

No. 09-6822

IN THE
Supreme Court of the United States

JASON PEPPER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

**BRIEF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. <i>BOOKER'S</i> CONSTITUTIONAL HOLDING APPLIES WHEN A DISTRICT COURT RESENTENCES A DEFENDANT UNDER SECTION 3742(g)(2).....	5
II. SECTION 3742(g)(2) MUST BE EXCISED UNDER <i>BOOKER'S</i> REMEDIAL HOLDING	12
CONCLUSION.....	21

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	2
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004).....	11
<i>Dillon v. United States</i> , 130 S. Ct. 2683 (2010).....	passim
<i>Gall v. United States</i> , 552 U.S. 38 (2007).....	passim
<i>Irizarry v. United States</i> , 128 S. Ct. 2198 (2008).....	11
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007).....	12, 13, 20
<i>Rita v. United States</i> , 551 U.S. 338 (2007).....	5, 9
<i>Spears v. United States</i> , 129 S. Ct. 840 (2009).....	15
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	passim
<i>United States v. Bruce</i> , 256 F. App'x 520 (3d Cir. 2007).....	20
<i>United States v. Harrison</i> , 362 F. App'x 958 (11th Cir. 2010)	19
<i>United States v. Hernandez</i> , 604 F.3d 48 (2d Cir. 2010)	20
<i>United States v. Mills</i> , 491 F.3d 738 (8th Cir. 2007).....	20

TABLE OF AUTHORITIES

(continued)

	Page(s)
STATUTES AND LEGISLATIVE MATERIALS	
18 U.S.C. § 3553(a).....	3, 15, 18
18 U.S.C. § 3553(b).....	5, 7
18 U.S.C. § 3742(e).....	6
18 U.S.C. § 3742(g)(2)	3, 8, 9, 14
18 U.S.C. § 3742(j).....	8, 10, 14
H.R. Rep. No. 108-66 (2003) (Conf. Rep.)	6
Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 670	6
ADMINISTRATIVE MATERIALS	
Notice of Submission to Congress of Amendments to the Sentencing Guidelines, 75 Fed. Reg. 27,388 (May 14, 2010)	11
UNITED STATES SENTENCING GUIDELINES	
U.S.S.G. § 3B1.1	10
U.S.S.G. § 4A1.3	18
U.S.S.G. § 5K2.19.....	4, 17
OTHER AUTHORITIES	
Mark Osler, <i>Uniformity and Traditional Sentencing Goals in the Age of Feeney</i> , 16 Fed. Sent. Rep. 253 (2004).....	6

**BRIEF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers (“NACDL”) as *amicus curiae* in support of Petitioner.¹

INTEREST OF *AMICUS CURIAE*

NACDL is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association (“ABA”) recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL’s mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in criminal cases in this Court and other courts.

¹ Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

NACDL agrees with Petitioner and the Government that post-sentencing rehabilitation is a permissible basis for granting a downward variance under 18 U.S.C. § 3553(a) during resentencing. NACDL writes separately to emphasize that granting a downward variance at resentencing on the basis of post-sentencing rehabilitation is not foreclosed by 18 U.S.C. § 3742(g)(2) because that 2003 statute—which mandates that district courts follow the United States Sentencing Guidelines (the “Guidelines” or “U.S.S.G.”) when cases are remanded for resentencing—is invalid under *United States v. Booker*, 543 U.S. 220 (2005), and should be excised from the Sentencing Reform Act of 1984 (“SRA”).

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States Sentencing Guidelines now perform an advisory role in the federal sentencing scheme. This Court held in *Booker* that the SRA assigned a role to the Guidelines that violated the Fifth and Sixth Amendments under the Court’s opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court also held that the SRA could be saved by excising those provisions that formed the basis of the constitutional violation, thus leaving in place a statutory system under which district courts must consider, but are no longer bound by, the Guidelines.

In particular, *Booker*’s remedial holding invalidated two provisions of the SRA: Sections 3553(b)(1) and 3742(e). The Court excised Section 3553(b)(1) from the statute because that provision directed the Guidelines to be employed unconstitutionally, and the Court excised Section 3742(e) because its opera-

tion depended, among other things, on a cross-reference to Section 3553(b).

Sentencing is now governed by Section 3553(a), which requires district courts—after considering the Guidelines together with a variety of sentencing objectives and other factors—to impose a sentence “sufficient, but not greater than necessary” to comply with those objectives. 18 U.S.C. § 3553(a). As Petitioner and the Government explain, that directive contemplates that district courts on remand may impose a sentence below the Guidelines range based on evidence showing that a defendant has rehabilitated himself, no longer poses a threat to his community, and would benefit from continued access to educational and vocational training outside prison.

NACDL writes separately to note that there is also another SRA provision, not mentioned in *Booker*, that cross-references Section 3553(b)(1) and in many cases would make the imposition of a sentence within the Guidelines mandatory. Section 3742(g)(2)—a statutory provision enacted before *Booker* was decided but that the Court did not address in that case—requires a district court to impose a sentence within the Guidelines range on remand from an appeal of the original sentence. The provision permits a sentencing judge to “depart[]” from that range only (1) as provided in the Guidelines themselves, (2) when the judge included the departure in its “written statement of reasons . . . in connection with the previous sentencing,” and (3) when the court of appeals specifically held that it was a “permissible ground of departure.” 18 U.S.C. § 3742(g)(2).

If Section 3742(g)(2) still governs after *Booker*, it is plainly relevant to this case. The Guidelines Manual states that post-sentencing rehabilitative efforts are not an “appropriate basis for a downward departure,” U.S.S.G. § 5K2.19, and such post-sentencing efforts by definition could not have been considered during the initial sentencing proceeding. Accordingly, Section 3742(g)(2) would appear to foreclose a district court’s consideration of post-sentencing rehabilitation on remand.

Yet neither the Government nor the Eighth Circuit relied on that provision below. And for good reason: Section 3742(g)(2) and *Booker* plainly cannot co-exist. The Government—which has a duty to defend the validity of this statute if it can—agrees here that subsection (g)(2) “is invalid after *Booker*.” U.S. Br. 48. This Court should confirm the point and hold expressly in this case that Section 3742(g)(2) cannot be enforced in light of *Booker*, and must be excised from the SRA.

Section 3742(g)(2) offends the Constitution for the very same reasons as the SRA provisions this Court invalidated in *Booker*. The statute violates the Sixth Amendment by mandating compliance with the Guidelines on remand and requiring judges to determine sentence-enhancing facts not found by the jury or admitted in a defendant’s plea. And like the excised Section 3742(e), Section 3742(g)(2) cross-references the now-excised Section 3553(b)(1). Section 3742(g)(2) was also enacted for the express purpose of mandating strict compliance with the Guidelines—a purpose that no longer remains valid after *Booker*.

In addition, Section 3742(g)(2) precludes district courts from varying from the Guidelines at resentencing based on the factors set forth in Section 3553(a). Under Section 3742(g)(2), the only permissible grounds for imposing a sentence outside the applicable Guidelines range are those authorized under Section 3553(b)(1)—the very provision that rendered the Guidelines mandatory, that the Court excised in *Booker*, and that permits consideration only of “the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.” 18 U.S.C. § 3553(b)(1). Requiring compliance with Section 3742(g)(2) after *Booker* would also lead to unfair and absurd consequences for both the Government and defendants—consequences that have led courts to ignore the provision altogether.

ARGUMENT

I. **BOOKER’S CONSTITUTIONAL HOLDING APPLIES WHEN A DISTRICT COURT RESENTENCES A DEFENDANT UNDER SECTION 3742(g)(2).**

Since *Booker*, this Court has stated consistently that the Sixth Amendment does not permit the Guidelines to be treated as mandatory in sentencing proceedings. *E.g.*, *Dillon v. United States*, 130 S. Ct. 2683, 2687-88 (2010); *Gall v. United States*, 552 U.S. 38, 46 (2007); *Rita v. United States*, 551 U.S. 338, 354 (2007); *see also Dillon*, 130 S. Ct. at 2698 (Stevens, J., dissenting) (*Booker* “eliminated the mandatory features of the Guidelines—all of them”). Nevertheless, the Court has yet to consider (and thus to invalidate) one provision of the SRA—Section 3742(g)(2)—that was passed expressly to mandate

compliance with the Guidelines. Like the provisions *Booker* invalidated, Section 3742(g)(2) requires district courts to impose Guidelines sentences that often depend on facts never admitted by the defendant or found by a jury beyond a reasonable doubt.

1. In 2003, Congress passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (“PROTECT Act”). Pub. L. No. 108-21, § 401(d)(1), 117 Stat. 670, 667-76. Several provisions in the PROTECT Act were added as a result of a last-minute rider—the so-called “Feeney Amendment”—which sought to address a perceived “problem of downward departures from the Federal Sentencing Guidelines.” H.R. Rep. No. 108-66, at 50 (2003) (Conf. Rep.), *reprinted in* 2003 U.S.C.C.A.N. 683, 693-94; *see* Mark Osler, *Uniformity and Traditional Sentencing Goals in the Age of Feeney*, 16 Fed. Sent. Rep. 253, 253-56 (2004). These new provisions effectively made “Guidelines sentencing even more mandatory than it had been.” *Booker*, 543 U.S. at 261.

In *Booker*, the Court excised one provision of the PROTECT Act’s Feeney Amendment: Section 3742(e). That section provided for *de novo* review and required an appellate court to set aside a district court’s departure from the “applicable guideline range” if, among other things, it was “based on a factor that . . . [was] not authorized under section 3553(b).” 18 U.S.C. § 3742(e). The Court held that Section 3742(e) was incompatible with the Sixth Amendment because, *inter alia*, it “cross-references . . . § 3553(b)(1).” *Booker*, 543 U.S. at 260. The Court excised Section 3553(b)(1), in turn, because it re-

quired sentencing courts to impose Guidelines sentences that often called for judicial determinations of sentence-enhancing facts. *Id.* at 259.² Those judicial determinations violate the Sixth Amendment because they require judges to find facts that enhanced a sentence above the maximum Guidelines sentence authorized by a jury verdict or guilty plea. *Id.* at 244.

The availability of “departures” from the applicable Guidelines sentences under Section 3553(b)(1) did not alter the Court’s conclusion. *Id.* at 234. The Court noted that “departures are not available in every case, and in fact are unavailable in most.” *Id.* As a result, sentencing courts generally were “bound to impose a sentence within the Guidelines range.” *Id.* And, although the Court recognized that not all Guidelines sentences required unconstitutional judicial fact-finding, it rejected a two-track system in which the Guidelines were mandatory in some cases

² Section 3553(b) stated, in pertinent part, that a sentencing court:

shall impose a sentence of the kind, and within the range referred to [in the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the [Guidelines], policy statements, and official commentary of the Sentencing Commission.

18 U.S.C. § 3553(b)(1).

but not others. A two-track system, the Court explained, would be inconsistent with Congressional intent and impracticable to administer. *Id.* at 266. Accordingly, the Court held that the Guidelines must be treated as advisory in all cases. *Id.*

2. The Feeney Amendment added another provision—not at issue in *Booker*—that also mandates Guidelines sentencing. Section 3742(g)(2) provides that, upon remand, a district court:

shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that . . . [t]he court shall not impose a sentence outside the applicable guidelines range except upon a ground that—(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and (B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

18 U.S.C. § 3742(g)(2). “Permissible ground of departure,” in turn, is narrowly defined by reference to Section 3553(b). 18 U.S.C. § 3742(j).

Section 3742(g)(2) offends the Sixth Amendment for the same fundamental reasons as Sections 3553(b)(1) and 3742(e): it requires district courts to impose Guidelines sentences that often depend upon facts found by a judge by a mere preponderance of the evidence—not those admitted by the defendant

in a plea agreement or found, beyond a reasonable doubt, by a jury. *See Booker*, 543 U.S. at 244-45.

Section 3742(g)(2) is mandatory in multiple ways. Most obviously, it requires courts to sentence defendants “in accordance with section 3553,” 18 U.S.C. § 3742(g)(2)—a command that encompasses Section 3553(b)(1), the very “provision that makes the relevant sentencing rules . . . mandatory and impose[s] binding requirements on all sentencing judges.” *Booker*, 543 U.S. at 259 (quotations omitted). But Section 3742(g)(2) also does more, stating in addition that district courts “*shall not* impose a sentence outside the applicable guidelines range” except in specific circumstances. *Id.* (emphasis added); *see Booker*, 543 U.S. at 233-34; *Gall v. United States*, 552 U.S. 38, 51 (2007) (district courts commit reversible error by “treating the Guidelines as mandatory”); *cf. Rita v. United States*, 551 U.S. 338, 351 (2007) (district courts do “not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.”).

Indeed, the district court’s authority to depart from the Guidelines on remand is even more restricted than a court’s pre-*Booker* authority to depart from the mandatory Guidelines range imposed by Section 3553(b)(1). Under Section 3742(g)(2), a district court may depart from the applicable Guidelines range on remand *only* if the court specified in its “written statement of reasons” at the initial sentencing proceeding that the defendant qualified for the departure. 18 U.S.C. § 3742(g)(2)(A). And even that does not suffice to permit departure: the appellate court also must have determined that the pro-

posed departure was a “permissible ground of departure.” 18 U.S.C. § 3742(g)(2)(B). Section 3742(j)(1), in turn, defines a “permissible’ ground of departure” as one that “(A) advances the objectives set forth in section 3553(a)(2); *and (B) is authorized under section 3553(b)*; and (C) is justified by the facts of the case.” 18 U.S.C. § 3742(j)(1) (emphasis added). Thus, Section 3742(g)(2) resurrects the mandatory nature of the Guidelines by requiring compliance with Section 3553(b) on remand, and is invalid for that reason.

An example illustrates the Sixth Amendment problem: Assume that at the initial sentencing proceeding, the court determines that the base offense level based on the jury’s verdict authorizes a sentence of 51-63 months. The court adjusts his sentence upward, however, imposing a 97-month sentence based on its own finding that the defendant was an organizer of an extensive criminal enterprise. *See* U.S.S.G. § 3B1.1(a) (requiring four-level increase to base offense level for defendant’s aggravating role). Because the total offense level and corresponding Guidelines range are merely advisory, the court’s adjustment does not violate the Sixth Amendment. *Booker*, 543 U.S. at 233. The court of appeals then vacates the sentence for any number of reasons, remanding the case for plenary resentencing. At the resentencing hearing, the judge again considers the defendant’s organizing role and makes detailed findings in support of the identical adjustment applied at the initial sentencing proceeding. Under Section 3742(g)(2), the judge must now treat the Guidelines as mandatory and impose the upward adjustment based on the court’s own factual findings. Because

the adjustment results in a sentence greater than the maximum penalty permitted by the Guidelines based on the facts found by the jury beyond a reasonable doubt, the sentence violates the Sixth Amendment. *Booker*, 543 U.S. at 244; *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

Section 3742(g)(2) also appears to preclude sentencing courts on remand from granting any and all variances under Section 3553(a). In *Irizarry v. United States*, 128 S. Ct. 2198, 2202 (2008), the Court held that a “[d]eparture” is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines.” A “variance,” by contrast, is a non-Guidelines sentence *outside* the Guidelines framework. *Id.*; *see also id.* at 2204 (Breyer, J., dissenting) (noting that the Court’s decision creates a “legal distinction” between “departures” and “variances”).³ Because Section 3742(g)(2) only permits a non-Guidelines sentence “upon a ground . . . held by the court of appeals . . . to be a permissible ground of *departure*” and such a departure must be “authorized under section 3553(b),” a district court on remand is prevented by the statute from granting a variance outside the Guidelines framework. *See Irizarry*, 128 U.S. at 2202-03; *see also id.* (“there is no longer a limit comparable to the one at issue in [*Burns v. United States*, 501 U.S. 129 (1991)] on the variances

³ Citing *Irizarry*, the Sentencing Commission has proposed amending the Commentary to U.S.S.G. § 1B1.1 to distinguish between “departures” and “variances.” Notice of Submission to Congress of Amendments to the Sentencing Guidelines, 75 Fed. Reg. 27,388, 27,392 (May 14, 2010).

from Guidelines ranges that a district court may find justified under the sentencing factors set forth in” Section 3553(a)).

Because Section 3742(g)(2) requires a court on remand to impose a sentence within the Guidelines, and the determination of that range will often depend upon judge-found facts, the provision violates a defendant’s Sixth Amendment right to “have the jury find the existence of ‘any particular fact’ that the law makes essential to his punishment.” *Booker*, 543 U.S. at 232 (quoting *Blakely*, 542 U.S. at 301).⁴ For this reason, Section 3742(g)(2) cannot be invoked to justify the decision below.

II. SECTION 3742(g)(2) MUST BE EXCISED UNDER *BOOKER*’S REMEDIAL HOLDING.

In *Booker*, this Court determined that the only “appropriate cure” for the Sixth Amendment violation was to excise those provisions of the SRA that rendered the Guidelines mandatory or depended on their binding nature. *Kimbrough v. United States*,

⁴ The Court’s recent decision in *Dillon v. United States*, 130 S. Ct. 2683 (2010), that *Booker*’s remedial holding does not apply to Section 3582(c) sentence-modification proceedings has no application to the validity of Section 3742(g)(2). The Court in *Dillon* determined that, given their limited scope and purpose, Section 3582(c) proceedings are *not* equivalent to a “sentencing or resentencing proceeding.” *See id.* at 2690-91 (citing 18 U.S.C. § 3742(f), (g)). Proceedings like Petitioner’s, on remand for resentencing, *are* “sentencing proceedings,” and—unlike the limited sentence modification proceeding at issue in *Dillon*, which could only result in a sentence reduction, *id.* at 2690—facts found by a judge at a resentencing proceeding may increase a defendant’s sentence.

552 U.S. 85, 100-01 (2007); *Booker*, 543 U.S. at 245. That remedial holding was meant to apply to all cases on direct appeal and on remand for resentencing, *see Booker*, 543 U.S. at 267-68—a mandate that cannot be squared with Section 3742(g)(2)’s requirement of mandatory Guidelines sentences on remand. Properly understood, *Booker* “eliminated the mandatory features of the Guidelines—all of them.” *Dillon*, 130 S. Ct. at 2698 (Stevens, J., dissenting); *see Booker*, 543 U.S. at 259 (“With [Sections 3553(b)(1) and 3742(e)] excised (*and statutory cross-references to the two sections consequently invalidated*), the remainder of the Act satisfies the Court’s constitutional requirements.”) (emphasis added). Because Section 3742(g)(2) is incompatible with *Booker*’s constitutional and remedial holdings, the Court should explicitly invalidate it now.

1. At the core of *Booker*’s remedial holding was the recognition that, if the Guidelines were “merely advisory provisions”—as they are employed, for instance, under Section 3553(a)(4)—the Guidelines would not violate the Sixth Amendment. *Booker*, 543 U.S. at 233. When determining which sections of the SRA to excise, therefore, the Court looked to the provisions whose mandatory nature made them “a necessary condition of the constitutional violation.” *Id.* at 259. Section 3553(b)(1), which made the Guidelines mandatory, was excised under that standard. *Id.* So, too, was Section 3742(e), which cross-referenced Section 3553(b)(1). *Id.* at 260.

Section 3742(g)(2) is no different from either of those provisions because it too mandates compliance with the Guidelines. *See pp. 8-12, supra.* Because

its binding nature is a necessary condition of its constitutional violation, the same reasons that prompted the excision of Sections 3553(b)(1) and 3742(e) require excision of Section 3742(g)(2) as well. Indeed, Justice Stevens observed as much in his dissenting opinion in *Dillon*. *Dillon*, 130 S. Ct. at 2698 n.5 (Stevens, J., dissenting) (“[A]t least one additional provision of the [SRA] should have been excised, but was not, in order to accomplish the Court’s remedy. Section 3742(g)(2) prescribes that the Guidelines are to have binding effect upon a remand for a new sentence in a direct appeal.”).⁵

Section 3742(g)(2) does not function independently of the now-excised Section 3553(b)(1), either. *See Booker*, 543 U.S. at 259 (retaining those sections of the SRA that functioned independently of its mandatory provisions). To the contrary, the resentencing statute works in tandem with Section 3553(b)(1), precluding judges from straying from the applicable Guidelines range except upon a ground that is a “permissible ground of departure”—*i.e.*, one authorized by the now-excised Section 3553(b)(1). 18 U.S.C. § 3742(g)(2), (j)(1)(B); *see also Booker*, 543 U.S. at 260 (excising Section 3742(e) because of its “critical cross-references” to Section 3553(b)(1)).

As discussed above, this limitation also appears to prohibit judges from varying from a Guidelines sentence based on the factors set forth in Section 3553(a)—the very same factors those judges “must consider” under *Booker* and its progeny. *Gall v.*

⁵ Because the majority did not view the process under consideration in *Dillon* to be a “sentencing” proceeding, the Court’s opinion is silent on the continued validity of Section 3742(g)(2).

United States, 552 U.S. 38, 50 n.6 (2007). Thus, permitting Section 3742(g)(2) to remain in force would foreclose a court from varying *below* the applicable Guidelines range, even if it found that a within-range sentence would be greater than necessary to achieve the purposes of sentencing, 18 U.S.C. § 3553(a), or would create unwarranted disparities among co-defendants, as the district court previously concluded here, *id.* § 3553(a)(6); J.A. 79.

Section 3742(g)(2) would also preclude a court from varying *above* the applicable Guidelines range if it found, for instance, that in light of the defendant’s post-imprisonment misconduct, such a sentence was necessary to protect the public from further crimes. 18 U.S.C. § 3553(a)(2)(C). And it would bar a court on remand from exercising its discretion, recently acknowledged by this Court, to vary from a Guidelines sentence in some circumstances because of a general policy disagreement with the applicable Guidelines range, *see Spears v. United States*, 129 S. Ct. 840, 843 (2009) (per curiam)—even if the court had exercised that precise discretion at the initial sentencing and that decision had not been challenged on appeal. Such an incongruous system further underscores why Section 3742(g)(2) should be excised. *See* U.S. Br. 48 (“By restricting the authority of district courts to vary from the applicable Guidelines range at resentencing, Section 3742(g)(2) is invalid after *Booker*.”).

Nor does “Congress’s basic purpose in enacting” Section 3742(g)(2) preclude excision of that provision. *See Booker*, 543 U.S. at 259. To the contrary, Section 3742(g)(2) was added when Congress passed

the PROTECT Act, legislation intended “to make Guidelines sentencing even more mandatory than it had been.” *Booker*, 543 U.S. at 261. That purpose “ceased to be relevant” in light of *Booker*. *Id.*; see also *id.* at 298 (Stevens, J., dissenting) (*Booker*’s remedial holding “has made the PROTECT Act irrelevant”).

If anything, permitting Section 3742(g)(2) to remain in force would frustrate Congress’s basic intent in creating the Guidelines in the first instance: to provide certainty, fairness, and uniformity in sentencing. *Booker*, 543 U.S. at 264. It would make little sense to require a district court to consider the Section 3553(a) factors during a defendant’s initial sentencing proceeding and an appellate court to review the resulting sentence for abuse of discretion in light of those factors while, at the same time, requiring the district court on remand to comply with the Guidelines and depart from them only on the grounds authorized by the now-excised Section 3553(b)(1). Compare *Gall*, 552 U.S. at 51 with 18 U.S.C. § 3742(g)(2). *Booker* itself foreclosed a “two-system proposal” to treat the Guidelines as mandatory in some cases and non-mandatory in others, finding that such an approach would not further “Congress’ basic objective of promoting uniformity in sentencing.” *Booker*, 543 U.S. at 266-67; *Dillon*, 130 S. Ct. at 2693 (“The incomplete remedy we rejected in *Booker* would have required courts to treat the Guidelines differently in similar proceedings, leading potentially to unfair results and considerable administrative challenges.”). Section 3742(g)(2) is therefore fundamentally incompatible with the post-*Booker* federal sentencing regime.

For these reasons, it is also of no consequence to the Court's remedial analysis that not all resentencing proceedings run afoul of the Sixth Amendment. In this case, for instance, the judge made no findings that increased Petitioner's sentence beyond the Guidelines range authorized under his plea agreement. J.A. 330-39. Enforcing Section 3742(g)(2) in cases like Petitioner's while rendering the provision inapplicable in all other proceedings would create precisely the type of administrative complexities that *Booker's* remedial holding sought to avoid. *Booker*, 543 U.S. at 266-67. It would also create a "one-way lever[]," rejected in *Booker*, that mandates strict adherence to the Guidelines in cases where a judge reduces a sentence beyond that authorized by a jury verdict or defendant's guilty plea, but applies no such limits in cases where the judge increases a sentence. *Id.* at 266.

2. Unfair and even absurd consequences will also result if Section 3742(g)(2) is not excised. This case proves the point: applying Section 3742(g)(2) without regard to *Booker* may foreclose the consideration of factors, such as post-sentencing rehabilitation, that are encompassed by Section 3553(a), but that have been rejected by the Sentencing Commission as grounds for "departure," *see* U.S.S.G. § 5K2.19, and that could by their very nature never be included in the district court's written statement of reasons at the initial sentencing proceeding or have been declared "permissible" on appeal.

Moreover, Section 3742(g)(2) may preclude a wide range of departures at resentencing even when those departures *are* memorialized at the initial sentenc-

ing proceeding and permitted by the Guidelines themselves. Consider a sentencing proceeding at which the district court departs upward under U.S.S.G. § 5K2.2, based on its finding that the victim suffered significant physical injury, but also departs downward under U.S.S.G. § 5K1.1, finding that the defendant provided substantial assistance to the government. If the defendant appeals the sentence on the basis of the upward departure but the government does not appeal the downward departure, the court of appeals could remand the case for resentencing on the sole basis that the upward departure was impermissible, but would have no occasion to address the departure for substantial assistance. On remand, Section 3742(g)(2) would preclude the district court from approving the same (or any) departure under U.S.S.G. § 5K1.1, potentially leading to a longer sentence than what the defendant originally received and undermining the system of rewards for providing substantial assistance to authorities.

The Government likewise may be prejudiced if Section 3742(g)(2) is not excised. Assume, for example, that a district judge departs downward under U.S.S.G. § 5H1.6, based on a finding that the defendant's family would suffer a substantial loss of caretaking and financial support. But the court also (i) increases the applicable Guidelines range because the defendant's criminal history was substantially underrepresented, U.S.S.G. § 4A1.3, and (ii) varies upward, beyond a Guidelines sentence, because the defendant's ongoing pattern of criminal activity poses a danger to the public, 18 U.S.C. § 3553(a)(2)(C). If the government successfully challenges the downward departure but the defendant

does not cross-appeal, the court of appeals cannot make a determination about the upward departure or variance. If so, Section 3742(g)(2) would preclude the district court from imposing any upward criminal history departure as well as from granting any variance at resentencing.

3. Section 3742(g)(2)'s incompatibility with *Booker*'s remedial holding is perhaps best illustrated by the way courts have applied the statute since the Guidelines were rendered advisory. With few exceptions, they have declined to apply it. Indeed, in *Booker* itself, this Court remanded *Booker*'s and *Fanfan*'s cases to the district courts to "impose . . . sentence[s] in accordance with today's opinion." *Booker*, 543 U.S. at 267-68. The Court nowhere suggested that the district courts, on remand, should abide by the mandatory Guidelines sentencing requirements in Section 3742(g)(2). To the contrary, the Court stated that, if the sentences were appealed, the court of appeals should review the sentences for unreasonableness "with regard to § 3553(a)"—not Section 3553(b)(1). *See id.* at 261, 267.⁶

Similarly, with the exception of the Eighth Circuit, many courts have treated the statute as implicitly invalid under *Booker* or, as in most cases, have

⁶ The Eighth Circuit's disposition of this case underscores how *Booker* and Section 3742(g)(2) cannot be reconciled. In *Pepper I*, the Eighth Circuit remanded Petitioner's case for resentencing "in accordance with . . . the principles set forth by the Supreme Court in *Booker*," J.A. 70—a mandate that would be meaningless if, under Section 3742(g)(2), the district court were required to impose a Guidelines sentence.

simply ignored it. *See, e.g., United States v. Harrison*, 362 F. App'x 958, 962, 966 (11th Cir. 2010) (affirming district court's "upward variance" at resentencing based on Section 3553(a) factors despite defendant's argument that Section 3742(g)(2) precluded that result); *United States v. Hernandez*, 604 F.3d 48, 54 (2d Cir. 2010) (holding that at resentencing district court may consider "an issue [that] became relevant only after the initial appellate review," such as post-sentencing rehabilitation); *see also United States v. Bruce*, 256 F. App'x 520, 523 n.1 (3d Cir. 2007) (holding that Section 3742(g)(2) did not bar reimposition of upward departure on remand where the defendants were initially sentenced before the provision was enacted; also raising concerns about constitutionality of Section 3742(g)(2) after *Booker*); *but see United States v. Mills*, 491 F.3d 738, 743 (8th Cir. 2007) (holding, without citing *Booker*, that Section 3742(g)(2) precluded consideration at resentencing of downward departure that was not included in written statement of reasons at initial sentence proceeding; but also remanding "for re-sentencing with consideration of the § 3553(a) factors").

After *Booker*, Section 3742(g)(2)'s mandatory Guidelines sentencing provisions can no longer stand. The only "appropriate cure," *Kimbrough*, 552 U.S. at 100, is to excise those provision from the SRA. As a result, district courts should be directed on remand to impose sentences in accordance with *Booker* and its progeny.

CONCLUSION

For the foregoing reasons and those stated in Petitioner's and the Government's briefs, the Court should excise Section 3742(g)(2) from the SRA. Because the judgment below cannot be affirmed on the basis of that invalid provision, the Court should also reverse that judgment and hold that Section 3553(a) permits district courts to consider post-sentencing rehabilitation at resentencing proceedings.

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