No. 19-2204

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES,
Appellee,

v.

EMILIANO EMMANUEL FLORES-GONZÁLEZ
Defendant-Appellant.

Appeal from the United States District Court for the District of Puerto Rico
Case No. 3:19-cr-00335-FAB-1
The Honorable Francisco A. Besosa

BRIEF OF *AMICI CURIAE* RODERICK & SOLANGE MACARTHUR JUSTICE CENTER, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AND THE PUERTO RICO CHAPTER OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF *AMICI CURIAE*[1]

The MacArthur Justice Center ("MJC") is a not-for-profit organization founded by the family of J. Roderick MacArthur to advocate for civil rights and a fair and humane criminal justice system. MJC has represented clients facing myriad civil rights injustices, including issues concerning unlawful and draconian sentencing, unlawful confinement, and the treatment of incarcerated people. MJC, which litigates sentencing issues in the federal and state courts, has an interest in ensuring that defendants receive individualized sentences no longer than necessary given the circumstances surrounding their conduct.

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU has an abiding interest in the civil, political and democratic rights of the residents of Puerto Rico and other U.S. Territories and it has established a Puerto Rico Chapter that has pursued this work for more than two decades. The ACLU engages in litigation and advocacy throughout the country to protect the constitutional and civil rights of criminal

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No person, other than the *amici*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief. All parties have consented to the filing of this brief.

defendants and end excessively harsh crime policies that result in mass incarceration and criminalization.

Amici collectively have an interest in the sound and fair administration of the criminal legal system. They submit this brief to highlight three important arguments in support of Mr. Flores-González. First, the brief explains the ways in which the sentence the district court imposed on Mr. Flores-González violated the bedrock principles of parsimony and individualized sentencing underlying our sentencing regime. Second, it recounts the ways in which Mr. Flores-González's sentence is not supported by—and is in some ways inconsistent with—the Supreme Court's decision in *Kimbrough v. United States*, 552 U.S. 85 (2007). Third, it describes that allowing upward variances based principally on community characteristics undermines respect for the law and erodes public confidence in the criminal legal system.

SUMMARY OF ARGUMENT

1. While federal sentencing law has seen a sea change over the last half-century, two principles have remained consistent throughout: one, sentencing must be based on the individual person and not merely the statute of conviction, and two, sentences must be no greater than necessary to accomplish the goals of sentencing (also known as the parsimony principle). The district court here failed to adhere to either mandate, explicitly admitting that the upwardly variant sentence was not based

on characteristics specific to Mr. Flores-González or his offense. Instead, it varied upward for a 19-year-old, first-time offender charged with a non-violent crime based solely on its demonstrably false views about violent crime rates in Puerto Rico and disproven notions about general deterrence. That sentence flouted the statutory requirement for an individualized sentence that complies with the parsimony principle, and exceeds the bounds of a district court's latitude in sentencing.

2. The sentence here cannot be justified by the Supreme Court's opinion in *Kimbrough v. United States*, 552 U.S. 85 (2007). *Kimbrough* endorsed policy-based *downward* variances to ameliorate decades of racial disparities in sentencing, which is fully consistent with the parsimony principle. By contrast, categorical *upward* variances implicate a host of different concerns, including conflicting with the overarching statutory requirement of parsimony. When those categorical upward variances are based on false "data" or disproven theories of general deterrence, they also raise serious Due Process concerns not present with downward variances. And whereas *Kimbrough* sought to undo longstanding racial disparities in sentencing, categorical upward variances based on community characteristics have the opposite effect, disproportionately burdening people of color.

3. A categorical upward variance based on inaccurate data and inflammatory evidence wholly disconnected from the individual defendant—like the one here—undermines respect for the law, erodes public confidence in the criminal legal

system, and makes communities less safe. The sentence here thus undercuts the statutory purposes of sentencing and should be vacated.

ARGUMENT

I. Federal Sentencing Must Be Individualized and Abide by the Parsimony Principle.

Federal sentencing law has undergone a sea change in the last 40 years. The passage of the Sentencing Reform Act in 1984 constrained the formerly broad discretion of sentencing courts, including by mandating the Sentencing Guidelines and prescribing factors that courts must consider in fashioning a criminal sentence. *See* 18 U.S.C. § 3551 *et seq*.; *Pepper v. United States*, 562 U.S. 476, 488-89 (2011). Some 20 years later, the Supreme Court transformed sentencing by holding that the Constitution demands the Guidelines be advisory, not mandatory. *United States v. Booker*, 543 U.S. 220, 245-46 (2005). Following *Booker*, the fundamental direction to sentencing courts is to impose a sentence consistent with the parsimony principle: a sentence sufficient, but not greater than necessary, to meet the statutory purposes of sentencing. 18 U.S.C. § 3553(a). On the way to that "overarching duty," *Pepper*, 562 U.S. at 493, the Guidelines now serve as the "starting point and initial benchmark" for sentencing, *Gall v. United States*, 552 U.S. 38, 49 (2007). After considering the sentencing factors laid out in 18 U.S.C. § 3553(a), a district court may determine that an outside-Guidelines sentence is warranted. But it must provide a "sufficiently compelling" justification to support the degree of the variance, with

a major departure requiring a "more significant justification." *Id.* at 49-51. And in all cases, district courts must "adequately explain the chosen sentence" to enable "meaningful appellate review" and "promote the perception of fair sentencing." *Id.* at 50.

Amid the turbulence in sentencing law over the last half-century, several principles have remained consistent. One such throughline is that courts must sentence individuals *as individuals*, so that the punishment "fit[s] the offender and not merely the crime."[2] *Pepper*, 562 U.S. at 488. In every case, sentencing courts "must make an individualized assessment based on the facts presented." *Gall*, 552 U.S. at 50. This principle "has been uniform and constant in the federal judicial tradition," requiring sentencing judges "to consider every convicted person *as an individual*." *Koon v. United States*, 518 U.S. 81, 113 (1996) (emphasis added). Congress has "acknowledg[ed] the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances," rather than mechanistically sentencing based on the crime and little else. *Id.* at 92. Put simply: "Fair sentencing is individualized sentencing." U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 113 (2004).

[2] Such individualized sentencing is also mandated by the Constitution of Puerto Rico. *See* Puerto Rico Const. Art. VI, § 19 (requiring that punishment enable "moral and social rehabilitation" of individual defendants).

Another such throughline is the parsimony principle, which mandates that the punishment for a crime be no greater than necessary to accomplish the goals of sentencing: "just punishment, deterrence, protection of the public, and rehabilitation." *Dean v. United States*, 137 S. Ct. 1170, 1175 (2017). That principle has been a cornerstone of criminal legal theory for hundreds of years, and its proponents heavily influenced the Founders. *See* Amicus Br. of Families Against Mandatory Minimums, *Gall*, 552 U.S. 38 (No. 06-7949), 2007 WL 2197509, at *2 (documenting that parsimony "was well known to the founding generation through the work of the Italian criminologist Cesare Beccaria, who borrowed the concept from Montesquieu, as well as the English philosopher Jeremy Bentham"). Parsimony is now the "substantive standard" Congress requires sentencing courts to follow. *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020); *see* 18 U.S.C. § 3553(a). Ensuring parsimony is the "overarching duty" of every sentencing court, in every case. *Pepper*, 562 U.S. at 493.

These two requirements—individualized sentencing and the parsimony principle—are interrelated: courts can comply with the parsimony principle only by individualizing the sentence. Thus, in every criminal case, courts must ask whether the sentence is the least severe punishment necessary to achieve the purposes of sentencing for *this* particular defendant, in *this* particular case. The answer to that question necessarily requires an "individualized assessment." *Gall*, 552 U.S. at 50.

After all, the § 3553(a)(2) factors—the statutory purposes of sentencing—focus heavily on the individual defendant, including that person's need for treatment and training, and the protection of the public from further crimes by that person. *See* § 3553(a)(2)(C)-(D).

To be sure, one of the § 3553(a)(2) factors—"adequate deterrence to criminal conduct"—may lend itself to some degree of generalized analysis. As this Court has held, "deterrence" considers both the deterrent effect on the individual defendant (specific deterrence) as well as the deterrent effect on others (general deterrence). *See United States v. Crespo-Rios*, 787 F.3d 34, 38 (1st Cir. 2015). But general deterrence cannot solely, or near solely, dictate a given sentence. *See infra* at 8-9. Near-exclusive reliance on general deterrence flies in the face of § 3553(a)—which reflects a fundamental focus on the *individual* defendant—and disregards the need for a sentence that "fit[s] the offender and not merely the crime." *Pepper*, 562 U.S. at 488.

That is precisely what happened here. The sentencing court admitted on the record that it "[did] not purport to establish that Mr. Flores[-González's] crime itself was more harmful than others similar to his." A.28. Similarly, it admitted that the inflammatory video it played of a mass shooting in another town hours away was wholly unrelated to Mr. Flores-González's specific case, or to Mr. Flores-González as a person. A.36; *see infra* § III. But it drastically varied upward for a 19-year-old,

first-time offender charged with a non-violent crime—simple possession of a handgun modified to meet the definition of a machinegun—based *solely* on its mistaken view that Puerto Rico as a whole has unacceptably high rates of violent crime.[3] *See* A.27-30, A.36. The district judge's reasoning suggests he would vary upward for *any* individual charged with a gun crime simply because of the judge's incorrect perception of violent crime in Puerto Rico, without regard to the other § 3553(a) factors or the need for individualized sentencing—just as he did in Mr. Flores-González's case.

Even in the pre-Sentencing Reform Act era—when district courts had greater leeway in sentencing than they possess in the modern era—this Court rejected the use of "mechanistic" approaches, reliance on a single questionable factor, and adherence to "unbending" views about deterrence in sentencing. *See United States v. Wardlaw*, 576 F.2d 932, 938-39 (1st Cir. 1978). The district court in *Wardlaw* imposed ten-year sentences on two individuals who had worked as "drug mules" because it wanted the "word [to] spread[] around" to the "mule owners" to deter them, in part because it was "afraid some drug peddler is going to get to my child." *Id.* at 936. This Court vacated the sentences, holding that the defendants "were

[3] The falsity of the district court's belief about violent crime in Puerto Rico further compounds the unreasonableness of the sentence: as Mr. Flores-González's en banc brief explains, the violent crime rate in Puerto Rico is actually *lower* than most states on the mainland. *See* Appellant's Corrected En Banc Br. 23-26.

entitled to have their sentences set primarily in terms of the seriousness of their own crimes and associated individual factors," and that sentences may not be used as "instruments of retaliation against other, different criminals." *Id.* at 939. Although *Wardlaw* confirmed that the sentencing court may consider deterrence as one of many factors, it cannot "relentlessly pursue at a defendant's cost a single, questionable theory while simply brushing aside all the other criteria" in sentencing. *Id.* And when a sentencing court appears to believe "conclusions as to deterrence" that are "so unbending as to forbid relaxation in an appropriate case," or holds "fixed ideas" about "what a particular type of crime invariably deserves," it exceeds the allowable bounds of its discretion. *Id.* at 938-39. As in *Wardlaw*, the district court here "relentlessly pursue[d] . . . a single, questionable theory"—that varying harshly upward for gun crimes will deter violence in Puerto Rico, which has a *lower* violent crime rate than most mainland states—"while simply brushing aside all the other [sentencing] criteria." *Id.* at 939. As in *Wardlaw*, then, this Court should vacate and remand for resentencing.

II. *Kimbrough* Did Not Sanction Categorical Upward Variances that Rely on Dubious Information Unrelated to Individual Defendants and that Impose Additional Burdens on People of Color.

A. *Kimbrough* permits policy-based downward variances to effectuate parsimony and to ameliorate the discriminatory effect of the crack/powder cocaine disparity.

Kimbrough allows district courts to make a policy-based determination that a within-Guidelines sentence would "yield[] a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." 552 U.S. at 110. The Court's reasoning in *Kimbrough* does not support categorical upward variances, even if the opinion does not expressly prohibit them. *Kimbrough* allowed district judges to decide that, based on the judge's policy disagreements, a within-Guidelines sentence would be too *long* and thus fail to comply with parsimony, the overarching and ultimate requirement of every federal sentence. *See supra* § I. As explained, parsimony, the principle that punishment for criminal offenses should be no greater than necessary, is both statutorily required and has been a touchstone of criminal legal theory since before our nation's founding. *See id.* It is therefore a defining feature of *Kimbrough* that downward variances are compatible with parsimony.

The Supreme Court decided *Kimbrough* after an unprecedented decades-long outcry against the former 100:1 crack/powder disparity, context that matters when drawing lessons from *Kimbrough*. The district court in *Kimbrough* disagreed categorically with the crack/powder guideline because "the case exemplified the

'disproportionate and unjust effect that crack cocaine guidelines have in sentencing.'" *Kimbrough*, 552 U.S. at 93. The result of the downward variance was to ameliorate longstanding and extreme racial injustice in the criminal legal system.

The 100:1 ratio originated in the Anti–Drug Abuse Act of 1986. Less than 10 years later, the Sentencing Commission unanimously recommended changing it,[4] and submitted proposed legislation to Congress and amendments to its sentencing guidelines that would have equalized the penalties for crack and powder cocaine offenses at the level of powder cocaine.[5] This recommendation was consistent with Congress's statutory directive that the "Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d). The Commission "acknowledged that its crack guidelines bear no meaningful relationship to the culpability of defendants sentenced pursuant to them. . . . [T]he Commission has never before made such an extraordinary *mea culpa* acknowledging the enormous unfairness of one of its guidelines." *United States v. Anderson*, 82 F.3d 436, 449-50 (D.C. Cir. 1996) (Wald, J., dissenting) (footnotes omitted).

[4] U.S. Sentencing Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 1 (1997).
[5] *See* Amendments to the Sentencing Guidelines for the United States Courts, 60 Fed. Reg. 25074, amend. No. 5 (proposed May 10, 1995).

In April 1997, the Commission issued a second report urging the reduction of the 100:1 ratio and highlighting the ratio's discriminatory impact. Indeed, the report's very first paragraph states that "[c]ritics [of the cocaine sentencing disparity] have focused on the differences in federal penalty levels between the two principal forms of cocaine . . . and on the disproportionate impact the more severe crack penalties have had on African-American defendants."[6] The Commission issued yet another report in 2002, which again called out the irrationality of the crack disparity and the impact on Black defendants.[7]

While the Commission published reports calling out the crack/powder disparity, federal judges were publishing opinions ringing the same alarm. The judicial outcry over the 100:1 ratio appears to be unprecedented in our history—perhaps no other single sentencing policy has inspired such harsh condemnation by so many federal judges. *See e.g.*, *United States v. Armstrong*, 517 U.S. 456, 479 (1996) (Stevens, J., dissenting) (characterizing as "undisputed" the fact "that the brunt of the elevated federal penalties falls heavily on blacks"); *United States v. Williams,* 982 F.2d 1209, 1214 (8th Cir. 1992) (Bright, J., concurring) ("writ[ing] separately to note the racial injustice flowing from this policy"); *United States v.*

[6] U.S. Sentencing Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 1 (1997).
[7] U.S. Sentencing Comm'n, Report to Congress: Cocaine and Federal Sentencing Policy v-viii (2002).

Smith, 73 F.3d 1414, 1418, 1422 (6th Cir. 1996) (Jones, J., concurring) (observing that "the African-American community has borne the brunt of enforcement of the 100:1 ratio," and urging colleagues to revisit the constitutionality of the ratio, because "[t]he longer the policies exist, the greater the risk that we send a message to the public that the lives of white criminals are considered by the U.S. justice system to be at least 100 times more valuable and worthy of preservation than those of black criminals" (internal quotation marks omitted)); *United States v. Dumas*, 64 F.3d 1427, 1432 (9th Cir. 1995) (Boochever, J., concurring) ("find[ing] the result in this case to be shocking, in that the punishment for the crack cocaine offense is the same as the punishment that would have been imposed for a comparable offense involving 100 times as much powder cocaine, and the evidence indicates that 92% of federal prosecutions for crack cocaine, which require the enormously higher terms of imprisonment, involve African-Americans"); *United States v. Clary*, 846 F. Supp. 768, 770 (E.D. Mo. 1994) (asserting that "this one provision, the crack statute, has been directly responsible for incarcerating nearly an entire generation of young black American men for very long periods, usually during the most productive time of their lives," and the finding the "disparity. . . so significantly disproportional that it shocks the conscience of the Court"), *rev'd*, 34 F.3d 709 (8th Cir. 1994); *United States v. Perry*, 389 F. Supp. 2d 278, 302 (D.R.I. 2005) (recounting that "approximately 85% of the offenders sentenced for crack cocaine violations are

black . . . and that this leads to, at the very least, a perception that the crack/powder disparity is racially-motivated")

In 2007, the Commission issued another report stating its concern about the disparity's discriminatory effect and unequivocally advocating for change: the "[f]ederal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups, and inaction in this area is of increasing concern to many, including the Commission."[8] That report was published in May 2007; *Kimbrough* was argued that October and decided that December. 552 U.S. 85.

Kimbrough cannot be divorced from its context: it sanctioned a downward variance that made an otherwise irrationally long and racially discriminatory sentence shorter. Indeed, the Court summarized the history of the 100:1 ratio and recounted that the Commission found the disparity "fosters disrespect for and lack of confidence in the criminal justice system because of a widely-held perception that it promotes unwarranted disparity based on race." *Kimbrough*, 552 U.S. at 98 (cleaned up). *Kimbrough* further acknowledged that the Commission had long objected to the ratio in part because "approximately 85 percent of defendants

[8] U.S. Sentencing Comm'n, Report to Congress: Federal Cocaine Sentencing Policy 2, 8 (2007).

convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio are imposed primarily upon black offenders." *Id.* (cleaned up).

B. The Supreme Court has not examined the distinct issues that categorical upward variances raise, and this Court should approach them with skepticism.

A categorical upward variance raises different concerns than a policy-based downward variance. Those concerns—tension with parsimony, due process, and the exacerbation of racial and ethnic disparities—were not at issue in *Kimbrough*, but they are central to the variance in this case. If this Court permits categorical upward variances at all, it must insist that sentencing courts provide an explanation and justification strong enough to counter the weighty concerns they raise.

i. National sentencing data and the history of the relevant guideline demonstrate that the categorical upward variance is in tension with the parsimony principle.

Categorical variances above the guideline (community-based or otherwise), by definition, press against a court's overarching duty to impose a sentence that is sufficient but not greater than necessary. This tension is increased where both the evolution of the applicable guideline and sentencing data suggest that the advisory guideline range is *already* too high—as is the case with simple possession of a machinegun in violation of 18 U.S.C. § 922(o).

Under the original 1987 Sentencing Guidelines, the base offense level for § 922(o) likely would have been 12 under U.S. Sentencing Guidelines Manual ("USSG") § 2K2.2(a) (U.S. Sentencing Comm'n 1987).[9] These initial guidelines were developed using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports. *Kimbrough*, 552 U.S. at 96 (citing USSG § 1A.1 intro. comment., Pt. A, ¶ 3). The Commission then "modified and adjusted past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like." *Id.* (cleaned up). As to the firearm guidelines, the Commission noted substantial sentencing variation before the Guidelines, with the variation driven primarily by the actual or intended use of the firearm, as well as the defendant's criminal history. USSG § 2K2.1 cmt. n.1 (1987), USSG § 2K2.2 cmt. n.1 (1987). Thus, the Commission provided a cross-reference for cases in which the defendant used the firearm in committing or attempting another offense. USSG §§ 2K2.1(c), 2K2.2(c) (1987).

Later, without reference to data, caselaw, literature review, or other exercise of its "characteristic institutional role," *Kimbrough*, 552 U.S. at 109, the

[9] USSG § 2K2.2 (1987) (Receipt, Possession, or Transportation of Firearms and Other Weapons in Violation of National Firearms Act). Although § 922(o) was enacted in 1986, there was no reference to it in the Guidelines until 1989. Machineguns are, however, firearms under the National Firearms Act. 26 U.S.C. § 5845(a)(6). The other possibility would be a base offense level 9 under USSG § 2K2.1(a) (1987) (Receipt, Possession, or Transportation of Firearms and Other Weapons by Prohibited Persons).

Commission increased the base offense level for simple possession of a machinegun twice in rapid succession: to level 16 in 1989,[10] then to level 18 in 1990.[11] The 1989 amendment provides no explanation of the increase from level 12 to 16,[12] and hearing minutes suggest that this increase was adopted against the recommendation of Commission staff.[13] The 1990 amendment's further increase to level 18 is even more perplexing in light of the Commission's failure to give the required notice that it was contemplating such an increase.[14] Commentators, including the editors of the Federal Sentencing Report, criticized the Commission for proposing amendments without identifying any problem with the current guidelines; any justification for proposed changes based on case law, empirical and literature research, or thorough analysis; or any explanation how it would meet the Commission's statutory mandate.[15] The Commission's sole explanation was that the increase was made "to better reflect the seriousness of the conduct covered."[16]

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[10] USSG, app. C, Amendment 189 (1989).
[11] USSG, app. C, Amendment 333 (1990).
[12] USSG, app. C, Amendment 189 (1989).
[13] Minutes of the April 18 and April 19, 1989, U.S. Sentencing Commission Business Meeting, at 7, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/19890418/Minutes.pdf (replacing Commission staff recommendation of (12) with (16)).
[14] Notice of Proposed Amendments, 55 Fed. Reg. 5718-01 (Feb. 16, 1990).
[15] Public Comment, Daniel J. Freed and Marc Miller, Editors, Federal Sentencing Reporter, March 28, 1990, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/199003/199003_PCpt6.pdf.
[16] USSG, app. C, Amendment 333 (1990).

National sentencing data likewise suggest that the guideline ranges for § 922(o) offenses are, in most cases, *already* higher than necessary—as revealed by Commission data of sentences under Guideline 2K2.1 in cases involving at least one § 922(o) conviction and no 18 U.S.C. § 924(c) counts.[17] These data show that during fiscal years 2014-2021, 66.9% of these sentences outside of the District of Puerto Rico were *below* the guidelines—as opposed to just 14.6% in Puerto Rico.[18] During the same period, the upward variance rate for these sentences in Puerto Rico was 21.2%—compared to a mere 1.7% for the rest of the country.[19] So even if there were some legitimate reason why sentences for machinegun offenses should always be higher in Puerto Rico than elsewhere (a proposition *amici* dispute), a sentence within the guidelines in most cases would *already* be higher—because elsewhere, most of these offenses get below-guideline sentences.

[17] 18 U.S.C. § 924(c) relates to the use of a firearm during or in furtherance of a crime of violence or drug trafficking.

[18] The data used for these analyses were extracted from the U.S. Sentencing Commission's Individual Offender Datafiles, publicly available for download at https://www.ussc.gov/research/datafiles/commission-datafiles. The analyses used Datafiles FY2014-2021, filtered to select for individuals sentenced under primary guideline § 2K2.1, with at least one count of conviction of 18 U.S.C. § 922(o). Cases with any convictions under 18 U.S.C. § 924(c) were excluded.

[19] *Id.*

ii. Upward variances based on unreliable information and disproven theories of deterrence may violate the Due Process Clause.

A defendant's Due Process rights are rarely implicated when a judge sentences them to less rather than more time. By contrast, a longer sentence implicates a criminal defendant's Due Process rights—even if that longer sentence is within the statutorily-defined range. *See Townsend v. Burke*, 334 U.S. 736, 741 (1948) (reversing a conviction and sentence on due process grounds that was "within the limits set by the statute" because it was based on "careless[ly]" obtained false information).

Caselaw from this Court and its sister circuits confirms that sentencing courts violate defendants' Due Process rights when they increase sentences based on irrational justifications or unreliable data. *See, e.g.*, *United States v. Gonzalez-Castillo*, 562 F.3d 80, 83-84 (1st Cir. 2009) ("It is well-established that a criminal defendant holds 'a due process right to be sentenced upon information which is not false or materially incorrect.'" (quoting *United States v. Pellerito*, 918 F.2d 999, 1002 (1st Cir. 1990)); *see also United States v. Hamad*, 495 F.3d 241, 247 (6th Cir. 2007) ("Although the district court may consider hearsay evidence in determining a sentence, the accused must be given an opportunity to refute it, and the evidence must bear some minimal indicia of reliability in respect of defendant's right to due process." (cleaned up)); *United States v. Scalzo*, 716 F.2d 463, 466 (7th Cir. 1983)

(explaining "fundamental and undisputed" due process right of defendant "to be sentenced on the basis of accurate information").

This Court's recent opinion in *United States v. Rivera-Ruiz*, 43 F.4th 172 (1st Cir. 2022), is especially instructive. *Rivera-Ruiz* found procedural error where the district court varied upward and "the record d[id] not sufficiently support [that] exercise of [] discretion in relying on certain administrative complaints [against the defendant] that lacked any indicia of reliability as to whether the underlying conduct took place." *Id.* at 181. This conclusion correctly applied the "fundamental precept … rooted in due process" that "a sentence must be based on 'information [that] has sufficient indicia of reliability to support its probable accuracy.'" *Id.* at 181-82 (quoting *United States v. Lopez*, 299 F.3d 84, 89 (1st Cir. 2002)). The court explained that the administrative complaints at issue were lacking in reliability because they "are simply accusations of misconduct that *sometimes* launch an investigation and result in adjudication." *Id.* at 183. If an upward variance based on unsubstantiated complaints against an individual violates Due Process, the same must be true of a categorical upward variance that is based on unreliable "characteristics of the specific community" unrelated to a specific defendant. *See infra* at 25-26 (recounting false or highly questionable nature of district court's "evidence" for an upward variance in this case); Appellant's Corrected En Banc Br. 23-26 (explaining that Puerto Rico's violent-crime rate is actually *lower* than most

states on the mainland, contrary to the district court's assertion). The latter is far more arbitrary and raises greater Due Process concerns.

Moreover, reliance on unfounded concepts of general deterrence increases the risk of a Due Process violation. Not even the Department of Justice subscribes to the disproven notion that longer sentences have a general deterrent effect. Indeed, "years of rigorous scientific inquiry"[20] has convinced DOJ's National Institute of Justice that "[i]ncreasing the severity of punishment does little to deter crime."[21] Any sound review of the literature leads to the same conclusion. *See* Appellant's Corrected En Banc Br. 27-31 (collecting sources). Tellingly, even the Government does not take the position that longer sentences are justified based on the notion of general deterrence. *See* Gov. En Banc Br. 44. There is an intolerable risk that a sentencing court violates Due Process by imposing a categorical upward variance based on discredited notions of general deterrence without acknowledging—much less grappling—with the weight of this evidence.

[20] Nat'l Inst. of Justice, "NIJ 'Five Things' Series," Aug. 22, 2022, https://nij.ojp.gov/library/nij-five-things-series.
[21] Nat'l Inst. of Justice, "Five Things About Deterrence," June 5, 2016, https://nij.ojp.gov/topics/articles/five-things-about-deterrence.

iii. Upward variances based on "characteristics of the specific community" exacerbate existing inequities that burden people of color in the criminal legal system.

"Characteristics of the specific community" in which a crime occurs are deeply intertwined with race and ethnicity, intentional and unintentional discrimination, and socioeconomic status. It is impossible to untangle those connections. The question for this Court then, is whether *those* are permissible reasons to increase a defendant's sentence. If they are not, calling them by another name should not change this Court's answer.

The policy-based downward variance that the Supreme Court upheld in *Kimbrough* ameliorated the effect of a sentencing regime that "fosters disrespect for and lack of confidence in the criminal justice system because of a widely-held perception that it promotes unwarranted disparity based on race." *Kimbrough*, 552 U.S. at 98 (cleaned up). Categorical upward variances based on "characteristics of the specific community" will have the opposite effect; *Kimbrough* does not allow them.

Although "characteristics of the specific community" may appear neutral on its face, it functions as a proxy for race and ethnicity. Several factors contribute to this. First, this country remains highly segregated.[22] Second, people of color

[22] *See, e.g.*, William H. Frey, *Neighborhood segregation persists for Black, Latino or Hispanic, and Asian Americans*, Brookings Institute (Apr. 6, 2021), https://

disproportionately experience lower socioeconomic conditions because of past and continuing discrimination and marginalization.[23] Third, lower socioeconomic conditions can be correlated with higher crime rates.[24] Fourth, detected crime is not equivalent to crime commission: law enforcement choices influence who ends up in the criminal legal system.[25] Thus, there is inequity and bias baked into the "characteristics of the specific community," making it—at best—a highly suspect rationale for categorically varying upward.

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www.brookings.edu/research/neighborhood-segregation-persists-for-black-latino-or-hispanic-and-asian-americans/.

[23] *See, e.g.*, *Ethnic and Racial Minorities & Socioeconomic Status*, American Psychological Association (2017), https://www.apa.org/pi/ses/resources/publications/minorities (collecting sources).

[24] Kesha Moore, et al., *The Truth Behind Crime Statistics*, The Thurgood Marshall Institute 29-31 (2022), https://www.naacpldf.org/wp-content/uploads/2022-08-03-TMI-Truth-in-Crime-Statistics-Report-FINAL-2.pdf; Ching-Chi Hsieh & M.D. Pugh, *Poverty, Income Inequality, and Violent Crime: A Meta-Analysis of Recent Aggregate Data Studies*, 18 CRIM. JUST. REV. 182, 198 (1993).

[25] *See, e.g.*, *The War on Marijuana in Black and White*, American Civil Liberties Union (2013), https://www.aclu.org/report/report-war-marijuana-black-and-white and *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, American Civil Liberties Union (2020), https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform (together documenting considerable racial disparities in marijuana possession arrests throughout the country between 2000-2018 that cannot be explained by comparable disparities in actual marijuana usage).

III. Permitting Categorical Upward Variances Based on False "Data" and Inflammatory Evidence Entirely Disconnected From the Individual Defendant and the Individual Offense Undermines Respect for the Law and Erodes Public Confidence in the Criminal Legal System.

As the Supreme Court and this Court have long held, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954); *Figueroa Ruiz v. Delgado*, 359 F.2d 718, 721 (1st Cir. 1966). Little is more corrosive to public confidence in the criminal legal system than the perception of unfairness in sentencing, particularly when harsh sentences are imposed inconsistently and arbitrarily. *See Rita v. United States*, 551 U.S. 338, 356 (2007) ("Confidence in a judge's use of reason underlies the public's trust in the judicial institution."); American Bar Association, *Handbook of International Standards on Sentencing Procedure* 3 (2010) ("[D]isparity in sentencing may erode the public's confidence in the integrity of the criminal justice system.").

This is no mere theoretical matter. One of the statutory purposes of sentencing—just as important as "adequate deterrence"—is to "promote respect for the law." 18 U.S.C. § 3553(a)(2)(A). An upwardly variant sentence imposed principally because of the community in which the crime was committed, without proper regard for the characteristics of the individual defendant and the individual offense, offends this statutory purpose. This is because a sentence "may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and

circumstances involved in sentencing." *Gall*, 552 U.S. at 54. This Court agrees: "respect for the law diminishes if natural principles of justice . . . are ignored." *United States v. Martin*, 520 F.3d 87, 94 (1st Cir. 2008). The most central of those "natural principles of justice" is the "principle that punishment should correlate with culpability." *Id.*

The district court here disregarded that fundamental tenet; the court made no attempt to connect Mr. Flores-González's punishment with his culpability. To the contrary, the court explicitly *disclaimed* basing the upward variance on anything particular to Mr. Flores-González or his individual offense, admitting that it did "not purport to establish that Mr. Flores-González's crime itself was more harmful than others similar to his." A.28. Instead, it based the upward variance on anecdotal experience, unreliable data, and a highly inflammatory, unexpected video of a mass shooting in a city hours away from where Mr. Flores-González lived and was arrested—in other words, about as far from reasonable, individualized, reliable information as it gets. To briefly review the court's reasoning:

- "Crime in Puerto Rico far exceeds the known limits on the mainland." A.27.
    - That assertion is simply false, as explained in Mr. Flores-González's en banc brief. *See* Appellant's Corrected En Banc Br. 23-26. It thus violates the "well-established" due process right not to be sentenced based on information that is "false or materially incorrect." *Gonzalez-Castillo*, 562 F.3d at 83-84.

- "Violent crime and murders are occurring at all hours of the day, in any place on the island, even on congested public highways, in shopping centers, public basketball courts, and at cultural events." A.27.

    - Because the court provided no support for this anecdotal assertion, it lacks the requisite "indicia of reliability." *Rivera-Ruiz*, 43 F.4th at 181. In any event, it's irrelevant: Mr. Flores-González was not charged with a violent crime of any kind, so the anecdotal descriptions of "violent crime and murders" have nothing to do with Mr. Flores-González as an individual or with his specific crime.

- "The dangerousness of a machine gun is clearly shown by the recent massacre which occurred at the Ramos Antonini Public Housing Project where six persons were machine-gunned to death in a matter of seconds. And we have the video and audio of that, which we will show now . . . This is what some people in Puerto Rico live with every single day." A.30.

    - This highly inflammatory video—70 seconds of multiple gunmen engaging in near-constant machine-gun fire at an apartment complex—cannot support an upward variance. For one, it has no connection to Mr. Flores-González's case—as the district court admitted. A.36. For another, the video does not have "sufficient indicia of reliability." *Rivera-Ruiz*, 43 F.4th at 181. As Mr. Flores-González notes, the district court did not say where it obtained the video, but it was posted on YouTube[26] by a user[27] with 25 subscribers and whose handful of other videos focus on video games and TV streaming applications. Due process requires more. *See id.*

At minimum, the district court was required to provide notice of its intent to rely on such irrelevant, inflammatory, and unreliable evidence at sentencing. *See United States v. Vega-Santiago*, 519 F.3d 1, 5 (1st Cir. 2008) (en banc); *United States*

[26] *See* Ricardo Rosario, *TERROR AND WAR IN PUERTO RICO GANGS OUT OF CONTROL*, YouTube (Oct. 22, 2019), https://youtu.be/4Ibsg2icjZU (last visited Oct. 24, 2022).

[27] *See* YouTube profile of "ricardo rosario," https://www.youtube.com/channel/UC8SDQcQSBR3lNlnSzXflwmg/featured (last visited Oct. 24, 2022).

v. Fleming, 894 F.3d 764, 768-70 (6th Cir. 2018) (sentence procedurally unreasonable where district court relied on local news article about overdose deaths without notice). That said, even with adequate notice, reliance on such flimsy and emotional evidence would still raise serious Due Process concerns. *See supra* § II.B.ii. And contrary to the government's assertion, *see* Gov. En Banc Br. 30-31, the district court's reliance on such "information" cannot be justified by citation to *Concepcion v. United States*, 142 S. Ct. 2389 (2022). For one, *Concepcion* reiterated that the Constitution limits the materials that may be considered at sentencing, *id.* at 2400, and as previously explained, the evidence here raised serious Due Process concerns, *see supra* at 25-26. For another, *Concepcion* focused on the district court's latitude to consider information relevant to assessing "the whole person before them." 142 S. Ct. at 2398; *id.* at 2399 (describing discretion to consider the "fullest information possible concerning the defendant's life and characteristics" at sentencing). *Concepcion* thus focused on sentencing courts' ability to receive a wide variety of information *about the specific individual*. *Id.* But that's not the situation here, where the district court used unreliable information that had *nothing* to do with Mr. Flores-González, or his specific offense.

Finally, the unfairness inherent to imposing an above-Guidelines sentence because of crimes committed by *other* individuals across Puerto Rico does not

promote the deterrent purpose of sentencing.[28] Far from it: study after study has shown that perceived unfairness in the criminal legal system can actually *increase* crime and harm public safety.[29] That means that district courts must not punish defendants harshly based principally on the communities they come from. *See* 28 U.S.C. § 991(b)(1)(C) (requiring the establishment of sentencing policies that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process"). Although modern studies uniformly agree that the perception of unfairness in sentencing harms public safety and respect for the law, this is not exactly news—even Blackstone recognized that "punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in

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[28] *Amici* also reiterate that harsher sentences have not been found to deter crime, including gun crimes. *See supra* at 20; Appellant's Corrected En Banc Br. 27-31 (collecting sources)

[29] *See, e.g.*, Melissa Barragan, *Policing and Punishing Illegal Gun Behavior*, 69 J. SOCIAL PROBLEMS 1170, 1171 (2022) (reviewing literature and explaining that severe penalties can lead to "legitimacy erosion and sense of failed protection by the state," which in turn leads to a sense that "illegal gun carry [is] . . . a more viable, even necessary, self-help strategy to ensure one's safety"); Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1165 (2006) (explaining that "prominent legal theorists" and "a broad array of recent empirical studies" support the notion that "[w]hen citizens perceive the state to be furthering injustice . . . they are less likely to obey the law, assist law enforcement, or enforce the law themselves"); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1399 (2005) (reviewing the literature and reporting new experimental evidence that "the perceived legitimacy of one law or legal outcome can influence one's willingness to comply with unrelated laws"); Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1185 (2004) ("As penalties increase, people may not be as willing to enforce them because of the disproportionate impact on those caught.").

preventing crimes . . . [T]he excessive severity of laws . . . hinders their execution: when the punishment surpasses all measure, the public will frequently out of humanity prefer impunity to it." 4 William Blackstone, COMMENTARIES*16-17.

* * *

The type of sentence the district court imposed on Mr. Flores-González—where the perceived characteristics of the community overwhelmed every other relevant sentencing factor to purportedly justify an upward variance—violates the fundamental tenets of sentencing, is unfaithful to *Kimbrough*, and undermines public confidence in the criminal legal system. It is, at bottom, entirely inconsistent with the values of a free and democratic society. *See United States v. Lawrence*, 254 F. Supp. 3d 441, 448 (E.D.N.Y. 2017) (Weinstein, J.) ("Manipulating a person's future adversely for the general social good is risky and ill-advised in a democratic society such as ours.").

CONCLUSION

This Court should vacate the sentence and remand for resentencing.

Dated: October 28, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I hereby certify that:

1. This brief complies with the 30-page limit set by the Court's August 22, 2022 Order.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

Dated: October 28, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2022, I electronically filed the foregoing *Brief of* Amicus Curiae *Roderick & Solange MacArthur Justice Center, the American Civil Liberties Union Foundation, and the ACLU of Puerto Rico* with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: October 28, 2022

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