hold great promise as a means to provide parties notice when a cross-appeal is necessary, amicus suggests that the Court consider the factors used by the Ninth Circuit in deciding whether a particular reason is "good." See Amicus Br. 36 & n.14 (citing *Lee*, 245 F.3d at 1107 & n.3). Even if the Court were to adopt such an amorphous standard—a standard that, as explained, is at least in significant tension with *Neztsosie* and this Court's other precedent—those factors would not justify an exception here.

Only the first factor of the Ninth Circuit's test—the interrelatedness of the sentencing issues on appeal with the issue that was not cross-appealed—even arguably cuts in favor of excusing the lack of a cross-appeal here. The second and third factors—whether the district court's ruling should have put the government on notice of the need to cross-appeal and whether a notice of cross-appeal was filed late or not at all—strongly counsel against reaching the error. As for the fourth factor, there is good reason to believe that petitioner was prejudiced by the absence of a cross-appeal, as he might well have negotiated mutual dismissals of the competing appeals if the government had sought to increase his sentence. See U.S. Br. 37. Amicus seems to assume (Br. 36-37) that petitioner should have realized that his appeal alone would require (or at least empower) the court

of appeals to increase his sentence, despite the lack of a government cross-appeal. Nothing in this Court's case law, however, suggested such a consequence, and much suggested the opposite.

Amicus also asserts that enforcing a mandatory consecutive sentence under 18 U.S.C. 924(c) "surely qualifies as 'good reason' to dispense with the cross-appeal requirement." Amicus Br. 37. Section 924(c) indeed imposes a mandatory obligation on the district court. But that mandatory provision co-exists with the government's prosecutorial discretion to decide whether to press counts that carry mandatory minimums. There is no reason to think a radically different situation exists with respect to appeal decisions. Indeed, the very nature of the cross-appeal requirement (and all mandatory claim-processing rules) presupposes that some true errors, even errors about substantial issues, will go uncorrected. See, *e.g.*, *Carlisle*, 517 U.S. at 421 (noting that an untimely motion could not be granted even in the face of "a claim of legal innocence," in a case where the district court had granted a belated motion for judgment of acquittal). The adversary system presupposes that parties can (and should) take the steps that they believe best protect their interests. Courts then adjudicate those claims. The appellate process in the criminal justice system is not exempt from that basic background principle.

2. *Section 3742*. Amicus again relies on the mandatory language of the standard-of-review and remedial provisions in Section 3742, contending (Br. 39) that, even in the absence of a cross-appeal, "section 3742 required the court of appeals to determine the legality of Petitioner's sentence once he filed an appeal under section 3742(a)(1), and to remand for resentencing." But

even assuming that a notice of appeal by the government is not a *jurisdictional* prerequisite to appellate consideration of sentencing errors that aggrieve the government, see pp. 3-15, *supra*, Section 3472 should not be read to create a blanket exception to the cross-appeal requirement in all sentencing cases.

The cross-appeal requirement was well-established when Congress enacted Section 3742 in 1984. As this Court observed in *Neztsosie*, the Court had recognized the requirement as early as 1796 and had described the rule as "inveterate and certain" in 1937. See 526 U.S. at 479 (citing *McDonough* v. *Dannery*, 3 U.S. (3 Dall.) 188, 198 (1796), and *Morley*, 300 U.S. at 191). Congress enacted Section 3742 with presumed awareness of that background understanding, including that this Court had never recognized an exception to the rule. See, *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979). Nothing in Section 3742 remotely suggests that its remedial provisions overrode that well-established rule and allowed—much less required—courts of appeals to enlarge judgments in favor of an appellee who did not cross-appeal.

To the contrary, Congress entrusted to several high-ranking Justice Department officials, not the courts, the decision whether sentencing errors that aggrieve the government should be pursued on appeal. See 18 U.S.C. 3742(b). That delegation strongly supports the conclusion that courts should not address a sentencing error that aggrieves the government *sua sponte*, when no Justice Department official authorized an appeal. Some courts have even dismissed a government sentencing appeal in the absence of "evidence that the Government

ever received § 3742 approval for th[e] appeal."[7] But no court, when faced with a motion to dismiss a government cross-appeal, has suggested that the Solicitor General's approval is "irrelevant" so long as the defendant has appealed his sentence.[8]

3. a. *Section 2106*. Amicus alternatively relies (Br. 39-43) on the supervisory power of courts of appeals to correct judgments under 28 U.S.C. 2106. But Section 2106 is not limited to plain errors, much less to sentencing errors in criminal cases—it applies in all cases, civil and criminal, and to all errors. 28 U.S.C. 2106 (stating that an appellate court "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a

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[7] *United States* v. *Thibodeaux*, 211 F.3d 910, 912 (5th Cir. 2000) (acting after the defendant's brief claimed a lack of authorization); *United States* v. *Ajmal*, No. 96-1405, 1997 WL 92935, at *1 (2d Cir. Mar. 5, 1997) (dismissing cross-appeal after government conceded it was not authorized); *United States* v. *Riggins*, No. 95-2181, 1995 WL 610333, at *2 (8th Cir. Oct. 18, 1995) (same); see also *United States* v. *Smith*, 910 F.2d 326, 328 (6th Cir. 1990) (per curiam) (imposing under its supervisory powers a requirement that the government file written proof of authorization with the court).

[8] *United States* v. *Boone*, No. 91-5585, 1993 WL 192513 (4th Cir. June 8, 1993), upon which amicus relies (Br. 12), is not to the contrary. There, the court dismissed the government's cross-appeal on defendant's motion when it came to light at oral argument that the cross-appeal, which alleged failure to comply with a statutory minimum, had not been authorized under Section 3742(b). *Id.* at *3. Although the court observed that "[i]n view of these developments at oral argument [defendant] withdrew his appeal on the sentencing issue so as not to expose himself to yet a longer sentence than that which he was given," *ibid.*, the implicit suggestion that he was so exposed was at most dicta. The more relevant lesson from *Boone* is that a defendant who realizes that he risks a sentencing increase on appeal may agree to forgo his own appeal if the government will dismiss its cross-appeal. Amicus's approach deprives defendants of that opportunity.

court lawfully brought before it for review"). Amicus's construction of Section 2106 would swallow the cross-appeal rule, a conclusion that is irreconcilable with *Neztsosie*; otherwise, Section 2106 would have been a basis to affirm the court of appeals in *Neztsosie*.

This Court has not read Section 2106 as trumping all rules of practice and procedure. To the contrary, the Court has recognized that "the broad grant of authority to the Courts of Appeals in § 2106 must be exercised consistent with the requirements of the Federal Rules of Civil Procedure as interpreted by this Court." *Unitherm Food Sys., Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394, 402 n.4 (2006). Nothing justifies a different conclusion with respect to the centuries-old cross-appeal requirement or the Federal Rules of Appellate Procedure governing the time deadlines for such cross-appeals.[9] Indeed, in the absence of a cross-appeal, an issue is arguably not "lawfully brought" before the court of appeals within the meaning of Section 2106. See *United States* v. *Barragan-Mendoza,* 174 F.3d 1024, 1030 (9th Cir. 1999) (on defendant's appeal from ruling on government's Rule 35 motion, refusing government's suggestion of a remand under 28 U.S.C. 2106 for correction of original "illegal" sentence because the government had neither appealed the original sentence on direct appeal

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[9] The cases on which amicus relies (Br. 40-41) involve defendants who themselves sought review; the appellate courts' recognition of errors harming those defendants does not support an exception to the cross-appeal rule. *Yates* v. *United States*, 356 U.S. 363, 366 (1958) (per curiam); *Tinder* v. *United States*, 345 U.S. 565, 566 (1953); *United States* v. *Wiley*, 278 F.2d 500, 503 (7th Cir. 1960) (defendant appealed on sentencing issue); *United States* v. *Ahuja*, 936 F.2d 85, 85 (2d Cir. 1991) (same); *Millich* v. *United States*, 282 F. 604 (9th Cir. 1922) (defendants appealed on other grounds).

nor filed a cross-appeal on the Rule 35 appeal); *United States* v. *Whaley*, 148 F.3d 205, 207 (2d Cir. 1998) (per curiam) (same).

b. *Sentencing Package Cases.* Most courts of appeals have recognized that, if a defendant successfully attacks some, but not all, of the counts of conviction on a multi-count indictment, the court of appeals may vacate the entire sentence on all counts so that the district court can consider the overall consequences for its sentencing plan. U.S. Br. 23 n.11. But those cases do not support amicus's position here. See Amicus Br. 40-41.

In the sentencing package cases, the defendant, by asking to have some or all of his convictions or sentence set aside, has implicated the entire sentencing package, which opens up that entire package for reconsideration on remand, if the defendant succeeds on appeal. See, *e.g.*, *United States* v. *Busic*, 639 F.2d 940, 947 n.10 (3d Cir.) ("When a defendant challenges one of several interdependent sentences, he, in effect, challenges the entire sentencing plan."), cert. denied, 452 U.S. 918 (1981); *United States* v. *Pimienta-Redondo*, 874 F.2d 9, 16 (1st Cir.) (en banc), cert. denied, 493 U.S. 890 (1989); *United States* v. *Shue*, 825 F.2d 1111, 1115 (7th Cir.), cert. denied, 484 U.S. 956 (1987). Any other approach would provide defendants an unintended windfall merely because of the way the district court structured the initial sentence. See *Busic*, 639 F.2d at 950 (citation omitted) ("'To hold otherwise would allow the guilty to escape punishment through a legal accident.'"). Here, in contrast, petitioner was unsuccessful on his appellate issues. Affirming the judgment without reaching out to address issues that would permit a sentencing increase would not give petitioner an unjustified windfall.

4. *Rule 52(b)*. As the government explained in its opening brief (U.S. Br. 39-47), reading Rule 52(b) to authorize relief in the absence of a cross-appeal would create a blanket plain-error exception to the cross-appeal requirement in all criminal cases. Although it is true (Amicus Br. 42, 51) that this Court has corrected plain errors that were not raised by defendants, it has done so only in cases in which the defendant had himself petitioned the Court for review on other grounds. See *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam); *Reynolds* v. *United States*, 98 U.S. 145, 168-169 (1878) (note on rehearing). Where the aggrieved party has filed a notice of appeal (or a petition for a writ of certiorari), his adversary has been placed on notice that he seeks to have the judgment altered in his favor. Amicus cites no case from this Court that has expanded the judgment in favor of a party that neither petitioned nor cross-petitioned, and the government is aware of none. See *Neztsosie*, 526 U.S. at 480. At most, this Court has suggested "in passing" that it *might* be appropriate to excuse the cross-appeal requirement with respect to a constitutional issue in a criminal case. *Id.* at 480 n.3. That is a far cry from excusing the cross-appeal requirement whenever there is plain error, and it is not comparable to reaching out to do so here in the absence of a cross-appeal by the government.

It is correct to observe that the cross-appeal requirement will inevitably mean that certain errors not recognized until after briefing, or on the eve of oral argument, will go unremedied. Amicus Br. 51-52. That, however, is the result of any mandatory claim-processing rule and the principle of finality; there inevitably comes a point in the process where errors can no longer be raised.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed in part, and the case remanded for re-imposition of the original sentence.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

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