No. 10-7387

IN THE
Supreme Court of the United States

MONROE ACE SETSER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW BY INVITATION OF THE COURT

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QUESTIONS PRESENTED

1. A federal sentence may be imposed before, but served after, an impending state sentence. The federal sentence is necessarily either concurrent with the state sentence (if the federal sentence credits some state-prison time) or consecutive to the state sentence (if no such credit is given). May the concurrent-or-consecutive sentencing determination be made by the federal court at the time of sentencing, or did Congress transfer that sentencing authority exclusively to the Executive Branch, and specifically to the Federal Bureau of Prisons?

2. The district court, when sentencing petitioner Setser, knew that state proceedings against him were already underway. Setser had been indicted for a Texas state offense based upon the same conduct that led to the federal conviction, and the State of Texas had applied to revoke Setser's probation as to a prior conviction. The district court therefore sentenced Setser to serve the federal sentence concurrently with the state sentence for the offense which offended both sovereigns. It also ordered that Setser's federal sentence run consecutively to any state sentence for the revocation of his state probation. Was the first-imposed federal sentence unreasonable because the state court thereafter ordered the state terms to run concurrently with each other?

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BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW BY INVITATION OF THE COURT

INTEREST OF *AMICUS CURIAE*

This brief is submitted by Evan A. Young, *amicus curiae* in support of the judgment below, by invitation of the Court. See 564 U.S. ___ (order of June 15, 2011).[1]

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[1] *Amicus* affirms, under this Court's Rule 37.6, that no counsel for a party authored any part of this brief, and no person other than *amicus* and his co-counsel have made a monetary contribution to fund its preparation or submission.

STATUTORY PROVISION INVOLVED

The principal statute involved is 18 U.S.C. §3584,[2] which provides:

Multiple sentences of imprisonment

(a) IMPOSITION OF CONCURRENT OR CONSECUTIVE TERMS.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) FACTORS TO BE CONSIDERED IN IMPOSING CONCURRENT OR CONSECUTIVE TERMS.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) TREATMENT OF MULTIPLE SENTENCE AS AN AGGREGATE.—Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

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[2] All statutory references are to Title 18 of the United States Code unless otherwise indicated.

STATEMENT

The decision in this case will allocate authority—either to judges or jailers—to determine whether a federal sentence will be served concurrently with or consecutively to an impending, but as-yet-unimposed, state sentence. The allocation will govern cases when a defendant is sentenced in federal court *first*, but incarcerated in federal prison *last*, with state sentencing and imprisonment fitting between these "federal bookends." The decision generally will affect sentencing authority only in cases that, like Setser's, proceed along six specific stages:

(1) the defendant begins in state custody;

(2) he is subsequently "borrowed" by federal authorities pursuant to a writ of habeas corpus ad prosequendum;

(3) he is convicted and sentenced in federal court;

(4) he is returned to state custody, and is eventually sentenced in the state court;

(5) he serves his state term of imprisonment; and finally

(6) he is transferred to federal custody for federal imprisonment.

Under such circumstances, the defendant's federal sentence cannot avoid being consecutive to or concurrent with state imprisonment. The only questions are *who* will decide, and *when*. The judgment below permits the district judge, subject to appellate review for reasonableness, to make that sentencing determination at stage 3. J.A. 56-57. Setser and the Government argue that Congress transferred that authority to the jailer—the Federal Bureau of Prisons—to make that determination at stage 5 or 6.[3]

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[3] Only those cases following this sequence are implicated because a court's sentence governs jailers of that court's sovereign. Thus, if

I. SETSER'S SENTENCES

Central to this case is Setser's commission, while on probation for a prior state conviction, of a new crime that offended both sovereigns. J.A. 55. Proceedings against Setser in the state court were ongoing when federal authorities "borrowed" him pursuant to a writ of habeas corpus ad prosequendum. J.A. 70. He pleaded guilty to federal charges and was sentenced to 151 months' imprisonment. J.A. 14-16. Because he remained in primary state custody, he was not incarcerated by BOP, but was returned to the State, with the federal sentence to be served following any state sentences. See J.A. 55-56.

The federal court, citing the state-court cases by docket number, ordered that the federal sentence "be served concurrent with" any state-prison sentence for the drug offense against both sovereigns. It also ordered that Setser receive no such credit for the prior, unrelated offense, ordering that the federal sentence "be served consecutive with" any state sentence in that case. J.A. 16, 25.

Back in Texas court, Setser's probation was revoked. J.A. 38. He had originally been sentenced to a five-year prison term for the underlying offense; that term had not been discharged, but probated, J.A. 35-36, and the court ordered him to serve it. J.A. 38. Setser received a ten-year sentence for the drug offense that was also the basis for the federal prosecution. J.A. 29-30. The court ordered both state sentences to run concurrently. J.A. 30, 36. Setser was imprisoned and paroled after two and a

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federal sentencing *and* federal imprisonment precede state imprisonment, a federal concurrent-or-consecutive order has no effect—the state prisons will credit (or not) federal time based on state-court orders. Nor are multiple federal sentences implicated here. See Part II.C.2, *infra*.

half years—before the maximum time for *either* state sentence had run. J.A. 56.

II. THE JUDGMENT BELOW

The Fifth Circuit affirmed. J.A. 54-64. Circuit precedent authorized anticipatory sentencing, whereby a district court may order the federal sentence to run concurrently with or consecutive to an impending state sentence, subject to appellate review for reasonableness. The court found Setser's sentence to be reasonable and unambiguous. J.A. 56-64. "Any ambiguity in the district court's sentence was not introduced until after the state court ordered Setser's two state sentences to run concurrently." J.A. 61. Setser's claim merely demonstrated "the very practical problems that arise in carrying out overlapping state and federal sentences in a dual sovereignty." *Ibid.* (internal citation omitted). Finally, given that the sentence was legal, Setser's avenue for enforcing any claimed right was to pursue administrative relief with BOP and then, if necessary, judicial review. J.A. 62.

Despite the district court's order that he receive credit for time served in state prison attributable to the common act that was punished by both sovereigns, Setser has not sought such credit, J.A. 63; U.S. Br. 36 n.21, and BOP has given him none. J.A. 56, 62-63.

SUMMARY OF ARGUMENT

Determining the length of a criminal sentence is the province of the judge, not the jailer. Setser and the Government would invert that structure. Their reasons for transferring judicial authority to the Executive are textually and historically unsupported, and their proposed interpretation poses grave practical and constitutional concerns. This Court therefore should affirm the judgment below.

The court of appeals properly upheld the district judge's discretion—subject to appellate review for rea-

sonableness—to make a federal sentence run concurrently or consecutively to an impending, but as-yet-unimposed, state sentence. The opposite outcome—federal-court silence—leaves the defendant in suspense and the state court in ignorance until BOP decides whether the state sentence counts toward the federal sentence.

Federal-court silence is never desirable. If mandated, it would deprive defendants of the ability to make their case before judges, with the benefit of counsel, in open court, and with direct appellate review. When judges meaningfully can apply the sentencing factors of § 3553(a) to determine the concurrent-or-consecutive question, doing so is salutary. When they cannot, doing so is by definition unreasonable, and therefore reversible. No legal or practical reason justifies silencing judges in *all* anticipatory cases simply because in *some* they cannot meaningfully resolve the issue.

I. The proposed surrender of power to the Executive is not compelled by § 3584(a) or any other statute, and is unlikely to have been Congress's intent. Under the common law, judges have had longstanding sentencing authority, and Congress did not withdraw it. Section 3584(a) provides default rules for some, but not all, consecutive-or-concurrent decisions. It is not the exclusive grant of such sentencing authority, nor does it require judicial silence in situations beyond its scope. When federal incarceration must follow a state term, but the federal sentence is imposed first, a judicial concurrent-or-consecutive determination is all the more important precisely because no § 3584(a) default rule is available.

The legislative history, moreover, demonstrates a congressional desire for judicial *guidance*, not silence, in sentencing. Indeed, the legislative history reveals considerable congressional hostility to previous executive encroachments on judicial authority.

II. Common sense, policy, practice, and federalism also point to leaving judicial discretion with judges. Setser and the Government hypothesize various outlandish anticipatory sentences that (if some court ever were to impose them) would be an abuse of discretion regardless of the proper interpretation of §3584(a). But occasional judicial excess, as in *any* sentencing context, is solved through appeals, not the wholesale abnegation of judicial power. And many anticipatory sentences—Setser's own among them—are plainly reasonable. By making Setser's federal sentence concurrent with the state sentence for the common offense, but consecutive to the sentence for the prior state offense, the district court made clear what credit was, and was not, due to Setser. If Setser can show what state-prison time was attributable to the prior offense, he is entitled to the balance as a credit against his federal sentence.

Federalism and comity are impeded, not advanced, by silencing federal judges as to the concurrent-or-consecutive effect of a federal sentence. An anterior federal sentence tells the state court how long the defendant will spend in federal prison after finishing a state term. With that knowledge, the state court, if it so desires, may adjust its sentence to account for the impending federal sentence. Because state courts cannot dictate the effect of a federal sentence, leaving the consecutive-or-concurrent decision to the second-sentencing state judge is not a valid option when the state sentence is served first. The Sphinx-like silence demanded by Setser and the Government would leave state courts with no idea what course BOP might later take, risking the imposition of unduly long or short state terms.

III. Moreover, their interpretation is burdened by substantial separation-of-powers implications. The rule of silence they advocate would arrogate Article III power to the Executive. Sentencing is for the court, and the de-

termination of whether a sentence should be concurrent or consecutive is a historical aspect of sentencing power. BOP, by contrast, is an agency; its administrative authority to determine *where* a sentence is served does not entail power to determine that sentence's *length*.

All separation-of-powers violations threaten liberty, but limiting the due-process protections afforded by Article III judges is particularly dangerous. Citizens expect their "day in court," not their day of administrative hearing—particularly one that, as BOP's procedures acknowledge, presumes consecutive terms. BOP's claim that it welcomes judges' "advice" or "views" on the concurrent-or-consecutive question—inviting advisory opinions rather than binding sentences—exacerbates, rather than mitigates, the constitutional concern. Whether Congress *could* transfer such sentencing authority to the Executive is questionable. But this Court should not attribute any such intent to Congress when §3584(a) does not require it.

ARGUMENT

If a prisoner is subject to multiple terms of imprisonment, judicial silence as to whether those terms are consecutive or concurrent prevents certainty for prisoners, other courts, and the correctional agencies into whose custody the prisoner is placed. When reforming federal sentencing in 1984, therefore, Congress for the first time codified default rules for classifying sentences as consecutive or concurrent when judges are silent. See §3584(a). But it did not attempt to supply default rules for every eventuality. Whether a federal sentence should run concurrently or consecutively to a sentence that has not yet been imposed by another sovereign's court, for instance, involves so many variables that no single default rule would be appropriate.

Instead, Congress accounted for such cases in §3584(b), which requires judges who impose consecutive or concurrent sentences in *any* case to do so pursuant to the familiar sentencing factors of §3553(a). Thus, the federal judge's discretionary sentence will be subject to meaningful appellate review for reasonableness.

Setser and the Government would turn that sensible approach on its head. Reading §3584(a) as a "grant"—indeed, the *exclusive* source—of concurrent-or-consecutive sentencing authority, they conclude that Congress intended to silence courts in the very cases in which sound judicial discretion is *most* important: those in which no default rule is available. Instead, they say, Congress must have intended to transfer sentencing authority from the courts to BOP. Once the prisoner is returned to federal custody, BOP will undertake the quintessentially judicial task of deciding how long the sentence must be.

This is error. Section 3584(a), far from being an exclusive grant of authority, is but a substitute for judicial silence in specified contexts. The legislative history confirms as much, revealing both a desire for judicial guidance and a deep hostility to executive determinations of sentence length. Similarly, citing federalism, Setser and the Government assert that state judges can sentence effectively only if federal judges are silent—plainly wrong, since absent a judicial concurrent-or-consecutive ruling, the state judge sentences in the dark with respect to the federal sentence's length. State judges cannot determine how long a federal prisoner remains in federal prison, but by knowing how long that federal term will actually be, state judges can meaningfully affect the total punishment.

Finally, transferring sentencing authority to the Executive as proposed by Setser and the Government threatens the separation of powers. Depriving the de-

fendant of the manifold protections of open courts and direct appeals—and relegating him to administrative hearings before the same Executive that prosecuted him—threatens to encroach on individual liberty. If Congress truly intends to withdraw discretion from the courts, it can say so. It has not said so yet.

I. Federal Law Contemplates Judicial, Not Executive, Authority To Sentence Concurrently Or Consecutively

No statute mandates the elimination of judicial power that Setser and the Government propose. Congress left consecutive-or-concurrent sentencing authority where Congress found it—with the courts. Section 3584(a) merely supplies default rules for some cases when courts *choose not* to exercise that authority. Section 3584(b), by contrast, applies when courts expressly use their power to decide between consecutive or concurrent sentences, directing them to do so pursuant to § 3553(a)'s sentencing factors. Far from intending to silence the courts and transfer their power to the Executive, Congress wanted *more* judicial guidance as to concurrent-or-consecutive decisions.

A. Section 3584 does not withdraw judicial sentencing discretion in cases like Setser's

Setser and the Government insist that the "plain text" muzzles federal judges in cases like Setser's. Not only does the statute lack any words precluding this power, but the interpretation utterly ignores the historical sentencing authority of judges at the time Congress legislated. And it overlooks statutory text and structure that confirm broad judicial authority to make concurrent-or-consecutive determinations in circumstances like those present here.

1. *The statutory text does not "grant" authority, but channels discretion*

This case turns initially on how Congress allocated sentencing authority between the Judiciary and the Executive in various provisions of the Sentencing Reform Act, including §3584. Setser and the Government must convince the Court that Congress "granted" district courts authority to sentence consecutively or concurrently only in the two circumstances described in the first sentence of §3584(a)—simultaneously imposed sentences, or a sentence imposed when a prisoner is already subject to a prior term of imprisonment.

But the statute does not *read* like a grant of power to courts at all. It is phrased in the passive voice—indeed, the word "court" does not even appear in the putative power-granting first sentence. Congress routinely grants authority by identifying the recipients of that authority, then delineating their power. That is the common practice even looking just at Title 18—including in situations that, unlike diminutions of judicial authority, may not *require* such clarity. See, *e.g.*, §3555 ("court * * * may order" defendant convicted of fraud to give explanation to victims); §3573 ("court may" remit or defer payment of fine); §3582(c)(1)(A) ("court * * * may" modify imposed term of imprisonment); §3582(d) ("court * * * may include as part of the sentence an order that requires the defendant not associate or communicate with a specified person"); §3663(a)(1)(A) ("court * * * may order" certain defendants to make restitution). Not so here: "If multiple terms are imposed on a defendant * * *, the terms may run concurrently or consecutively." §3584(a).

Beyond the first sentence, which passively recognizes preexisting authority, the remaining two sentences simply create default rules to provide clarity when no court has actively exercised its discretion to choose a result.

The statute thus looks exactly like the Senate Report described it: "a *rule of construction* in the cases in which the court is silent as to whether sentences are consecutive or concurrent," enacted "to avoid litigation" over the question in the face of silence. S. Rep. No. 225, 98th Cong., 1st Sess. 127 (1983) (emphasis added) ("Report").

Setser and the Government say comparatively little about § 3584(b), but it is crucial to understanding how the statute functions as a whole. Section 3584(b) guides discretion when judges *speak* on the concurrent-or-consecutive question. It orders courts in all such cases (including Setser's) to use the § 3553(a) sentencing factors. In that way, § 3584(b) complements § 3584(a) by protecting against erroneous imposition of concurrent-or-consecutive sentences, whether resulting from a default rule or from an affirmative judicial choice.

2. *Section 3584 fits within the historical context of broad judicial discretion*

Although this Court reads statutes in light of the legal history prevailing at their inception, see, *e.g.*, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001), Setser and the Government proceed as if judicial sentencing were born in 1984. They imbue § 3584(a) with an assumption lacking a textual or historical basis—that it is *the source* of consecutive-or-concurrent sentencing authority. Congress certainly did not say this, nor does anything in the circumstances surrounding the statute's adoption suggest it.

a. "'Firmly rooted in common law is the principle that the selection of either concurrent or consecutive sentences rests within the discretion of sentencing judges.'" *Oregon* v. *Ice*, 555 U.S. 160, 168-69 (2009) (quoting A. Campbell, Law of Sentencing § 9:22, p. 425 (3d ed. 2004)). The Court in *Ice* recognized as "unfettered" the "discretion judges possessed at common law to impose consecu-

tive sentences at will," *id.* at 163, 171. Our Anglo-American legal heritage, dating from colonial times, presupposes "'[i]nherent jurisdiction to impose consecutive sentences of imprisonment in any appropriate case where the court had power to imprison.'" *Id.* at 169 n.8 (quoting *Lee* v. *Walker*, [1985] 1 Q.B. 1191, 1201 (C.A. 1984)). This was still the regime in federal court at the time Congress passed the Sentencing Reform Act. See, *e.g.*, *Tapia* v. *United States*, 131 S. Ct. 2382, 2386 (2011); *Dorszynski* v. *United States*, 418 U.S. 424, 443 (1974). Indeed, at that time, "[e]xisting law permit[ted] the imposition of either concurrent or consecutive sentences, but provide[d] the courts with *no statutory guidance* in making the choice." Report at 126 (emphasis added).

b. Federal courts' broad authority extended to cases like Setser's. A sentence ordered "to run consecutively to whatever sentence [defendant] received in connection with his pending New York robbery charge" gave the Second Circuit no pause; it stated that "[t]he right of federal judges to impose such a sentence has been recognized for many years." *Salley* v. *United States*, 786 F.2d 546, 547 (2d Cir. 1986).[4] See also, *e.g.*, *Abdul-Malik* v. *Hawk-Sawyer*, 403 F.3d 72, 75 n.2 (2d Cir. 2005) (noting circuit precedent approving pre-§3584 anticipatory sentencing); *Anderson* v. *United States*, 405 F.2d 492, 493 (10th Cir. 1969) (*per curiam*) (endorsing anticipatory sentencing); *United States ex rel. Lester* v. *Parker*, 404 F.2d 40, 41-42 (3d Cir. 1968) (approving anticipatory federal sentence); *Hall* v. *Looney*, 256 F.2d 59, 59-60 (10th Cir. 1958) (*per curiam*) (finding no defect in anticipatory

[4] The court knew of one appellate decision to the contrary—*United States* v. *Eastman*, 758 F.2d 1315 (9th Cir. 1985). The Second Circuit, with one judge dissenting, stated that if *Eastman* "enunciates a different rule, it is dictum with which we disagree." *Salley*, 786 F.2d at 548; see *id.* at 548-549 (Newman, J., dissenting).

consecutive sentence); *Smith* v. *Keohane*, 491 F. Supp. 626, 628 (W.D. Okla. 1979) (describing anticipatory sentence imposed when "at the time of federal sentencing, no state sentence had been imposed"); *United States* v. *Barnett*, 258 F. Supp. 455, 456 (M.D. Tenn. 1965) (federal sentence would run "concurrent with any additional sentence [defendant] might receive" after federal sentencing). And while it was apparently much rarer for state courts to be in the position that the federal court occupied in Setser's case, anticipatory sentencing in the dual-sovereign context was, and is, not uniquely a federal-court practice. See, *e.g.*, *State* v. *Mees*, 272 N.W.2d 61, 62, 67-68 (N.D. 1978) (holding that "a North Dakota sentence of imprisonment may be imposed upon a defendant to commence on the date of his release from federal custody when at the time of state sentencing the defendant was awaiting sentencing by a federal court"); *Thomas* v. *Drew*, No. 5:10-cv-00180, 2011 WL 867487, at *1, *9 (S.D. W. Va. Mar. 14, 2011) (describing Virginia state-court sentence imposed consecutively to anticipated federal sentence).

In other cases, courts implicitly recognized anticipatory-sentencing power. See, *e.g.*, *United States* v. *Kanton*, 362 F.2d 178, 179-180 (7th Cir. 1966) ("[a]bsent clear intent to have defendant's sentence run concurrently with any [impending] state sentence," defendant lacked any right to concurrent treatment); *Hayward* v. *Looney*, 246 F.2d 56, 57 (10th Cir. 1957) (in similar circumstances, "[t]he judgment of the Federal court contained no reference to any state sentence and no recital as to the time of commencement of the Federal sentence"); *Reed* v. *United States*, 236 F. Supp. 967, 967 (S.D. Tex. 1964) ("[s]ince this Court had not provided that the federal sentence be concurrent with any State sentence which might be imposed," motion to achieve concurrent effect was

overruled). Unexercised power is not noteworthy if such power did not actually exist.

c. Challenges to anticipatory sentences generally concerned not *authority*, but *clarity*. See, *e.g.*, *Anderson*, 405 F.2d at 493; *Parker*, 404 F.2d at 42. "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." *United States* v. *Daugherty*, 269 U.S. 360, 363 (1926). Setser quotes that sentence twice, Pet. Br. 12, 40, but not the one that follows it: "The elimination of every possible doubt cannot be demanded." *Daugherty*, *supra*, at 363. Indeed, only *more* judicial guidance, not less, could eliminate "misapprehensions by those who must execute" sentences, *ibid.*—i.e., BOP. Judges crossed the line not by sentencing anticipatorily, but by sentencing unclearly.

3. *Congress would not make such a substantial change absent a clear expression*

The historical background is dispositive because this Court requires clear statements before it will infer congressional intent to diminish judicial power. Congressional transfer of the ultimate sentencing decision from the courts to BOP is too momentous a shift to be implied from a text that does not mandate it.

Confronting another argument for a statutory reading that would "limi[t] the sentencing court's discretion," this Court held that it "will not assume Congress to have intended such a departure from well-established doctrine without a clear expression to disavow it." *Dorszynski*, 418 U.S. at 441. Accord *INS* v. *St. Cyr*, 533 U.S. 289, 298-299 & n.10 (2001); *Williams* v. *Taylor*, 529 U.S. 362, 379 (2000) ("[i]f Congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity").

Even in matters less constitutionally significant than the deprivation of liberty, the Court expects clear statements if longstanding practices are changed. See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944) ("if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain"). That is a sensible rule of construction, for "Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.

Accordingly, in *United States* v. *Wilson*, 503 U.S. 329 (1992), the lack of a clear statement, despite the presence of a plausible one, was fatal to a statutory interpretation that would allow district judges to intrude on BOP's ministerial authority to calculate pre-sentence detention credit under §3585(b). "'It is not lightly to be assumed that Congress intended to depart from a long established policy.'" *Id.* at 336 (quoting *Robertson* v. *Railroad Labor Bd.*, 268 U.S. 619, 627 (1925)). If in *Wilson* the Court vindicated *BOP* authority against a claim of *judicial* power, it should certainly vindicate the traditional authority of judges against BOP's claim here.

Congress knows that, unlike BOP, "courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority," *Ex parte United States*, 242 U.S. 27, 41-42 (1916), and hold broad "discretion * * * at common law to impose consecutive sentences at will," *Ice*, 555 U.S. at 171. It knows that no "grant" is needed for any such authority; sentencing discretion is so firmly entrenched as to be called "inherent in the courts." *Swempston* v. *United States*, 289 F.2d 166, 168 (8th Cir. 1961); *Sherman* v. *United States*, 241 F.2d 329, 336-337 (9th Cir. 1957).

Consistent with these principles, Congress acted clearly in establishing binding Sentencing Guidelines. See *United States* v. *Booker*, 543 U.S. 220, 233-234 (2005). But the mousehole of § 3584(a)'s first sentence—passively phrased, omitting reference to courts (much less BOP), and lacking the language of a limited grant of power—conceals no elephantine shift of core sentencing authority from courts to BOP.

4. *Section 3584 functions as a whole*

The interaction of text and history makes it easier to see how the statute functions as a whole. For example, the preclusion of consecutive sentences for "an attempt and another offense that was the sole objective of the attempt" is readily explained by § 3584(a)'s role as a discretion-channeling provision applicable when judges are silent. Because that default rule could have the unintentionally harsh consequence of *requiring* attempt-object consecutive sentences as a matter of law, Congress excised that narrow possibility.

But Congress did not need to statutorily preclude attempt-object consecutive sentences in cases like Setser's, which are not governed by any default rule. The lack of a default rule is sensible; given the potential disparity in knowledge about various impending cases, a single default rule could potentially cause more harm than good. Instead, in cases like Setser's, judges may exercise their preexisting authority to make concurrent-or-consecutive decisions under § 3584(b). This in turn requires recourse to the § 3553(a) factors, which inform *all* sentences and subsequent appellate review for reasonableness. *Gall* v. *United States*, 552 U.S. 38, 49-50 (2007).

What eliminates the risk of erroneously imposed anticipatory attempt-object consecutive sentences is, first, that any anticipatory sentence must be *affirmatively* undertaken by the judge, not automatically imposed by de-

fault. Second, the guarantee of sentencing pursuant to §3553(a) means that, were a judge to unreasonably impose such a sentence, the defendant could appeal based upon the sentencing factors. Congress acted sensibly by providing an attempt-object exclusion where default rules threaten harsh results.

Of course, precisely because there *is* no default rule available in cases like Setser's, judicial guidance is especially valuable. The proposed rule of silence would make this impossible. It would deprive prisoners of the chance to make their case for concurrent sentences before a judge, consigning them instead to a BOP regime stacked in favor of consecutive sentences.

B. Setser and the Government cannot sustain their "plain-text" argument

The lack of a plain statement withdrawing the Judiciary's historical sentencing authority should resolve this case. But there are still more reasons why Setser and the Government cannot make a persuasive plain-text argument.

1. *Stripped of assumptions, the plain text delineates default rules, and goes no further*

The "grant" theory falters at the start. As described above, see Part I.A.1, *supra*, all the textual clues militate against reading the first, passive sentence of §3584(a) as a "grant" of authority. For a putative grant of such significance as *all federal judicial authority to sentence concurrently or consecutively*, one might at least expect to find the word "court" in the relevant text.

The words of the first sentence instead simply stipulate that the two specified circumstances may result in either concurrent or consecutive terms. Nor does it state that the two specified circumstances are the *only* circumstances when consecutive or concurrent terms are legally permitted. Nothing in the text justifies smuggling in ex-

tra-textual and ahistorical assumptions about the allocation of power or permissible sentencing practice in other circumstances. Stripped of those assumptions, the first sentence merely delineates the realm of the default rules of the second and third sentences, and qualifies that scope by removing the possibility of consecutive sentences for "an attempt" and its "sole objective." §3584(a). Of all proposed readings of the first sentence, this is the plainest.

Setser and the Government, however, argue that §3584(a) *limits* courts' power to the two circumstances specified in the first sentence. That assertion is not only textually unsupported, but also self-defeating. The text does not distinguish between decision-makers. If the first sentence of §3584(a) contains an exclusive list of circumstances when "terms may run concurrently or consecutively," this limits not only *judges'* authority, but *BOP's* as well—it is a system-wide declaration. Indeed, the Government acknowledges that BOP is bound by §3584(a) in other respects, such as application of the default rules, U.S. Br. 35, and offers no reason why it is not bound here as well. The Government's exclusivist reading of §3584(a) would leave literally *no one* to make consecutive-or-concurrent determinations in cases like Setser's, and Setser and the Government fail to explain how BOP can. Conversely, if the two circumstances in the first sentence are *not* exclusive, then §3584(a) poses no obstacle to a consecutive-or-concurrent determination in unlisted circumstances, so long as the decision-maker can identify an independent source of authority. Federal judges certainly can do that.

2. *The first and third sentences of §3584(a) generate irresolvable ambiguity under the approach of Setser and the Government*

Nor can the exclusive-grant theory explain the ambiguity resulting from the phrasing of the first and third

sentences of §3584(a). Whereas the first sentence of §3584(a) addresses "imprisonment" that is

> imposed on a defendant who is already subject to an undischarged term of imprisonment,

and which clearly does not address Setser's case, the third sentence addresses "imprisonment" that is

> imposed at different times,

which certainly *does* embrace Setser's case. While Setser and the Government claim that the second and third sentences merely "specify what happens, in those two situations" set forth in the first sentence, U.S. Br. 9, they cannot explain how the very different words indented above mean *precisely the same thing*. Such a reading is the antithesis of "plain." Contrary to Setser's argument that Congress was just saving ink by using four words instead of fourteen,[5] Congress ordinarily repeats the same words to convey the same meaning—sometimes using definitions sections, sometimes reprinting tedious language over and over within a statute to avoid precisely the sort of ambiguity that Setser wishes away. *E.g.*, §1028 ("an identification document, authentication feature, or a false identification document"); 15 U.S.C. §2611(a) ("substance, mixture, or article").

There are other ways to account for this variation. If §3584(a) channels power, rather than "grants" it, the broader language in the third sentence may reflect Congress's understanding that courts possess inherent authority to make consecutive-or-concurrent determinations whenever sentences are "imposed at different times," §3584(a), but without imposing a default rule. See *United States* v. *Mayotte*, 249 F.3d 797, 799 (8th Cir.

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[5] "It is not necessary * * * to restate in the third sentence the restrictive clause," Setser asserts, because "[t]his limitation is implied by the placement of the sentence within the statute." Pet. Br. 19.

2001) (*per curiam*); *United States* v. *Williams*, 46 F.3d 57, 58-59 (10th Cir. 1995). Yet *even if* the variation stems from inadvertence, a channeling interpretation leads to no greater surplusage than Setser's and the Government's approach, while avoiding the many problems of their take on the statute.

Another plain-text approach is found in *Romandine* v. *United States*, 206 F.3d 731 (7th Cir. 2000). In dicta, *Romandine* accepted the premise that the first sentence of §3584(a) defined the range of cases in which *judges* could sentence consecutively or concurrently. 206 F.3d. at 737. Consequently, it concluded, courts lack such authority when sentencing anticipatorily. *Ibid.* But to give meaning to the third sentence's broader use of "imposed at different times," it concluded that the default rule *did* embrace anticipatory sentences—and with an iron grip. Judges could not modify it—an odd and harsh result (since the anticipatory context is the most variant and fact intensive), but a textual one. Thus, sentences like Setser's "run consecutively by force of law," *ibid.*, and are "automatically consecutive" whether the judge speaks or not. *Id.* at 738.[6]

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[6] Under *Romandine*, the judgment below would be affirmed, because the consecutive sentence would be automatic. Yet Setser does not cite *Romandine* at all, and the Government's criticism fails to explain why *Romandine*'s interpretation of "at different times" is inferior to the non-explanation offered by Setser and the Government. See U.S. Br. 14 n.3. But there is much to criticize about *Romandine* as well. Like Setser and the Government, it ignores the historical context of sentencing to assume that §3584(a) is the exclusive grant of authority. In contrast to its constricted view of judicial power, it oddly assumes power for the Attorney General to "make" an "automatically consecutive" federal sentence nonetheless "run concurrently." 206 F.3d at 738. And it does not explain why, if the statute is a "grant," the third sentence's concluding phrase "unless the court orders that the terms are to run concurrently" does not grant power with respect to all sentences that are imposed "at different times."

A fourth plain-text approach focuses on the third sentence of §3584(a). See, *e.g.*, *United States* v. *Ballard*, 6 F.3d 1502, 1505-1506 (11th Cir. 1993). Under this approach, the phrase "imposed at different times" encompasses anticipatory terms like Setser's, and the final default rule applies to anticipated terms. But that rule also provides that terms of imprisonment "imposed at different times run consecutively *unless the court orders* that the terms are to run concurrently." §3584(a) (emphasis added). This exception to the default rule can be read as coextensive with the default rule itself, authorizing courts to order concurrent sentences even when one term is anticipatory. After all, "the words 'unless the court otherwise directs' quite plainly vest some power in the court," because, if they do not, the option would be illusory and the text superfluous. *Farmer* v. *Arabian Am. Oil Co.*, 379 U.S. 227, 232 (1964) (quoting Fed. R. Civ. P. 54(d)) (overruled in part on other grounds, *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)). Reading the third sentence as written creates an affirmative reason for rejecting the Government's premise that the *first* sentence must be the universal limit for authority. See U.S. Br. 13-14.[7]

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[7] The Government's claim that "reading the third sentence as an independent grant of authority would read the limitations in the first sentence out of Section 3584(a)," U.S. Br. 13, begs the central question whether the bulk of the first sentence contains any "limitations" on judges at all. Unlike the third sentence, which expressly contemplates judicial *power*, the first sentence expresses no judicial limit at all. Moreover, the first sentence would still do useful work by prohibiting consecutive terms for attempts and objects of the attempts for cases otherwise within the scope of the default rule. While this might theoretically permit attempt-object consecutive terms to be anticipatorily imposed, *id.* at 14, no evidence from real life or the logic of reasonableness review suggests the threat is real. See Part I.A.4, *supra*.

At most, then, Setser and the Government can argue that the text of §3584(a) is ambiguous. And this ambiguity matters; all of the plain-text readings discussed above justify affirming the judgment below, except what Setser and the Government advance. Their simple approach, in a vacuum, may indeed seem appealing at first. But "in light of the foregoing textual and historical analysis, the initial plausibility of [that] reading simply does not carry the day." *Reno* v. *Koray*, 515 U.S. 50, 62 (1995).

3. *No plain text gives BOP exclusive authority over anticipatory sentencing*

Setser and the Government prefer to focus on §3584(a) as the sole governing text. But that cannot be right, because §3584(a) does not mention BOP—so if §3584(a) actually withdrew sentencing authority from the courts, some other statute must grant it to BOP. *Both* of those actions—withdrawal from courts, transfer to BOP—are substantial. One would expect textual clarity for both. But no such grant to BOP exists; Setser and the Government, yet again, must rely on dubious implication. Pet. Br. 26-27; U.S. Br. 30, 37. The lack of any solid textual basis for BOP's claimed sentencing authority resolves any ambiguity as to whether §3584(a) withdrew anticipatory sentencing authority from the courts—without the former, the latter is implausible. See *Boumediene* v. *Bush*, 553 U.S. 723, 776 (2008) ("When interpreting a statute, we examine related provisions in other parts of the U.S. Code.").

BOP's own overarching grant of authority appears in §4042. Its core duties are the "management and regulation of all Federal penal and correctional institutions," "provid[ing] for the safekeeping, care, and subsistence" of the incarcerated, and establishing release and reentry "planning procedures." §4042(a). That administrative focus is reflected throughout the Code. See, *e.g.*, §3552(b) (presentence investigations and reports); §3623

(transfer of prisoners to state authorities); §3624(b) (calculation of good-time credit); §3624(a), (d) (release of prisoners); §4012 (seizure of contraband in prisons).

As to sentencing, however, BOP lacks any statutory mandate. If, for example, BOP wants to reduce a sentence, Congress requires that it *go to court*. §3582(c). Unlike BOP's proper administrative tasks, criminal law and sentencing are "far outside *Chevron* territory." *United States* v. *McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987). See also *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("[t]he law in question, a criminal statute, is not administered by an agency but by the courts"); *Evans* v. *United States Parole Comm'n*, 78 F.3d 262, 265 (7th Cir. 1996) (Easterbrook, J.) ("we have substantial doubt that the Judicial Branch owes any deference to the Executive Branch when the question concerns the maximum term of imprisonment").

Nevertheless, Setser and the Government argue that BOP's authority to "designate the place of the prisoner's imprisonment," §3621(b), amounts to the authority to make the concurrent-or-consecutive decision because BOP may retroactively designate the state prison as the place where a federal sentence was served (making it concurrent) or not do so (making it consecutive). Pet. Br. 3-4, 26-27; U.S. Br. 30-38. That may be how BOP administratively enforces a court's consecutive-or-concurrent order. But §3621(b) does not displace judicial sentencing, giving BOP authority to engage in this fiction *on its own motion* to make the concurrent-or-consecutive determination that has historically been made by judges. Using expertise as the Nation's premiere corrections agency to select the proper kind of facility—minimum security, maximum security, etc.—is certainly within BOP's ambit, so long as it uses the correct administrative factors. See *Levine* v. *Apker*, 455 F.3d 71, 81 (2d Cir.

2006). Determining a sentence's *length*, however, is a different matter.

Section 3621(b)'s reference to "designat[ing] the place" of imprisonment does not remotely sound like an exclusive grant of sentencing authority in cases like Setser's. The statutory factors that BOP must consider when selecting the proper facility for each inmate are not the factors judges consider when selecting the proper length of imprisonment or when choosing between consecutive and concurrent sentences. Compare §3621(b) ("standards of health and habitability") with §§3584(b), 3553(a). BOP's factors are more administrative in nature, referring to such things as "the resources of the facility contemplated." §3621(b)(1). And in making the facility designation, BOP is not free to assess the goals of punishment according to its own views, but must consider "any statement by the court that imposed the sentence * * * concerning the purposes for which *the sentence* to imprisonment was determined to be warranted." §3621(b)(4) (emphasis added). BOP implements *courts'* sentences by choosing the appropriate facility. It certainly has no legislative mandate to exercise sentencing authority *to the exclusion* of courts. Section 3621, an unremarkable statute giving BOP the ability to select prisoners' accommodations, is not capacious enough for the authority claimed for BOP in this case.

Invoking §3621(b) for BOP's authority also has its ironies, given the textual methodology Setser and the Government use to construe §3584(a). Section 3621(b) makes clear that "[a]ny order, recommendation, or request by a sentencing court that a convicted person serve a term of imprisonment *in a community corrections facility* shall have no binding effect on the authority of the Bureau under this section to determine or change the place of imprisonment." (Emphasis added.) Does specifying *one* instance when BOP has exclusive authority imply that in

all *unspecified* contexts BOP does not? The answer should be "yes" if, as the Government and Setser believe, the enumeration of two sentencing contexts in §3584(a) means that judicial power in all the others is implicitly revoked. Pet. Br. 14-17; U.S. Br. 10-12. But the correct answer is "no." BOP's historical, exclusive administrative authority over prisons, see *Tapia*, 131 S. Ct. at 2390-2391, is not impliedly repealed by text *reaffirming* that authority in a specific context. Just so here.

In both §3621(b) and §3584(a), Congress legislated in the light of history, and history may resolve questions that text leaves unclear. History reveals that BOP properly determines where prisoners should be housed—and that sentencing discretion belongs with the Judiciary. Modifying either would invite potentially significant intrusions by both branches of government into each other's sphere. See *infra* Part III. Such drastic modifications should not be inferred absent a clear congressional statement—something wholly missing here.

C. The legislative history supports judicial discretion, not judicial silence

Setser and the Government both invoke legislative history, but it—like the text and historical background—favors judicial discretion, not judicial silence. Whereas Setser and the Government interpret the Sentencing Reform Act to enhance the Executive's power over sentence lengths, the legislative history reveals hostility to such executive power. And while they interpret the statute to silence judges in cases like Setser's, the legislative history shows a strong intent to amplify the judicial voice.

1. *Congress intended to diminish, not magnify, the Executive's role in sentencing*

This Court has previously recognized "Congress' 'strong feeling' that sentencing has been and should remain 'primarily a judicial function.'" *Mistretta* v. *United*

States, 488 U.S. 361, 390 (1989) (quoting Report at 159). Indeed, the legislative history reveals concentrated animosity toward previous incursions by the Executive. Before the Act's enactment, the Parole Commission generally had complete authority to release a prisoner (or not) at any point after one-third of the sentence had passed. See K. Stith & J. Cabranes, Fear of Judging 19 (1998). Troubled by the distinction between an open judiciary and a closed bureaucracy, Congress decried the "problem that *actual* terms of imprisonment are determined in private rather than public proceedings." Report at 55 (emphasis added). These rule-of-law and separation-of-powers concerns were enhanced by "the degree of restriction on liberty that results from imprisonment," *id.* at 59; see *id.* at 77.

For this reason, Congress rejected executive entreaties to retain the Parole Commission's role.[8] Doing so "would perpetuate the current problem that *judges* do not control the determination of the length of a prison term even though this function is *particularly judicial in nature*." Report at 54 (emphases added). Executive determinations amounted to sentencing, and "[t]he better view is that sentencing should be within the province of the judiciary. Indeed, it is arguable that the Parole Commission by basing its decision on factors already known at the time of sentencing, has already *usurped a function of the judiciary*." *Ibid.* (emphasis added).

Except for "minor adjustments based on prison behavior called 'good time,'" Congress expected prisoners' total debt to the United States to be calculated *at sentencing*. Report at 46. It wanted all parties to be "certain about the sentence and the reasons for it." *Id.* at 39.

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[8] The Act reduced the Parole Commission to a shadow of its former self. It now has sentence-adjustment authority limited to District of Columbia local crimes. See http://www.justice.gov/uspc/history.htm.

Sentencing results were to be left to the *Judiciary*: Congress "finds totally unacceptable" the possibility that the Executive "would review and amend a sentence after a United States court of appeals had already found it to be reasonable." *Id.* at 55.

Simultaneously, the Report reveals Congress's view that BOP's institutional role is to implement—not impose—sentences. *E.g.*, Report at 57 (administrative responsibilities). When describing newly adopted § 3584, the Report does not even *mention* BOP, see Report at 125-128, much less suggest that it has a substantial role to play. And in discussing § 3621, the Report gives no hint that the facility-designation authority is a backdoor route to BOP power over concurrent-or-consecutive decision-making, whether in anticipatory or other sentencing contexts. See Report at 141-142. Compared to the illustrious power described by Setser and the Government, the Report describes facility-designation authority as wholly administrative—concerning "such matters as place of confinement of prisoners, transfers of prisoners, and correctional programs." *Id.* at 141. It emphasizes that designating the "place of confinement" really means *choosing the right facility* by insisting on minimum standards of health, *ibid.*, and it lists the factors that BOP "is specifically required to consider" in making that choice, *id.* at 142.

To put it mildly, the Report has no kind words for executive involvement in individual sentencing.

2. *Congress intended for judges to be in control of sentencing, both formally and substantively*

Beyond minimizing executive intrusion in sentencing, Congress sought to encourage judges to exercise their traditional authority to make concurrent-or-consecutive determinations. The Report explains that § 3584(a)

> is intended to be used as a rule of construction in the cases in which the court is silent as to whether sentences are consecutive or concurrent, in order to avoid litigation on the subject. However, the Committee hopes that the courts will attempt to avoid the need for such a rule by specifying whether a sentence is to be served concurrently or consecutively.

Report at 127. Five things are readily apparent. First, and most importantly, Congress recognized courts' longstanding authority to order that multiple sentences run concurrently or consecutively, and it stated no exception to that authority for anticipatory sentencing. Second, Congress regarded § 3584(a) *only* as a default rule—it authorizes nothing, it takes nothing away.[9] Third, Congress wanted *more* judicial guidance, not less. The default rules, where applicable, serve as a last resort, but it was "hope[d]" that they would remain dormant as judges gave individualized determinations. Fourth, Congress explicitly chose not to *require* courts to speak, even though it plainly preferred that they do. Fifth, Congress wanted a default rule to eliminate uncertainty, foster finality, and prevent further litigation whenever possible.

Congress desired judicial guidance as to the *actual* "length of a prison term." Report at 54. Over and again, the Report emphasized the importance of "Federal *judges* * * * select[ing] from among the available alternatives an appropriate sentence to impose upon the particular defendants before them." *Id.* at 49. *"[S]entencing judges*" must "consider [statutory purposes] in imposing sentence," *id.* at 60 (emphasis added), and the "*sentencing judge* [must] announce how the guidelines apply * * * and * * * give his reasons for the sentence imposed."

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[9] Consecutive sentences for attempts and their sole objects are withdrawn from the scope of § 3584(a). See Part I.B.1, *supra*.

Ibid. (emphasis added). It was for "[t]he *judge* * * * to give * * * specific reasons for imposing a sentence of a different kind or *length* than recommended in the guidelines." *Ibid.* (emphasis added).[10]

3. *Snippets that merely replicate, rather than explain, the text are unenlightening*

Setser and the Government ignore the language describing Congress's desire to free sentencing from executive oversight and to ensure greater certainty and fairer individualization of sentences. Instead, they invoke legislative history that essentially quotes, but does not explain, the statutory text. Pet. Br. 22-23; U.S. Br. 21-23. They are correct about this much: The legislative history does not explicitly approve of sentencing orders that make a sentence run consecutively or concurrently to an anticipated sentence. But neither are such orders explicitly *dis*approved.[11] As shown, however, the singular thrust of the legislative history militates strongly against Setser's and the Government's approach.

The Government largely relies on the National Commission's report, but to no avail. See U.S. Br. 21-23. Like the legislative history of the Act, the report of the

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[10] Congress also clarified for courts that they *did* have concurrent-sentencing authority in the dual-sovereign context—a clarification that was necessary because some courts had misread old-§ 3568 to preclude that authority (in *any* context). See, *e.g.*, *United States* v. *Segal*, 549 F.2d 1293, 1301 (9th Cir. 1977); Report at 127 n.314 ("it is intended that this provision be construed contrary to the holding in" *Segal*).

[11] The same is true of the Guidelines. "In more than two decades," the Government observes, the Sentencing Commission "has never promulgated guidelines or policy statements" in the anticipatory-sentencing context. U.S. Br. 24. But the circuit split has existed for the same two decades, during which the Commission has never *dis*approved anticipatory sentences or lifted a finger to discourage their use. This silence may cut against, but cannot aid, the Government.

Commission never explicitly addresses anticipatory sentences. But it would not matter even if it had. If Congress loosely based § 3584(a) on the Commission's proposal, Congress edited heavily. Unlike § 3584(a), the Commission's proposal *did* read as a grant of authority to courts—meaning that if Congress wrote § 3584(a) in light of the Commission's proposal, it consciously rejected that crucial feature. See Final Report of the National Commission on Reform of Federal Criminal Laws 291 (1971). Congress's repudiation of the Commission's proposal in that respect was hardly unique. Over the Commission's contrary view, *id.* at 299-304, Congress abolished parole, largely based on the very separation-of-powers concerns that undermine the Government's argument here. Congress's differences with the Commission reflect how hostile Congress really was to executive intrusion into the judicial role.

II. Adverse Consequences Flow Not From Retaining, But From Limiting, Judicial Discretion

According to Setser and the Government, disastrous consequences will surely flow from the judicial retention of anticipatory sentencing authority. Pet. Br. 28-29; U.S. Br. 13-15, 18-20. First, they say, judicial discretion would lead to bizarre and uninformed results. Second, invoking federalism, they claim that only federal judges' silence prevents disrespect for state judges. Both points are meritless—indeed, backwards. Unsurprisingly, Setser's own sentence was reasonable—a factbound question properly answered by the court below under a proper legal framework.

A. Reasonableness review on appeal resolves any practical problems

Under the judgment below, sentences anticipatorily made consecutive or concurrent are reviewed for reasonableness on appeal. J.A. 56-57. As with all sentences,

this is the command of Congress, see §3584(b) (specifically addressing concurrent-or-consecutive decisions); §3742(a)(1), and of this Court, see, *e.g.*, *United States* v. *Rita*, 551 U.S. 338, 354-358 (2007); *Booker*, 543 U.S. at 261-263.

Reasonableness review eliminates the risk of bizarre, arbitrary, uninformed, or unreasoned sentences—anticipatory or otherwise. In the anticipatory-sentencing context, the worries about abuses of discretion expressed by Setser and the Government give too little credit to the district courts. No evidence suggests that judges in that half of the country currently possessing this power have used it oppressively. On the other hand, courts in the remaining half have expressed dissatisfaction with this power being left to BOP. A Second Circuit panel, for instance, expressed discomfort with circuit precedent, and even directed its opinion be sent to members of Congress. See *Abdul-Malik*, 403 F.3d at 74-76 ("BOP has the effective authority to determine how the sentences should run" simply because the federal court imposed sentence before the state court did—an authority that "BOP lacks" if the timing is reversed); *Reynolds* v. *Thomas*, 603 F.3d 1144, 1160 (9th Cir. 2010) (W. Fletcher, J., concurring) (pet. filed) ("an important sentencing decision may be made by the executive rather than the judicial branch").

Even assuming that judicial errors will occur, total elimination of anticipatory sentencing by *courts* is unjustified—particularly since the alternative is sentencing by *BOP*. The possibility of abuse inheres in discretion, but judges' mistakes in specific cases can be redressed on appeal. "At times, [district courts] will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur." *Rita*, 551 U.S. at 354.

The result is a developing jurisprudence that guides the exercise of discretion. Cf. Report at 52 (anticipating

body of case law regarding Guidelines). Nothing prevents the development of such guidance in the anticipatory context—except, of course, the rule of silence proposed by Setser and the Government. Appellate courts routinely vacate sentences and remand for resentencing when the district court's sentence is unreasonable, regardless of context. See, *e.g.*, *United States* v. *Taylor*, 648 F.3d 417, 429 (6th Cir. 2011) (remanding for resentencing when district court did not "consider the merits of a statutorily relevant sentencing argument"); *United States* v. *Dorvee*, 616 F.3d 174, 183-184 (2d Cir. 2010) (finding within-Guidelines child-pornography-distribution sentence unreasonable); *United States* v. *Paul*, 561 F.3d 970, 975 (9th Cir. 2009) (*per curiam*) (remanding to different district court judge where first judge repeatedly and unreasonably gave excessive weight to one factor); *United States* v. *Omole*, 523 F.3d 691, 700 (7th Cir. 2008) (remanding sentence given lack of a "compelling justification for the 'break' [defendant] caught at sentencing"). And at least one court has remanded for resentencing because a district court was silent in a *non*-anticipatory case as to the concurrent-or-consecutive question—even though §3584(a) provides default rules for silence in that context. See *United States* v. *Martin*, 371 F. App'x 602, 606 (6th Cir. 2010).

Over time, some anticipatory sentences will surely be vacated for resentencing; some may be vacated because it was unreasonable to make the concurrent-or-consecutive determination at all. In *United States* v. *Smith*, for instance, the district court "order[ed] that its sentence run consecutively to 'any other sentence in any other case.'" 472 F.3d 222, 225 (4th Cir. 2006). The Fourth Circuit reversed—not (as it should have done) because running a sentence consecutive to *unknown* future cases was unreasonable under §3584(b) and §3553(a), but because, like Setser and the Government, it

erroneously read § 3584(a) to preclude *all* anticipatory sentencing. *Smith*, *supra*, at 226. *Smith* reached the right result, but for a wrong, needlessly broad reason.

District courts can readily apply the § 3553(a) factors in many anticipatory contexts. Sometimes the *only* unfinished state proceeding is sentencing. See, *e.g.*, *United States* v. *Donoso*, 521 F.3d 144, 149 (2d Cir. 2008) (barring anticipatory sentence even though state sentencing followed federal sentencing by *one day*). Sometimes the same conduct offends both sovereigns, so the federal judge may confidently run the sentences concurrently—the benefit Setser himself received as to one state sentence. J.A. 15-16. Alternatively, a federal judge may know that the state-court case is sufficiently distinct as to desire consecutive sentences, avoiding double-counting. See Report at 127. The eventual state sentence may not matter in various other cases, where the federal court is aware of a state statutory maximum, but considers even that amount too low to justify making the federal sentence concurrent. Or, with knowledge of the offender and the offenses, the federal court may conclude that a concurrent sentence suffices no matter how *little* time the state court imposes. Appellate courts in turn, like the court below, review such anticipatory sentences for reasonableness. J.A. 60-62; *Mayotte*, 249 F.3d at 799; *Ballard*, 6 F.3d at 1504, 1506-1510 (quoting the district court's careful analysis under § 3553(a) and affirming anticipatory sentence).

B. Setser's own sentence is reasonable

Setser's second question presented, challenging his sentence even if judicial authority is upheld, is meritless. He argues that his federal sentence "contradicts itself and cannot be fully implemented." Pet. Br. 37. But his run of good fortune—a partially concurrent federal sentence, receiving state sentences running concurrent with each other, and being paroled well before even the short-

est state term expired—hardly makes the federal sentence "impossible to implement." *Id.* at 38. Neither the state nor federal sentence was frustrated. While complaining that it generated an impossible sentence, Setser also is quick to demand that the concurrent part of the sentence be left in place. *Id.* at 43 (asking the Court to "strik[e] the consecutive order, but leav[e] intact the concurrent order").

It is hard to see how the "consecutive order" could *not* be reasonable. Setser was *on probation for another conviction* when he committed the drug-possession crime that offended both sovereigns. The Government notes that this alone justifies consecutive treatment. U.S. Br. 17 n.5. Nor was the district judge sentencing in the dark. Setser's state proceedings were ongoing when the Government "borrowed" him. J.A. 15-16. The PSR described and the district judge plainly understood the state charges, which he precisely listed by state docket number and carefully distinguished. J.A. 16, 77-78. That federal credit should be granted as to the joint offense, but denied as to state-probation revocation, is reasonable and sensible. It was a split sentence tailored to Setser's individual circumstances. That resolves the reasonableness question.

Setser's federal-court sentence gave him one key benefit—a right that anything beyond five years in state prison be credited against his 151-month federal sentence. There is no risk of deprivation, since he was released well before five years into his state sentence. And if there is latent ambiguity, the Government suggests that this is the sort of thing BOP—an administrative agency—can iron out, pursuant to a *nunc pro tunc* request. U.S. Br. 36 n.21. *This* kind of resolution—not sentencing in the first instance—is indeed a clearly appropriate role for BOP, subject to judicial review if necessary. But that function must be limited "to common

sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928). Administratively processing sentences from dual sovereigns—harmonizing data points that may not immediately jibe—is similar to the work BOP must do whenever guidance from courts is inadequate or missing. That sentence-implementing role is in stark contrast to the purported assumption of sentencing power itself.

Setser's sentences were not imposed in a vacuum. Once he received his concurrent-sentencing order from the federal court, what he did with it when he returned to state court was up to him. If the Texas court "had no knowledge of the [federal] sentence, [Setser] has no one to blame but himself for not bringing the fact to its attention." *Mees*, 272 N.W.2d at 68. See Tex. Code Crim. Proc. art. 37.07(3)(a)(1) (allowing prior criminal record to be brought before sentencing judge). The same is true if he failed to seek modification or clarification once the state sentence was imposed. See *State* v. *Aguilera*, 165 S.W.3d 695, 697-698 (Tex. Crim. App. 2005) (trial court's authority to modify sentence). As with his Fifth Circuit briefing, Setser is silent regarding any such efforts. See Pet. Br. 7-8 (describing state proceedings).

Even so, Setser *still* benefits from the court order declaring his right to credit for a particular state sentence. While he apparently has not bothered to make the effort, see U.S. Br. 36 n.21, nothing prevents him from attempting to show that some time served in state prison was attributable solely to the ten-year sentence for the 2007 drug-possession offense—the sentence the federal court intended to be concurrent. If he can make that showing, then BOP should credit that time via a *nunc pro tunc* designation, and if it does not, after exhausting administrative remedies, Setser can pursue the claim in court under 28 U.S.C. §2241. See *Barden* v. *Keohane*, 921 F.2d

476, 480-484 (3d Cir. 1991); 28 C.F.R. 542.10 *et seq*. Setser has, or could obtain, the necessary parole records and other materials for submission to BOP.[12] By making the case for how long he likely would have served for the shorter sentence—the revoked probation—had it stood alone, he can show that the balance was for the joint offense.[13]

Regardless of how the factbound details may ultimately shake out, it is implausible for Setser to contend that the district court's guidance was worse than none at all. Had the district court been silent, Setser would have no more than a hope for BOP's solicitude. See U.S. Br. 37 (noting that consecutive treatment is probably appropriate); BOP Program Statement No. 5160.05, § 8 (Jan. 16, 2003) (designation of state institution requires affirmative finding of propriety). Because the court instead

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[12] Texas inmates can obtain data regarding good-conduct and time-earnings status every six months. See Tex. Dept. Crim. Justice Unit Classification Procedure 2.01, Time-Earning Status and Good-Conduct Time Information, Section VI, Printing PCRS Time Slips Per Offender Request. Inmates can dispute the calculations. Tex. Gov't Code § 501.0081. Upon release, the prisoner receives discharge papers including the calendar time actually served. *Id.* § 501.016(a)(5).

[13] For example, Texas inmates generally become eligible for release on parole when their "actual calendar time served plus good-conduct time equals one-fourth of the sentence imposed or 15 years, whichever is less." Tex. Gov't Code § 508.145(f). Setser would have been eligible for parole after serving 15 months of the five-year sentence, but had to wait for approximately 29 months of the ten-year sentence. See *Ex parte Alexander*, 861 S.W.2d 921, 924 (Tex. Crim. App. 1993), superseded on other grounds by Tex. Code Crim. Proc. art. 11.07. The difference in parole-eligibility dates, combined with data on how quickly parole was actually granted, provides Setser and BOP some basis for determining how much time to allocate to the "concurrent" portion of the federal sentence. Setser could have begun earning concurrent federal credit in month 16, for a total of 13 months credit toward his federal sentence.

spoke, and granted Setser a partially concurrent sentence, Setser can at least make his case. Receiving an individually tailored, logical sentence has not prejudiced him in the slightest. He was sentenced reasonably, and his sentence should be affirmed.

C. Federalism is advanced, not impeded, by federal judges determining the concurrent or consecutive effect of a federal sentence

1. Setser, see Pet. Br. 30-33, and to a lesser extent the Government, see U.S. Br. 27-29, invoke federalism and comity as a basis for silencing federal courts in cases like Setser's. This is exactly backwards. Only certainty regarding the eventual federal sentence permits the state court to sentence with precision.

Sentences instruct the prison of the *same sovereign*. A federal sentence tells BOP how long to keep a prisoner; a state sentence tells the state prison the same thing. Courts cannot command jailers of the other sovereign. See, *e.g.*, *Abdul-Malik*, 403 F.3d at 72 ("'[T]he state court's intent is not binding on federal authorities.'" (quoting *McCarthy* v. *Doe*, 146 F.3d 118, 120-21 (2d Cir. 1998))); *Opela* v. *United States*, 415 F.2d 231, 232 (5th Cir. 1969).[14] But a *federal* judge determining the effect of

[14] Setser claims that "[t]he state court * * * imposed both state sentences concurrently with the previously imposed federal sentence." Pet. Br. 32. The judgments say no such thing. J.A. 29-40. Nor, contrary to Setser's assertion, does such a recommendation arise by operation of Texas law. Setser cites *Ex parte Spears*, 235 S.W.2d 917 (Tex. Crim. App. 1950), but that case presumed concurrence only when the state court "failed to cumulate the state sentence with the [preexisting] Federal sentence *and then returned [the defendant] to the Federal authorities*." *Id.* at 917 (emphasis added). Where, as here, the federal sentence is served last, *Spears* is irrelevant. Indeed, Texas courts correctly note that state judges lack any power over the administration of the federal sentence. *Ex parte Moody*, 991 S.W.2d 856, 859 (Tex. Crim. App. 1999). The other case cited by

a *federal* sentence cannot possibly violate federalism. Instead, dual sovereignty "requires * * * a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure." *Ponzi* v. *Fessenden*, 258 U.S. 254, 259 (1922). In this context, withholding information from state courts increases the inevitable friction in our system. Transparent sentencing in the dual-sovereign context reduces it.

Federal judges who sentence anticipatorily expect that state courts will know of the federal sentence, see *Ballard*, 6 F.3d at 1504, and recognize that the state court, pursuant to state law, may adjust their sentences as they please to achieve more or less punishment.[15] Indeed, the Government inadvertently acknowledges as much, citing *Romandine* for the proposition that "the second judge can impose a term of imprisonment, but with 'a discount * * * on account of [the] undischarged federal sentence.'" U.S. Br. 28 (quoting 206 F.3d at 738). But under *Romandine*, anticipatory sentences are "automatically consecutive," 206 F.3d at 738, which—contrary to the regime the Government proposes—means that the state court would *know* the effect of the federal sentence.

Consider two hypothetical defendants, P and Q, subject to the same sentencing-and-incarceration sequence

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Setser is also irrelevant; it simply authorizes state sentences to run consecutively to prior federal sentences. Pet. Br. 7 (citing *Cook* v. *State*, 824 S.W.2d 634, 640-643 (Tex. App. 1991)).

[15] Even if state law requires a mandatory minimum, state judges who would prefer that minimum sentence to be served concurrently to a federal sentence are never worse off by being *aware*, ex ante, of how the federal sentence will run. States' authority "over the administration of their criminal justice system lies at the core of their sovereign status." *Ice*, 555 U.S. at 170. If a State has laws limiting the discretion of its judges, it is unreasonable to lay that self-inflicted "injury" at federalism's door.

as Setser. P and Q are both sentenced to five years by the federal court. The court makes P's sentence consecutive, but is silent about Q's. The state court wishes both to spend at least seven, but no more than nine, years in prison. Knowing that P will spend five years in prison regardless of the state sentence, the state court can sentence P to between two and four years. But it is uncertain in Q's case. Concerned that BOP will later determine the federal sentence to be concurrent, the state court could sentence Q to seven years. But BOP may treat the sentence consecutively—in which case, Q would spend 12 years in prison. Yet if the state court sentences Q to only two years, he may wind up serving only five, if in the end BOP treats the state sentence as concurrent. Because it provides state courts with knowledge relevant to their own criminal proceedings, transparent sentencing in cases like Setser's is far more respectful of States' dignity than a mandatory silence that allows BOP to thwart state courts' attempts to impose a just sentence.

Federal guidance on the effect of federal sentences is particularly important because when the state court sentences second and imprisons first, any shading it chooses to give the *federal* sentence is unenforceable. In *Clark* v. *State*, a federal court was silent, but a subsequent South Carolina state-court plea bargain treated the state sentence as concurrent with the as-yet-unserved federal sentence. *Clark* v. *State*, 468 S.E.2d 653, 654 (S.C. 1996) (*per curiam*). The South Carolina Supreme Court readily agreed that the concurrent-or-consecutive effect of a first-imposed federal sentence "is a federal matter which cannot be overridden by a state court provision for concurrent sentencing on a subsequently obtained state court conviction," *id.* at 655 (citing *Bloomgren* v. *Belaski*, 948 F.2d 688 (10th Cir. 1991)), and that "a state court is without authority to modify or place conditions on a sentence from a foreign jurisdiction." *Ibid.* Thus, it held, "it

appears the only way to effectuate a state trial court's order that a state sentence run concurrently with a prior federal sentence is to have the defendant returned to federal custody to serve his federal sentence." *Ibid.* That way Clark would satisfy his federal-prison obligation, and the State, by placing a detainer on him, would be able to imprison him only for the balance of the time. *Id.* at 655 n.3. Neither sovereign would be offended. But this "bureaucratic quagmire," *id.* at 655 n.1, could have been avoided had the state court simply *known* how long the federal sentence would be.

Second-sentencing (usually state) courts can sentence justly and confidently only by knowing *ex ante* whether the federal sentence is concurrent or consecutive—not just the number of years subject to a later concurrent-or-consecutive determination by BOP. It is hard to imagine any actual state-court judge being grateful for the ignorance that Setser and the Government would foist upon them in the name of "federalism."

2. Setser and the Government also decry the disastrous consequences that would attend construing the statute to authorize anticipatory sentences when the impending sentence is in *federal* court. But both merits briefs' Questions Presented properly limit the issue to whether federal courts can make sentences concurrent or consecutive to anticipated *state* sentences. Nor is there a circuit split on the parallel question in the federal/federal context; indeed, it appears that Setser and the Government have a solution in search of a problem. See U.S. Br. 18-20. Even setting that aside, the argument is specious.

First, Setser and the Government fail to note that a federal sentence anticipating a state sentence has materially different consequences for all parties than one anticipating another federal sentence. In the dual-sovereign context, anticipatory sentencing carries no true risk of inconsistency. The prison of each sovereign takes

instruction from the courts *of that sovereign*. A federal court ordering that *its own* sentence be consecutive to an impending state sentence has no effect on the state—the state may keep the prisoner for as long or as short as it desires, and then release the prisoner to BOP, which will follow the federal judge's order. BOP properly states in its Program Statements that it is not bound by a state court's "request" that the inmate's state sentence be served concurrently to his federal sentence. See BOP Program Statement No. 5160.05, § 9(b)(5) (Jan. 16, 2003) (detailing procedure in which BOP evaluates "a request from a state jurisdiction indicating that the state and federal sentences are to be served concurrently"). See also, *e.g.*, *Taylor* v. *Sawyer*, 284 F.3d 1143, 1151-1153 (9th Cir. 2002) (state courts cannot control federal sentences); *Ballard*, 6 F.3d at 1509 n.9 (anticipatory sentencing permissible and workable "because punishment by two sovereigns is involved").

By contrast, if a federal court makes its sentence concurrent or consecutive to an anticipated federal sentence, the *same* jailer (BOP) must attempt to execute *both* sentences. This may generate inconsistency, and so precluding that sort of anticipatory sentence makes sense. See *United States* v. *Quintana-Gomez*, 521 F.3d 495, 498 (5th Cir. 2008). And federal sentences anticipating future federal sentences might, for that reason alone, be categorically "unreasonable" under §3553(a), whether or not §3584(a) itself forbids them as well.

Such a scenario—if it ever emerges again—can be avoided by the appellate courts' exercise of their supervisory authority. See, *e.g.*, *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957) ("We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system."). Cf. *Dickerson* v. *United States*, 530 U.S. 428, 437 (2000) (absent contrary instruction from

Congress, rules governing district courts are in the Judiciary's purview). Internally developing coherent rules of sentencing sequencing—i.e., the Judiciary managing itself—raises none of the separation-of-powers or institutional competency concerns that would arise from the transfer of all anticipatory sentencing authority to the Executive. See Part III.A, *infra*.

And failing that, even if a district court *did* attempt to impose such an anticipatory sentence, the second court will always have the upper hand. If the first sentence were ordered to run concurrent to the second, the second judge could lengthen her sentence; if the first judge had demanded consecutive service, she could shorten it. Given that the Guidelines are only advisory and that reasonableness is the touchstone of all sentencing, achieving that result would be far easier now than before expansive discretion was reintroduced in *Booker*, 543 U.S. at 243. If nothing else, the second judge could simply clarify for BOP precisely how long the prisoner is to be in their custody, effectively superseding the prior sentence, as in *United States* v. *Joseph*, No. 03-214, 2010 WL 5288736, at *1 (E.D. La. Dec. 16, 2010).

Whatever else the potential federal/federal sentencing order may entail, it does not offer any reason for wholesale withdrawal of *all* anticipatory-sentencing authority in every context.

III. The Court Should Avoid An Interpretation That Poses Serious Constitutional Questions

Setser and the Government ask the Court to drive the statute headlong into a constitutional thicket. Their reading of §3584(a) should be rejected based on text and history. But even setting that aside, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is

plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Construing the statute to leave discretion with the courts is not "plainly contrary to the intent of Congress." *Ibid.* By contrast, mandating judicial silence, and transferring sentencing authority to the Executive, would "raise serious constitutional problems." *Ibid.* That construction would require the Court to confront the thorny issues it avoided many years ago—"the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch." *Mistretta*, 488 U.S. at 391 n.17. The Court should therefore resolve any remaining doubt about the statute in favor of the construction that leaves discretion with the courts.

A. The rule of silence is in tension with the separation of powers

This case will decide whether the Judiciary or the Executive has ultimate sentencing authority in cases like Setser's. "Separation-of-powers concerns * * * caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Kucana* v. *Holder*, 130 S. Ct. 827, 831 (2010). See *supra* Part I.A.3 (describing clear-statement prerequisite to reading statute as divesting courts of discretion or jurisdiction).

1. Just last Term, this Court held that statutes unambiguously vesting judicial authority outside Article III are unconstitutional. *Stern* v. *Marshall*, 131 S. Ct. 2594, 2620 (2011). *Stern* alone is sufficient to cast grave constitutional doubt on the reading advanced by Setser and the Government.

Stern held that the resolution of state-law counterclaims by bankruptcy judges violated the separation of powers. 131 S. Ct. at 2620. Transferring sentencing authority from Article III judges to BOP violates the same principle, only far more egregiously. Authority in the hands of bankruptcy judges—who are appointed by the court of appeals, whose cases can be withdrawn by the district court, whose decisions are subject to direct appellate review, and who are subject to no Executive oversight—surely threatens the separation of powers less than the authority claimed for BOP, in which none of those protections apply.

While *Stern* recognized a "public rights" exception to mandatory Article III jurisdiction, that exception does not implicate sentencing, because there is no argument that sentences "'historically could have been determined exclusively by'" the Executive or Congress. 131 S. Ct. at 2610 (quoting *Northern Pipeline Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50, 67-68 (1982) (plurality opinion)). Individual sentencing—determining how much liberty a citizen must lose—has never been a historical function of any branch other than the Judiciary. "[U]nder our constitutional system the right to * * * impose the punishment provided by law, is judicial," *Ex parte United States*, 242 U.S. 27, 41-42 (1916), and has always been. If sentencing was within the province of "'the courts at Westminster in 1789,'" *Stern*, *supra*, at 2609 (quoting *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in judgment)), it is in the province of "Article III judges in Article III courts" today. *Ibid.* Congress *could*, of course, fix a single penalty for a given crime "without giving the courts any sentencing discretion" to deviate. *Chapman* v. *United States*, 500 U.S. 453, 467 (1991). But it did not do so.

Individualized sentencing is perhaps the most "prototypical exercise of judicial power." *Stern*, 131 S. Ct. at

2615.[16] "A separation of powers issue arises when the same branch of government that prosecutes federal prisoners determines concurrency in lieu of the judge." *Abdul-Malik*, 403 F.3d at 76.[17] If such core judicial attributes could be eroded, "Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking." *Stern*, 131 S. Ct. at 2615.

BOP's power to choose where a sentence is served cannot morph into the power to choose how long that sentence lasts. Just as "Congress may not bypass Article III just because a proceeding may have *some* bearing on a bankruptcy case," *Stern*, 131 S. Ct. at 2618, it may not—and in § 3584(a) *did* not—bypass Article III just because the length of a sentence may have *some* bearing on BOP's designation of prisons under § 3621(b).

Likewise, the Court in *Stern* was troubled that bankruptcy courts can make the "final determination"—in the sense that further review was not *de novo*—in cases arising under Article III. 131 S. Ct. at 2619. BOP's sentencing decisions in cases like Setser's allow for even *less* judicial review—only a collateral attack under 28 U.S.C. § 2241. See Part III.B, *infra*.

To be sure, the question in this case is "narrow," affecting only that set of cases in the dual-sovereignty context that follow Setser's sequence of sentencing and in-

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[16] Sentencing is such a core judicial function that even having someone else *mouth the words* of the sentence—in the judge's presence—is inappropriate. Some courts required "the clerk physically to pronounce the sentence *** while the judge was sitting on the bench," but "the pronouncement of sentence is so important it should come from the judge." 3 C. Wright & S. Welling, Federal Practice and Procedure § 538, p. 198 (4th ed. 2011).

[17] "The implications of this discretion are worrisome and unresolved, but we are bound by our precedent." *Abdul-Malik*, 403 F.3d at 76.

carceration. But *Stern* readily characterized the question it addressed as "narrow," too. 131 S. Ct. at 2620. As to whether "narrow" separation-of-powers incursions merit vigilant response, "[t]he short but emphatic answer is yes." *Ibid.* "A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely." *Ibid.*[18]

2. This Court's painstaking allocation of institutional authority pertaining to the length of sentences *within* the judicial process, in cases like *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), indicates that transferring sentencing authority *outside* that process altogether is at least questionable. *Oregon* v. *Ice*, for instance, addressed the constitutionality of leaving consecutive-or-concurrent sentencing authority with judges under Oregon's statutory scheme. 555 U.S. at 164. But neither the majority nor the dissenting opinion lends support to giving the decision neither to the judge nor to the jury, but to the jailer instead. Both opinions recognized the significance of a consecutive sentence. See, *e.g.*, *id.* at 171-172; *id.* at

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[18] Indeed, the courts of appeals have repeatedly invalidated delegations to BOP and probation officers of far less consequential judicial authority than consecutive-or-concurrent sentencing power. See *United States* v. *Mike*, 632 F.3d 686, 695-696 (10th Cir. 2011) ("granting the probation officer the discretion to decide whether [inpatient sex-offender treatment] will be imposed is tantamount to allowing him to decide the nature or extent of the defendant's punishment" and therefore an unconstitutional delegation of judicial power); *United States* v. *Esparza*, 552 F.3d 1088, 1091 (9th Cir. 2009) (same); *United States* v. *Pruden*, 398 F.3d 241, 250 (3d Cir. 2005) (same with respect to decision to require "mental health treatment"); *United States* v. *Kent*, 209 F.3d 1073, 1078-1079 (8th Cir. 2000) (same with respect to decision to require "psychiatric treatment"); *United States* v. *Kinlock*, 174 F.3d 297, 300 (2nd Cir. 1999) (same with respect to delegation to BOP to determine amount and timing of restitution payments); *United States* v. *Johnson*, 48 F.3d 806, 807-809 (4th Cir. 1995) (same).

174 (Scalia, J., dissenting). Quite unlike parole—which, as described above, troubled Congress on separation-of-powers grounds, Report at 54-55—the power at issue in this case *determines* the sentence imposed, and can lengthen as well as shorten it.

3. The Government suggests that judges are adequately involved because, it says, BOP routinely seeks their advice. U.S. Br. 34-35. This only exacerbates the problem. Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-219 (1995). The Government, at least in cases like Setser's, would ask the judge to play the same advisory role vis-à-vis BOP officials that probation officers play vis-à-vis the judge. Judges do not advise; they *decide*.

This Court has rejected a federal-court advisory role at least since 1793, when Secretary of State Jefferson told this Court that President Washington "would be much relieved" to receive answers to specific questions that "would secure us against errors dangerous to the peace of the United States" as the new republic struggled in the midst of international turmoil. 6 Documentary History of the Supreme Court of the United States, 1789-1800, p. 747 (M. Marcus ed. 1998)) (reprinting letter of July 18, 1793). The Court respectfully declined, citing "[t]he Lines of Separation" established by the Constitution. *Id.* at 755 (reprinting letter to President Washington of Aug. 8, 1793). If at a momentous point in history, this Court declined to provide advisory opinions for Thomas Jefferson, asking on behalf of George Washington, it is hard to see why federal judges today should

provide advisory opinions for the "chief" of BOP's "Designation and Sentence Computation Center."[19]

To the contrary, when a judgment becomes final, it "becomes the last word of the judicial department." *Plaut*, 514 U.S. at 227. The Government, however, argues that the *real* last word comes long after the judgment is final—and comes in the form of advice to a bureaucrat. U.S. Br. 34-35. Alternatively, BOP suggests that courts can go ahead and provide their advice up front, sparing BOP "the need to return to the judge, perhaps years later, to ascertain the intent of the judge." Sadowski, Interaction of Federal and State Sentences When the Federal Defendant Is Under State Primary Jurisdiction 3 (July 7, 2011).[20] That is, *even when a judge has enough knowledge* to sentence in a timely fashion, BOP still considers her to be its advisor, and no more.[21] That is intolerable. See *Reynolds*, 603 F.3d at 1161 (W. Fletcher, J., concurring) (describing BOP's treatment of judges as advisory).

4. The Constitution does give the Executive authority over sentence length, but only in one specific way—the President's "Power to grant Reprieves and Pardons for" federal crimes. U.S. Const. art. II, §2; *Schick* v. *Reed*, 419 U.S. 256, 266 (1974). Otherwise, in incarceration as in other areas, the Executive's role is to enforce and administer the law. "After a district court sentences a federal

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[19] See, *e.g.*, *Fletcher* v. *U.S. Att'y Gen.*, No. 09-379-KKC, 2010 WL 3938373, at *4 (E.D. Ky. Oct. 5, 2010) (noting letter soliciting views).

[20] Available at http://www.bop.gov/news/ifss.pdf. The guidance, at 3, notes that this case is pending before this Court. See also Pet. Br. 39 (citing source).

[21] This is in contrast to "recommendations" that judges may choose to make in an area that is *not* judicial in nature—such as the location of the facility in which BOP may wish to confine the prisoner. §3621(b)(4)(B).

offender, the Attorney General, through the BOP, has the responsibility for administering the sentence." *Wilson*, 503 U.S. at 335.

As jailer and administrator, BOP administers sentences as best it can, particularly in the dual-sovereign context. See Part II.B, *supra*. A new state offense committed, or discovered, after federal sentencing—one that the federal court had no knowledge of and could not address in a sentence—necessarily requires BOP to administratively determine whether federal credit is justifiable for time served on the state sentence. That BOP has no choice but to do its best *absent judicial guidance* provides no basis, of course, for mandating judicial silence in circumstances where guidance can be given. This rare necessity for BOP to make decisions about a sentence's *length* when there is no prior opportunity for judicial guidance is clearly a second-best result to be avoided whenever possible. It is not the impetus for a constitutionally questionable transfer of *exclusive* sentencing authority to BOP. Second-best mechanisms are occasionally necessary in real life, but only when the ideal is unavailable. Even though notice and an opportunity to be heard are the hallmarks of our judicial system, for instance, those requirements may be temporarily dispensed with when necessity requires. For example, Federal Rule of Civil Procedure 65(b)(1) allows a court to "issue a temporary restraining order without written or oral notice to the adverse party or its attorney" if irreparable harm would result before the adverse party could be notified and heard. That judges *can* under certain circumstances grant *ex parte* relief hardly means that it should displace traditional adversary practice—and the Rule prevents that.

B. Liberty and due-process values counsel a reading of §3584(a) that provides access to judges, not jailers, for sentencing

"Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton* v. *City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). While violations of the separation of powers typically threaten liberty indirectly, the transfer of traditionally judicial sentencing authority to other branches directly infringes personal liberty and raises due-process concerns. This Court can avoid those concerns by construing §3584(a) to provide that judges, not jailers, may decide whether a sentence is consecutive or concurrent, a decision which, "[f]or many defendants, * * * is more important than a jury verdict of innocence on any single count." *Ice*, 555 U.S. at 174 (Scalia, J., dissenting).

By following the timeless methods of Anglo-American courts, "the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure." *Rita*, 551 U.S. at 351. This is how courts, but not bureaus, function. See, *e.g.*, *Irizarry* v. *United States*, 553 U.S. 708, 715-716 & n.2 (2008) (describing requirements for sentencing hearings); *Gall*, 552 U.S. at 49 (both parties entitled to argue for the proper sentence).

Between treating §3584(a) as silencing courts in cases like Setser's, versus allowing them to retain discretion to sentence, the constitutionally preferred choice is easy. The "less harsh meaning," *Ladner* v. *United States*, 358 U.S. 169, 177 (1958), is to allow sentencing to be made in open court, by an Article III judge, subject to the rigorous sentencing procedures of the Federal Rules and the Constitution, with allocution available, with counsel able to assist and argue, with due consideration of the sen-

tencing factors in §3553(a), and subject to direct appellate review.

Forcing citizens to await the judgment of a bureaucracy, without those salutary procedures, unnecessarily risks the erroneous deprivation of liberty. Indeed, the threat of consecutive sentences imposed *by sheer administrative default* is all too real. BOP admits that when judges are silent, "the default by [BOP] is to compute the federal sentence as consecutive to the state sentence regardless of which sentence was imposed first." Sadowski, *supra*, at 3. Thus, "[i]n circuits where the federal sentencing judge does not have the authority to dictate whether the federal sentence is to run concurrently or consecutively with a yet-to-be imposed sentence, the default is that the two sentences run consecutively." *Reynolds*, 603 F.3d at 1155 (W. Fletcher, J., concurring).

Agency determinations are not the same thing as judicial sentences. BOP follows the *administrative* factors of §3621(b), while Congress directed courts to the §3553(a) factors. Outcomes are riskier, as individualized administrative sentencing "could invite favoritism, disunity, and inconsistency." *Lopez* v. *Davis*, 531 U.S. 230, 244 (2001). Relief from those outcomes are also more difficult, for BOP's final denial of *nunc pro tunc* credit must be challenged under 28 U.S.C. §2241. *E.g.*, *Hunter* v. *Tamez*, 622 F.3d 427, 429 (5th Cir. 2010) (challenge to *nunc pro tunc* denial "correctly construed * * * as a §2241 habeas corpus application"). Failed §2241 actions when *nunc pro tunc* credit was denied are legion, see, *e.g.*, *Hunter*, *supra* at 428; *Reynolds*, 603 F.3d at 1145-1146; *Eccleston* v. *United States*, 390 F. App'x 62, 63-64 (3rd Cir. 2010), and cases granting relief are sparse and generally limited to simply directing BOP to reconsider. See, *e.g.*, *Barden*, 921 F.2d at 478 (ordering reconsideration after rejecting BOP's view that it could not credit state sentences when the court was silent); *Dunn* v. *Sanders*, 247 F. App'x 853,

854 (8th Cir. 2007) (ordering reconsideration because BOP did not consider proper factors). The lack of direct and searching judicial review when a non-Article III entity exercises core judicial functions is yet another constitutional problem—and yet another reason to avoid the interpretation advanced by Setser and the Government. See *Stern*, 131 S. Ct. at 2619 (rejecting bankruptcy judges' authority over Article III cases when review was not *de novo*).

The choice between the competing interpretations of §3584(a) should be easy, because it amounts to choosing between the protections afforded by an Article III court and their absence. Having one's "day in the bureaucracy" is sometimes necessary, but is uncelebrated. By contrast, a defendant's "right to his day in court," which is "basic in our system of jurisprudence," is a cherished attribute of Anglo-American law. *In re Oliver*, 333 U.S. 257, 273 (1948).

* * *

Setser and the Government offer a statutory construction devoid of textual and historical support that also raises serious constitutional questions. If Congress ever incorporates their view by enacting a law to that effect, there will be time enough for this Court to reach its constitutionality. Congress did not do that in §3584(a), and following longstanding practice, this Court should attribute to it no such views.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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October 11, 2011