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**

## REPLY BRIEF FOR PETITIONER

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Amicus's arguments rest on his primary contention that courts historically have had an inalienable authority to impose anticipatory consecutive sentencing orders. He contends that § 3584 passively recognizes some of the inherent judicial authority and creates default rules in some (but not all) cases when the court remains silent, and that the separation of powers doctrine supports his view of the statute. He is wrong on all counts.

## REPLY BRIEF FOR PETITIONER

### I. Amicus's claim to inherent authority for anticipatory consecutive sentencing orders fails

Amicus argues that § 3584 is not the sole source of judicial authority to order consecutive service, but he identifies no other source of authority. He argues only that the statute should be read to do less than its plain language suggests. That is, he argues that § 3584 does not grant any consecutive sentencing authority, but merely "passively recognizes" existing authority and supplies default rules for interpreting silent judgments. Br. 11.

Amicus argues that courts have "inherent authority" to issue anticipatory consecutive sentencing orders. Br. 20. But sentencing is not the exclusive province of the judicial branch, and there was no well-established doctrine permitting anticipatory consecutive sentencing orders at the time of the Sentencing Reform Act (SRA). Even assuming anticipatory orders

came within the courts' broad discretion, Congress remained free to legislate in the area, and did so.

### A. There is no separation of powers problem here; sentencing authority has always been shared.

Sentencing has never been considered the sole province of the judicial branch:

> Historically, federal sentencing – the function of determining the scope and extent of punishment – never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government. Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control.

*Mistretta v. United States*, 488 U.S. 361, 364 (1989) (internal citations omitted). Judicial sentencing discretion has always been cabined by the limits set by Congress.

Furthermore, this Court has long approved of substantial Executive involvement in determining the duration of imprisonment. *See United States v. Addonizio*, 442 U.S. 178, 190 (1979); *Williams v. New York*, 337 U.S. 241, 248 (1949). Prior to the SRA, for example, "the prisoner's actual release date generally was set by the Parole Commission." *Mistretta v. United States*, 488 U.S. at 365-66. Likewise, this Court has

held that the power to award pre-sentence credit – which also determines the length of incarceration – was vested in the Attorney General, not the courts. *United States v. Wilson*, 503 U.S. 329, 331-37 (1992).

Amicus notably ignores pre-SRA law empowering BOP to designate state facilities as the location for service of a federal sentence, and hence to effect a concurrent sentence. *See Gomori v. Arnold*, 533 F.2d 871, 875 (3d Cir. 1976) ("A federal court has no power to direct that a federal sentence shall run concurrently with a state sentence. . . . [A] federal judge may recommend to the Attorney General that he designate a state institution as the place of service of a federal sentence in order to make it concurrent with a state sentence being served at that institution.") (citation omitted); *see also Greathouse v. United States*, 548 F.2d 225, 227 (8th Cir. 1977); *Ange v. Paderick*, 521 F.2d 1066, 1068 (4th Cir. 1975); *United States v. Herb*, 436 F.2d 566, 568 (6th Cir. 1971); *Larios v. Madigan*, 299 F.2d 98, 100-01 (9th Cir. 1962).

Congress is presumed to be aware of prevailing law. *See Gomez-Perez v. Potter*, 553 U.S. 474, 488 (2008). In passing the SRA, Congress gave absolutely no indication that it wished to limit BOP's executive role. *See* S. REP. NO. 98-225 at 141 (1983) ("Proposed 18 U.S.C. 3621(b) follows existing law. . . . The Committee, by listing factors . . . does not intend to restrict or limit the Bureau in the exercise of its existing discretion.").

Post-SRA, there is widespread consensus that BOP is empowered to designate state facilities as the location for service of a federal sentence to provide a concurrent sentence. *See Pierce v. Holder*, 614 F.3d 158, 160 (5th Cir. 2010); *Rogers v. United States*, 180 F.3d 349, 356 (1st Cir. 1999); *United States v. Evans*, 159 F.3d 908, 911-12 (4th Cir. 1998); *McCarthy v. Doe*, 146 F.3d 118, 123 (2d Cir. 1998); *Barden v. Keohane*, 921 F.2d 476, 483 (3d Cir. 1990).

Amicus's position gives rise to a more serious separation of powers concern – the notion that "inherent" sentencing authority cannot be limited by Congress. Federal district courts "may constitutionally impose only such punishments as Congress has seen fit to authorize." *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980). The Judicial Branch does not have exclusive authority over sentencing, and Congress is empowered to fix both the "sentence for a federal crime" and "the scope of judicial discretion with response to a sentence." *Mistretta v. United States*, 488 U.S. at 364.

### B. Congress properly legislated in an area of unsettled judicial authority.

Even if courts had an inherent power to issue anticipatory orders – an assumption resting on unsettled circuit case law – Congress may legislate in areas falling within the "inherent powers" of district courts. "[T]he exercise of the inherent power of lower federal courts can be limited by statute and rule, for '[t]hese

courts were created by act of Congress.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (quoting *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 511 (1874)); *see also Melkonyan v. Sullivan*, 501 U.S. 89, 101 (1991).

Further, this Court has recognized that statutes may limit the courts' authority expressly or by "necessary and inescapable inference." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Accordingly, the judiciary lacks the "power to disregard the considered limitations of the law it is charged with enforcing." *Thomas v. Arn*, 474 U.S. 140, 148 (1985) (quoting *United States v. Payner*, 447 U.S. 727, 737 (1980)). And while courts have a recognized authority to devise *procedural* – not substantive – rules, this Court has cautioned that these rules may not either "circumvent *or* conflict with" those adopted by Congressional approval. *Carlisle v. United States*, 517 U.S. 416, 426 (1996) (emphasis added). To trigger a presumption that Congress intended to leave an inherent power in place, such a power must be of "wide use" and "long unquestioned." *Carlisle v. United States*, 517 U.S. at 426. As noted below, the few authorities marshaled by Amicus to show an inherent power of anticipatory sentencing are conflicting and equivocal.

At § 3584's enactment, courts lacked authority to impose binding concurrent sentences with respect to existing state sentences, because such orders were thought to usurp the Attorney General's power under former 18 U.S.C. § 4082. *See United States v. Thornton*, 710 F.2d 513, 516 (9th Cir. 1983); *United States v. Sackinger*, 704 F.2d 29, 30 (2d Cir. 1983); *United*

*States v. Lee*, 500 F.2d 586, 588 (8th Cir. 1974). Courts thus acknowledged that consecutive and concurrent sentencing authority was cabined by statute.

Moreover, courts that affirmed anticipatory consecutive orders did so on the basis of the statutory regime in place at the time – former 18 U.S.C. § 3568 – not a claimed inherent authority. *See Anderson v. United States*, 405 F.3d 492, 493 (10th Cir. 1969) (referencing § 3568); *Abdul-Malik v. Hawk-Sawyer*, 403 F.3d 72, 75 n.2 (2d Cir. 2005) (explaining that *Salley v. United States*, 786 F.2d 546, 547-48 (2d Cir. 1986), authorized the practice "under predecessor statutes"); *see also Salley v. United States*, 786 F.2d at 548 (examining whether the anticipatory consecutive order would infringe upon Congress's delegation to the Attorney General in former 18 U.S.C. § 4082).

In any case, it was far from settled – and certainly not "long unquestioned" – that courts had authority to issue anticipatory orders before § 3584. *Carlisle v. United States*, 517 U.S. at 426. In *United States v. Eastman*, 758 F.2d 1315 (9th Cir. 1985), the Ninth Circuit reversed an anticipatory consecutive sentence *sua sponte* and on plain error review. It held that the order deprived Eastman of the

> right to have a state court consider whether a state sentence should run concurrently with his federal sentence and, further, because it creates uncertainty and ambiguity which may in the future result in problems in calculation of service of his sentence.

758 F.2d at 1318.

*Salley*, the only pre-SRA circuit court decision that explicitly supports Amicus's view, was sharply divided. *See Salley v. United States*, 786 F.2d 546. In it, the majority stated that "[t]he right of federal judges to impose [a consecutive] sentence has been recognized for many years."[1] *Salley v. United States,* 786 F.2d at 547. It then held that "this right may be exercised regardless of whether the state sentence has as yet been imposed." 786 F.2d at 547. It reasoned that a "federal sentence [does] not begin to run until [the defendant is] received at the correctional facility for service of that sentence" under former 18 U.S.C. § 3568. 786 F.2d at 548.

Only two judges in *Salley* agreed that this was the correct result. Judge Newman wrote separately to disagree "with the view that a sentencing judge has authority to impose a sentence to run consecutively to a sentence that has not yet been imposed." 786 F.2d at 548 (Newman, J., concurring). He opined that consecutive sentencing authority "should be used only after awareness of a sentence already imposed so that the punitive effect of the consecutive sentence is carefully considered at the time of its imposition." 786

[1] Amicus suggests that the Second Circuit was speaking of long-standing authority for anticipatory orders (Br. 13), but read in context it is clear the court was referring only to consecutive orders in general. Otherwise, it would not have been necessary to add the next sentence, in which the court states that "this right" – the right to impose consecutive sentences generally – may be exercised even if the state sentence has not been imposed yet. *See Salley v. United States*, 786 F.2d at 547.

F.2d at 548. (Newman, J., concurring). Concluding as well that an anticipatory order was not sufficiently definite and certain, Judge Newman would have held that district courts "lack[ ] authority to impose a sentence consecutively to a future sentence." 786 F.2d at 549 (Newman, J., concurring).[2]

At the time of *Salley*, "[t]he only court to rule on the issue directly ha[d] held that a federal judge may not impose a sentence to run consecutively to a sentence that will be imposed in the future by a state court." 786 F.2d at 548-49 (Newman, J., concurring) (citing *United States v. Eastman*). Amicus cites three additional circuit cases that actually involve anticipatory orders,[3] but they do not squarely address the district court's statutory or inherent authority to issue them. Two of these cases passed on due process challenges to the sentences as "indefinite," not on challenges to the district court's authority. *See Anderson v. United States*, 405 F.2d at 493; *United States ex rel. Lester v. Parker*, 404 F.2d 40, 42 (3d Cir. 1968). The remaining case did not involve a challenge to the validity of an anticipatory consecutive order at all. Instead, it involved a claim that the defendant's federal sentence

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[2] Judge Newman nevertheless voted to affirm because the defendant had not raised this challenge on direct appeal. *Salley v. United States*, 786 F.2d at 549-50 (Newman, J., concurring).

[3] Other cases cited by Amicus did not involve anticipatory sentencing orders, but rather the practical reality of consecutive service when the defendant was in primary state custody. *See United States v. Kanton*, 362 F.2d 178 (7th Cir. 1966); *Hayward v. Looney*, 246 F.2d 56 (10th Cir. 1957).

should not yet have begun to run, because his state sentence was not discharged. *See Hall v. Looney,* 256 F.2d 59, 60 (10th Cir. 1958). These authorities – scarce, conflicting, equivocal, and generally spare in their reasoning – obviously do not show a "long unquestioned" practice of "wide use." It was far from clear that district courts ever had "inherent" authority to issue anticipatory consecutive orders. Accordingly, Congress's conspicuous refusal to authorize such should be read as a deliberate withholding of that power, rather than an implicit approval of such a practice.

## II. Amicus's interpretation of § 3584 is unsupported by the statute's plain text.

Amicus's efforts to re-imagine the plain text of § 3584 are not plausible. The best and simplest reading of the statute's language is that it grants full consecutive sentencing authority in two out of three temporal circumstances, subject to a substantive restriction for cases involving an attempt and its object. Consecutive orders are authorized with respect to terms of imprisonment imposed before the federal sentencing, or at the same time as the federal sentencing, but not with respect to terms of imprisonment imposed after the federal sentencing. The statute then establishes default rules that operate in the two authorized circumstances.

Amicus critiques this interpretation, arguing that the first sentence cannot be a grant of sentencing

authority because it does not explicitly mention "the court." Br. 11. Yet, as in *Wilson*, the statute's verb tense helps indicate the setting and the actor. *See United States v. Wilson*, 503 U.S. at 333. Here, the statute speaks in the present tense, discussing the case where multiple terms of imprisonment "*are* imposed" at the same time; it does not use the past tense and refer to multiple terms of imprisonment that *were* imposed at the same time. Similarly, it refers to a defendant who "is" already subject to an undischarged term of imprisonment, not one who "was" already subject to such a term. *Wilson*'s guidance is clear: the use of the present tense shows that the setting envisioned is the defendant's sentencing proceeding (not the subsequent calculation of his release date) and the actor is the sentencing court (not BOP).[4]

Amicus also points out that the statute does not explicitly prohibit an anticipatory consecutive sentence. Br. 10. But it nonetheless communicates this prohibition, by authorizing concurrent or consecutive sentences in two of three temporal possibilities (*i.e.*, with respect to sentences imposed *before* or *at the same time as* the federal sentence). *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (canon of *expressio unius exclusio alterius* applies where a

[4] This resolves as well Amicus's worry that Petitioner and the Government's reading "would leave literally *no one* to make consecutive-or-concurrent determinations in cases like Setser's." Br. 19 (emphasis added). The statute's first sentence addresses only the court.

statute identifies "a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded."); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."). Further, if the first sentence does not foreclose an anticipatory consecutive order, the two conditional phrases introducing that sentence serve no plausible function. There is no reason to specify two particular occasions in which concurrent or consecutive orders are authorized if such orders are always permissible. Moreover, there is an obvious policy rationale for the prohibition on anticipatory consecutive sentencing: a district court does not know the future term of imprisonment. The court is required to consider that (yet unknown) information in its concurrent-or-consecutive determination under § 3584(b), but cannot do so with regard to future sentences.

Amicus argues that the first sentence of § 3584(a) instead serves one of two purposes: it either "passively recognizes preexisting authority" before providing default rules in the second and third sentences (Br. 11), or it "merely delineates the realm of the default rules of the second and third sentences." Br. 19. Both suggestions are flawed.

The first view flies in the face of the canon against surplusage. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (restating the "cardinal principle of statutory

construction" that a statute ought to be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant."). Statutory terms are not presumed passive and actionless, and Amicus's interpretations render the first clauses "insignificant, if not wholly superfluous." *TRW Inc. v. Andrews*, 534 U.S. at 31 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). A statute is a command, not an observation.

Nor is it plausible to suggest that the restrictive clauses introducing the first sentence "merely delineate[ ]" the scope of the default rules. Petitioner agrees that the default rules of the second and third sentences apply only in the circumstances described by the first sentence, but this is not all that the first sentence does. It also prohibits attempt/object consecutive sentencing, and that is obviously a directive to courts, not to BOP. All of the statute's first sentence is more naturally read as a limitation on the district court's authority.

Further, under Amicus's strained reading of the first sentence of § 3584, the attempt/object limitation on consecutive sentencing applies only when the defendant is already subject to imprisonment for one of the offenses, or when the defendant is sentenced at the same time for the two offenses. Br. 22 n.7. But the Amicus's view would allow a court to order consecutive attempt/object sentences in Petitioner's situation. This reading attributes a bizarre intention to Congress and leads to absurd results, which "are to be avoided." *United States v. Wilson*, 503 U.S. at 334.

Amicus scarcely addresses the canon of *expressio unius exclusio alterius*. Amicus does not contend, nor could he, that the temporal classifications at issue here are not "members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). Instead, Amicus argues that application of the canon to *a different statute* would produce absurd results. Section 3621(b) states that a court's recommendation for a defendant's placement in a community corrections facility is not binding on BOP. Amicus argues that application of the "*expressio unius*" canon to § 3621(b) would compel BOP to enforce *every other* judicial recommendation, including recommendations regarding concurrent or consecutive sentencing. His premise is questionable, as there is no "group or series" in § 3621 to invoke this canon. In any case, §§ 3621(b) and 3584(a) are plainly distinguishable. There is a finite number of temporal possibilities under § 3584: a term of imprisonment may come before the federal sentence, be imposed simultaneously with the federal sentence, or come after the federal sentence. Conversely, the number of possible judicial recommendations are infinite. Application of the canon to § 3621(b) would produce "no logical stopping point." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. at 81, 83-84. Application of the canon to § 3584, on the other hand, imposes a single, easily defined limitation – it prohibits anticipatory sentencing orders. Therefore, while Amicus's argument against

application of the canon to § 3621 may be valid, he offers no cogent argument against the canon's application to § 3584.

Next, Amicus critiques Petitioner's understanding of the statute because it does not account for a linguistic variation found in the first and third sentences of the statute. Br. 19-23. Whereas the first sentence of the statute refers to a term of imprisonment imposed while a defendant "is already subject to an undischarged term," the third sentence refers to "[m]ultiple terms of imprisonment imposed at different times."

Despite the change in language, there are several reasons to understand the default principles in the second and third sentences as limited by the situations delineated in the first sentences. The third sentence's "place in the overall statutory scheme" implies that it is dealing with the set of cases described in the first sentence, those in which the defendant enters federal court already subject to an undischarged term of imprisonment." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Any contrary reading would ignore the tight parallelism evident in § 3584(a). The first sentence specifies two circumstances in which the district court is authorized to order consecutive or concurrent service, and the second and third sentences then provide default principles operative in those two circumstances. While the use of different language in different parts of a statute ordinarily signifies a different intended meaning (*see Russello v. United States*, 464 U.S. 16, 23 (1983)), this is not necessarily so

when the language is naturally read to mean the same thing. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc*., 554 U.S. 33, 45 (2008) (unnecessary to repeat explicit temporal modifier because the language actually included "is most naturally read to" include it.) Furthermore, this Court has recognized that restrictive modifiers may be implied by context without being repeated. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. at 809 (unnecessary to repeat restrictive clause "as an officer or employee" in each of its use where it was implied by context).[5] Indeed, the phrase

[5] Amicus discusses but does not endorse the reasoning of *United States v. Romandine*, 206 F.3d 731 (7th Cir. 2000), which suggests that district courts must remain silent as to the relationship between federal sentences and future state sentences, but further suggests that the default principle in favor of consecutive sentences might nonetheless apply in that situation. *See United States v. Romandine*, 206 F.3d at 737-38. It would not be rational for Congress to mandate that *all* defendants in Petitioner's circumstance be subjected to a consecutive term, as this would produce profoundly arbitrary results, depending only on the order of sentencing. *See* Pet. Br. 29; *United States v. Wilson*, 503 U.S. at 334. Certainly, the rule of lenity counsels against such a reading in the event of ambiguity. *See United States v. Bass*, 404 U.S. 336, 347-48 (1971). Petitioner's view of the third sentence permits the court to impose a concurrent sentence in every case where the default rule to consecutive sentencing would be applicable, and honors the place of the third sentence in the overall statutory scheme.

In any case, as Amicus notes, even the *Romandine* court did not withhold from BOP the power to run such sentences concurrently. Br. 21 n.6; *United States v. Romandine*, 206 F.3d at 738-39. As noted above, courts have long been in consensus that the Executive has the authority to effectuate a concurrent sentence by way of a facility designation.

"[m]ultiple terms of imprisonment imposed at different times" as it appears in the third sentence cannot plausibly be read to mean "*all* terms of imprisonment imposed at different times," or the result would be to negate the prohibition on consecutive attempt/object sentencing. The third sentence does not apply to Petitioner's situation, because he was not already subject to an undischarged term of imprisonment.

Amicus suggests that the third sentence might authorize anticipatory concurrent sentences, and argues this possibility defeats the idea that the first sentence sets limits on the courts' authority. Br. 22. This argument suffers many of the same flaws outlined above. It provides no function for the restrictive clauses that introduce the first sentence, thereby violating the rule against surplusage. It supposes a contorted way for Congress to express that district courts have anticipatory sentencing authority, buried by implication in the statute's third sentence. And as Amicus appears to agree, the more natural reading of the third sentence is as a default principle, not as an independent grant of authority.

Amicus also attacks the idea that BOP might make the concurrent/consecutive determination in cases involving a later-imposed state sentence. Again, however, his concessions are telling. Amicus concedes that BOP may impose a concurrent sentence by retroactively designating a state facility in several circumstances: when implementing a concurrent order, when a district court imposes conflicting anticipatory orders

(Br. 35), and, presumably, when the district court remains silent as to a future term. That is, Amicus concedes that some cases "necessarily require[ ] BOP to administratively determine whether federal credit is justifiable for time served on a state sentence." Br. 50. But Congress's decision to withhold consecutive sentencing authority as to future state sentences requires this administrative determination whenever a state sentence follows a federal one.

Similarly, Amicus overstates the textual case against BOP's authority to award credit for time in state custody. Several factors enumerated in § 3621(b) replicate the § 3553(a) factors, and are accordingly well-suited to the concurrent/consecutive decision. These include "the nature and circumstances of the offense," "the history and characteristics of the prisoner," statements by the court "concerning the purposes for which the sentence to imprisonment was determined to be warranted," and, most pertinently, the Sentencing Commission's policy statements. 18 U.S.C. § 3621(b). Further, as noted above, there has been longstanding consensus that BOP is empowered to designate state facilities as the location for service of a federal sentence, thus providing a concurrent sentence. *See supra,* pp. 3-4.

## III. Even if Amicus's construction of § 3584 were plausible, Petitioner's construction is preferable.

Amicus's construction permits the final, binding decision about concurrent or consecutive service to be made by the actor who possesses the least information. A district court making an anticipatory order does not know whether the future sentence will occur; what its length will be; whether it will run concurrently with or consecutively to any other sentence; whether the sentence will be premised on or enhanced by the conduct underlying the federal case; what facts will be elucidated in that litigation; or what the second court will say about the concurrent/consecutive decision. All of these factors are, at the very least, *relevant* to the decision.

Amicus protests that "[d]istrict courts can readily apply the § 3553(a) factors in many anticipatory contexts." Br. 34. At best, district courts may form a preference based upon limited knowledge. To the extent those preferences, based on incomplete information, are worthy of respect, Petitioner's construction permits the court to express them in a recommendation under § 3621(b)(4). But under Amicus's construction, those premature determinations acquire the controlling force of law.

Moreover, because Amicus relies so heavily upon extra-statutory inherent authority, he can point to no definitive source to resolve difficult questions about its scope. He instead must rely on mere judicial

intuition. The weakness of this position is demonstrated by Amicus's own argument. Under Petitioner's view, consecutive orders anticipating a *federal* sentence are precluded because the text of § 3584 does not authorize *any* anticipatory consecutive orders at all. But there is no text delineating the scope of "inherent authority," and accordingly, no guarantee that it will not also authorize courts to anticipate future *federal* sentences. Amicus can say only that those orders carry "different consequences for all parties," that they "might . . . be categorically 'unreasonable' under § 3553(a)," and that appellate courts very well may use "their supervisory authority" to prohibit them. Br. 41-42. Certainly, § 3584 does not distinguish between state and federal sentences.

The same problem arises as to "*unknown* future cases." Br. 33. Amicus agrees that a district court should not order consecutive service as to unknown offenses, but he cannot explain why doing so would be unauthorized. If district courts possess broad inherent authority to order consecutive service as to anticipated sentences, then there really is no source to warn the court that the state charge must be *known*. Nor can the court discern what stage of the state prosecution permits an anticipatory determination: an adjudication of guilt, a formal charge by indictment or information, an arrest, a complaint, a search warrant, or an accusation of misbehavior in the presentence report. Petitioner's rule is easier to administer: if the defendant is already serving another sentence, or if another sentence is imposed at the same time, the

judge may order consecutive or concurrent service. Otherwise, she cannot.

Contending that its position better honors the spirit of federalism, Amicus argues that anticipatory sentencing allows state courts to choose the ultimate length of imprisonment, which they may not be able to do if they do not know how BOP will treat the defendant. Br. 39-40. But this ignores a risk that state judges confronted with a federal judgment demanding consecutive service will feel coerced to also impose a consecutive sentence. This possibility is reason enough to avoid Amicus's position. Further, Amicus wrongly focuses on the influence of state courts on the total quantum of imprisonment, rather than the independence of those courts. The independence of state courts is not threatened by their inability to determine the total length of imprisonment, but by their inability to determine the effect of their own judgments, and to "administ[er] . . . a discrete criminal justice system." *Oregon v. Ice*, 555 U.S. 160, 168; *see also Nixon v. Missouri Mun. League*, 541 U.S. 125, 140-41 (2004) (Congress is presumed not to "trench on the States' arrangements for conducting their own governments"). Anticipatory consecutive orders unilaterally seize the right to determine the relationship between federal and state sentences, and require BOP to ignore a contrary state judgment.

Under Petitioner's view, by contrast, the state court may address the consecutive versus concurrent question explicitly, without the need to manipulate

the sentence length (which course of action in any event may be foreclosed by mandatory minimums). Moreover, the ultimate federal decision-maker (BOP) will have the benefit of the state court's views on the concurrence question and the ability to practice comity. *See United States v. Warren*, 610 F.2d 680, 685 (9th Cir. 1980) ("In the federal system, the 'power and discretion' to practice comity is vested in the Attorney General.") (quoting *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922)). Petitioner's view better promotes comity.

## IV. The district court unreasonably ordered Petitioner's federal sentence to run both concurrently to, and consecutively with, the same state term of imprisonment.

Even under Amicus's understanding of reasonableness review,[6] this sentence must be vacated. In his discussion of consecutive orders anticipating another *federal* sentence, Amicus concedes that BOP cannot be expected to execute inconsistent orders. Br. 42.

[6] Amicus argues that appellate reasonableness review will "resolve[ ] any practical problems" with anticipatory consecutive orders (Br. 31), but in many cases the circuit court will be in no better position than the district court. In this case, Petitioner was sentenced by the state court while his direct appeal was pending, so the appellate court knew that the possibility of inconsistency created by the district court's order had become actual inconsistency. But in many cases, the state charges are unresolved even at the time of direct appeal. Those defendants cannot rely upon reasonableness review because the facts will remain unknown to the appellate court as well.

He further admits that the possibility of subsequent contradiction "might, for that reason alone" render a consecutive order as to an anticipated federal sentence "categorically 'unreasonable' under § 3553(a)." Br. 42. But in this very case, the district court entered two inconsistent orders which must be executed by "the *same* jailer (BOP)." Br. 42. The judgment commands BOP to run the federal sentence both consecutive and concurrent to the merged state term. This is impossible.

Amicus argues that the inconsistent orders are workable, but this argument mischaracterizes both the orders and Petitioner's state prison service. First, he argues that the district court imposed a "partially concurrent federal sentence." Br. 34. This is not so. It ordered the federal sentence to run fully concurrent with the 2007 state case, and fully consecutive to the 2006 state case. Nothing was partial. J.A. 15-16. There is no "ambiguity," "latent" or otherwise. Br. 35. The judgment unambiguously orders full concurrent service with the sentence in the 2007 state drug case, and unambiguously orders full consecutive service with respect to the sentence in the 2006 state drug case.

Likewise, Amicus suggests that the district court intended Petitioner to serve five years of state custody consecutively, and anything over that concurrently. Br. 35. But this is no more accurate than to say that the court intended Petitioner to serve ten years concurrently, and anything after that consecutively.

Nothing in the federal judgment gives priority to the consecutive order over the concurrent. In any event, at the time it acted, the court did not know what new sentence Petitioner would receive in the revocation case, or indeed whether his probation would ultimately be revoked. This well-illustrates why it is unreasonable for a district court to issue binding orders regarding the order of service before it has all the facts.[7]

Second, Amicus argues that his personal calculations show the change in Petitioner's parole eligibility date attributable to his second state sentence. Br. 37 & nn.12-13. He suggests this provides an easily workable number that BOP can use to award credit to Petitioner under the concurrent sentencing order. But BOP has already made an initial determination. J.A. 62 ("BOP has determined that Setser is not entitled

[7] Because the state sentence had not yet been imposed, USSG § 5G1.3 simply did not apply. *Cf.* Br. 35; U.S. Br. 17 n.5. If the state sentences had been imposed *before* the federal sentence, USSG § 5G1.3 would recommend credit "for any period of imprisonment already served on the undischarged term of imprisonment" for the 2007 state drug case, and then concurrent service with respect to the remaining portion of the sentence in that case. USSG § 5G1.3(b). Because the two state sentences would "seemingly call for the application of different rules," the court would be required to adjust its sentence and order partial concurrency to achieve a reasonable aggregate punishment. USSG § 5G1.3(c) & cmt., n.3(D). But USSG § 5G1.3 did not apply, because the Sentencing Commission reads the statute in the same way that Petitioner and the government do: the district court lacks the authority to impose anticipatory consecutive terms. Pet. Br. 24-26; U.S. Br. 24-25.

to any credit for the time he spent in state custody."). And regardless of when Petitioner *might have been* eligible for parole, he was not paroled then. He was *in fact* paroled on the same date in both cases. Thus, hypothetical eligibility aside, every day Petitioner served in state custody was served on the 2006 state revocation case, and he is not entitled to credit for it under the district court's consecutive order. The problem, of course, is that every day Petitioner served in state custody was also served on the 2007 state case, and he *is* entitled to credit for it (and all of it, not just some of it) under the district court's *concurrent* order. There was no state custody time "attributable solely to the ten-year sentence for the 2007 drug-possession offense." Br. 36. The orders are irreconcilable.

The district court in this case occupied the same position as the first district court in the anticipatory-federal situation, where Amicus acknowledges that the result would be unreasonable. The court did not know what the subsequent decision-maker would do – because even assuming that the Texas court chose to revoke Petitioner's probation, it could have imposed any term of imprisonment up to five years. *See* TEX. CODE CRIM. PROC. art. 42.12, § 23(a). But the district court nonetheless sought to dictate how its sentence would interact with two unknown sentences. In doing so, the court created the possibility (and eventual reality) of subsequent "inconsistency." Thus, even Amicus's reasoning demonstrates that the sentence

should be reversed as unreasonable or vacated through "supervisory authority." Br. 42-43.

## CONCLUSION

For the foregoing reasons and those in Petitioner's opening brief, the consecutive sentencing term should be stricken from the district court's judgment. Alternatively, the judgment of the court of appeals should be reversed and the case remanded.

Respectfully submitted,

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