No. 09-6338

In The Supreme Court of the United States

PERCY DILLON,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. §3582(c)(2).

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae, Federal Public and Community Defenders in the United States (not including the Federal Defender representing the petitioner in this matter) have offices in 90 of the 94 federal judicial districts. *Amicus curiae*, the National Association of Federal Defenders, formed in 1995, is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. *Amici curiae* represent tens of thousands of individuals sentenced in federal court each year, including thousands of individuals in proceedings under 18 U.S.C. §3582. The issue presented in this case is of great importance to our work and the welfare of our clients.

INTRODUCTION

Amici support Petitioner's persuasive challenge, based on the Sixth Amendment holding in *United States v. Booker*, 543 U.S. 220 (2005), and its remedial interpretation of the sentencing law, to the lower courts' reading of USSG §1B1.10, p.s. (2008) as mandatory. As Petitioner makes clear, it is §1B1.10

[1] The parties have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. Sup. Ct. R. 37.6. No person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

that purports to render the Guidelines mandatory in proceedings under 18 U.S.C. §3582(c)(2), not the statute itself.[2] *Amici* further address the plain meaning of 18 U.S.C. §3582(c)(2) and the pertinent directives to the Sentencing Commission (Commission), namely, 28 U.S.C. §994(a)(2)(C), (o) and (u). Taken together, these provisions of the Sentencing Reform Act (SRA) give the Commission an important gatekeeping role with respect to the court's *power to entertain* a motion, but do not permit the Commission to control the court's ultimate *resentencing decision*. Because the 2008 version of §1B1.10, unlike its predecessor, purports to control the substance of the court's resentencing decision, it is at odds with the relevant provisions of the SRA and thus invalid.

When a district court considers a motion for reduction of a defendant's term of imprisonment under §3582(c)(2), it must potentially resolve two questions. In every case, the court must first decide whether it has the power to impose a new sentence. To do so, it decides whether the defendant was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. §994(o)." Second, if the court has the power to do so, it must decide whether and to what extent to reduce the term of imprisonment. It may "reduce the term of imprisonment, after considering the factors set forth

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[2] Pet'r's Br. 34-36 & n.18.

in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

In describing these two stages of the judicial decision, §3582(c)(2) references duties of the Commission in two distinct clauses. First, §3582(c)(2) establishes that the court's power to reduce a term of imprisonment is triggered by the Commission's lowering of a sentencing range "pursuant to 28 U.S.C. §994(o)," which requires the Commission to review and revise its guidelines. Second, it establishes that the court, in deciding whether and to what extent to reduce the term of imprisonment, is to act "consistent with applicable policy statements issued by the Sentencing Commission," which are specifically authorized for §3582(c)(2) proceedings by 28 U.S.C. §994(a)(2)(C). Both matters – the triggering mechanism and the resentencing decision – have long been addressed in a policy statement, USSG §1B1.10, p.s.

Before March 3, 2008, that policy statement addressed the triggering mechanism by stating that a reduction in the term of imprisonment was "authorized" only if the applicable guideline range "has subsequently been lowered" by an amendment "listed in subsection (c)." USSG §1B1.10(a) & comment. (n.1) (2007). As to the resentencing decision, it merely advised that the court "should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was

sentenced." *See id*. §1B1.10(b). It advised that, except that the reduced term could not be less than the term already served, the court had "the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section." *See id*. & comment. (n.3).

On May 1, 2007, the Commission sent to Congress an amendment to reduce offense levels by two for most crack cocaine offenses, explaining that "[c]urrent data and information continue to support the Commission's consistently held position that the 100-to-1 drug quantity ratio significantly undermines various congressional objectives set forth in the Sentencing Reform Act and elsewhere." *See* 72 Fed.Reg. 28,558, 28,572-73 (May 21, 2007). The amendment would "alleviate some" of the "urgent and compelling problems . . . associated with the 100-to-1 drug quantity ratio," while still tying the guidelines to the mandatory minimum statute. *Id*.

In July and September 2007, the Commission published a "request for public comment" regarding (1) whether the crack amendment "should be included in subsection (c) of §1B1.10 as [an] amendment[ ] that may be applied retroactively," and (2) if so, whether §1B1.10 should be amended "to provide guidance to the courts on *the procedure to be used* when applying an amendment retroactively under 18 U.S.C.

§3582(c)(2)" (emphasis added).[3] The Commission received numerous comments supporting retroactivity, a few opposing it, and four comments regarding "procedure."[4]

The Commission at no time solicited public comment on whether it should attempt to prevent judges from reducing sentences below the amended guideline range, and at no time published any language for such a policy statement. The Commission received a letter on behalf of the Criminal Law Committee of the Judicial Conference, recommending that the crack amendment be made retroactive and stating that it was "clear that, in the wake of *Booker*, all resentencings now have to be done under an advisory guidelines system."[5]

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[3] *See* 72 Fed.Reg. 41,794, 41,794-95 (July 31, 2007); 72 Fed.Reg. 54,960, 54,960-61 (Sept. 27, 2007).

[4] U.S. Sent'g Comm'n, Public Comment Letters on the Retroactivity of Amendments 9 & 12, November 2007, http://www.ussc.gov/pubcom_retro/pc200711.htm. "Procedure" was addressed in some fashion by the Criminal Law Committee of the Judicial Conference, the Federal Public and Community Defenders, the Practitioners Advisory Group, and Dawn E. Worsley, Esq. *Id*.

[5] *See* Letter from Paul Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States Re: Comments on Retroactivity of Crack Cocaine Amendments at 1, 5-6 (Nov. 2, 2007), http://www.ussc.gov/pubcom_retro/pc200711_004.pdf. In the letter, Judge Cassell said that he believed the Commission could, by policy statement, merely advise that "the court should only consider the change in the crack guideline made by the Commission and whether this change now suggests

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On October 15, 2007, the Commission issued a "notice of public hearing," scheduled for November 13, 2007, solely regarding whether the amendment "should be applied retroactively to previously sentenced defendants."[6] Notwithstanding the limited purpose of the hearing, Commissioners questioned representatives of the Judiciary, the defense bar and the prosecution about whether they thought *Booker* would apply in §3582(c)(2) proceedings, what the effect of this Court's forthcoming decision in *Kimbrough v. United States,* 552 U.S. 85 (2007), might be, and whether the Commission should attempt to limit these effects in §3582(c)(2) proceedings.[7] The witnesses advised that this was an issue for the courts, not the Commission, to decide.[8] A law professor then

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a lower sentence in light of the factors set forth in 18 U.S.C. §3553(a) to the extent that they are applicable." *Id*. at 6. This suggestion was not included in the Criminal Law Committee's written testimony for the later public hearing. *See* Testimony of Judge Reggie B. Walton, Nov. 13, 2007, http://www.ussc.gov/hearings/11_13_07/Walton_testimony.pdf. Nor was it published for comment.

[6] 72 Fed.Reg. 58,345, 58,345-46 (Oct. 15, 2007).

[7] Tr. of Public Hearing on Retroactivity Before the U.S. Sent'g Comm'n at 29, 81, 85-86, 97-98, 134 (Nov. 13, 2007), http://www.ussc.gov/hearings/11_13_07/Transcript111307.pdf.

[8] Testifying on behalf of the Criminal Law Committee, Judge Walton emphasized that this was an issue for the lower courts and perhaps ultimately this Court to decide. *Id*. at 29-31, 35-36. Prosecution and defense witnesses agreed. *Id*. 54-55, 66-67, 82-85, 93-94, 98-99, 134-35. The defense bar also urged the Commission not to attempt to limit judicial discretion in §3582(c)(2) proceedings without a full opportunity for study and

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opined that the Commission could issue a policy statement placing an "absolute" limit on the extent of reduction of the term of imprisonment. This lone witness acknowledged that no court had adopted his view of §3582(c)(2) proceedings, and that the courts may deem such a "policy statement" to be advisory.[9] Practitioners and judges had no opportunity to respond to this unexpected proposal, which was never published for comment in any form.

On December 11, 2007, the day after this Court decided *Kimbrough*, the Commission voted to make its crack amendments retroactive, and also to substantially revise its policy statement.[10] The revised §1B1.10, p.s. (Mar. 3, 2008) contains unprecedented language that attempts to dictate all aspects of the court's decision under §3582(c)(2): "As required by 18 U.S.C. §3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement." USSG §1B1.10(a)(1), p.s. The policy statement repeatedly refers to "this policy statement" and "§3582(c)(2)" interchangeably. *See id*. §1B1.10(a)(2), (a)(3), (b)(1), (b)(2)(A). It purports to impose a mandatory, absolute limit on the court's resentencing decision, stating that "the court *shall*

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comment from the public and practitioners, *id*. at 66-67, 82-83, and noted that there was no such limitation previously. *Id*. at 60-61, 77.

[9] *Id*. at 153-55.

[10] 73 Fed.Reg. 217 (Jan. 2, 2008); USSG, App. C, Amend. 712 (Mar. 3, 2008).

not reduce the defendant's term of imprisonment *under 18 U.S.C. §3582(c)(2) and this policy statement* to a term that is less than the minimum of the amended guideline range." *Id*. §1B1.10(b)(2)(A) (emphasis added). It asserts that "the court shall consider the factors set forth in 18 U.S.C. §3553(a) . . . only within the limits described in subsection (b)." *Id*., comment. (n.1(B)(i)). And, while the policy statement permits a reduction based on the amended range and a further "comparable" reduction if the original sentence included a "downward departure," *id*. §1B1.10(b)(2)(B) & comment. (n.3) (2008), it provides that any "further reduction generally would not be appropriate . . . if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. §3553(a) and *United States v. Booker*, 543 U.S. 220 (2005)."[11] *Id*. §1B1.10(b)(2)(B).

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[11] The revised policy statement also implicitly redefines the requirement in the first clause of §3582(c)(2) that the defendant was sentenced "based on" a subsequently lowered guideline range by directing that no reduction is "authorized" if an amendment "does not have the effect of lowering the defendant's applicable guideline range . . . because of the operation of another guideline or statutory provision (*e.g.*, a statutory mandatory minimum)." USSG §1B1.10(b)(1) & comment. (n.1(A)). The courts are split on whether this language obliterates the "based on" language of the first clause of §3582(c)(2) by virtue of its final "consistent with" clause. *Compare*, *e.g.*, *United States v. Doe*, 564 F.3d 305, 309-15 (3d Cir. 2009), *with id*. at 315-18 (Fuentes, J., concurring), *and United States v. McGee*, 553 F.3d 225 (2d Cir. 2009).

The sole rationale for the amendment was the tautological statement that it "clarif[ies] when, and to what extent, a reduction in the defendant's term of imprisonment is consistent with the policy statement and is therefore authorized under 18 U.S.C. §3582(c)(2)." *See* Reason for Amendment, USSG, App. C, Amend. 712 (Mar. 3, 2008).

SUMMARY OF THE ARGUMENT

Because revised §1B1.10 purports to establish mandatory decrees that control the court's resentencing decision, it conflicts with the plain language and statutory structure of the pertinent provisions of the SRA. In Part I, we show that the plain language of §3582(c)(2) commits the resentencing decision to the court's sound discretion, consistent with both §3553(a) and applicable nonbinding policy statements issued by the Commission pursuant to 28 U.S.C. §994(a)(2)(C). In Parts II and III, we show that the Commission's effort to control that resentencing decision with a mandatory rule is based on two false assumptions. Contrary to one assumption, §994(u) does not allow the Commission to issue a rule controlling the resentencing decision. Rather, because §994(u) supplements only the Commission's power under §994(o) to amend guidelines, §994(u) gives the Commission only a gatekeeping role with respect to §3582(c)(2) proceedings. Contrary to the second assumption, neither §3582(c)(2), which is not a directive to the Commission, nor the directive to the Commission to issue the applicable policy statements,

authorizes the Commission to issue binding policy statements. A "policy statement" is, by definition, nonbinding. In Part IV, we show that §1B1.10(b)(2)(A) is also invalid because it was issued without proper notice and comment.

This Court should reverse the judgment of the court of appeals and remand for resentencing absent the sentencing floor that §1B1.10(b)(2)(A) purports to set. *See United States v. LaBonte*, 520 U.S. 751, 762 (1997).

ARGUMENT

I. The Plain Language of §3582(c)(2) Commits the Resentencing Decision to the Court's Sound Discretion.

Section 3582(c)(2) of Title 18 describes one of a handful of ways that a court may modify an otherwise final sentence of imprisonment. *See* 18 U.S.C. §3582(b). The statute has a two-part structure. The first clause triggers the court's power to consider a motion to reduce a term of imprisonment "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. §994(o)." The last three clauses make the court's resentencing decision discretionary and identify the pertinent considerations: "the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such

a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

As its title indicates, §3553(a) sets out "Factors to be considered in imposing a sentence." The overarching instruction (and first factor) directs that the court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of sentencing] set forth in" subsection (a)(2). The statute further directs that "in determining the particular sentence," the court "shall consider" those purposes, along with other factors, including the circumstances of the offense and the history and characteristics of the defendant, §3553(a)(1), the applicable guideline range, §3553(a)(4)(A)(i), and any pertinent policy statements, §3553(a)(5)(A). According to the plain language of §3553(a), the guideline range and any pertinent policy statement are two of several factors to be considered and balanced in imposing a particular sentence.[12]

"A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."

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[12] *See Kimbrough v. United States*, 552 U.S. 85, 101 (2007) ("The statute . . . contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to achieve the goals of sentencing."); *id*. at 90 ("[T]he Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence."); *Gall v. United States*, 552 U.S. 38, 59 (2007) (The "Guidelines are only one of the factors to consider when imposing sentence.").

Hibbs v. Winn, 542 U.S. 88, 101 (2004) (internal citations and quotation marks omitted). Thus, the requirement in the last clause of §3582(c)(2) that the court act "consistent[ly] with applicable policy statements" must be read to elaborate on, and not contradict, the preceding clause, which commands the court to "consider" (without limitation) all of the factors set forth in §3553(a), including "any pertinent policy statement" issued by the Commission, listed at subsection (a)(5). The last clause clarifies that there are particular policy statements applicable in §3582(c)(2) proceedings that are to be used as guidance in the exercise of discretion. To understand "consistent with" as meaning "bound by," as the lower courts did, would turn the final clause into a contradiction of the preceding clause. This is impermissible.[13]

While these provisions of Title 18 control the court's decision, the Commission's duties are located in Title 28. There, among the "general policy

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[13] *See District of Columbia v. Heller*, 128 S.Ct. 2783, 2795-96 (2008) (a "qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass"); *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395, 2402 n.11 (2008) ("Congress surely could not have meant this phrase to contradict its express allocation of the burden, in the same amendment."); *Park 'n Fly v. Dollar Park & Fly*, 469 U.S. 189, 197 (1985) (rejecting construction of statutory text that would "effectively emasculate[ ]" another provision of the same act); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985) (rejecting interpretation of one phrase at the end of a statutory provision that would "render superfluous the preceding clauses").

statements" the Commission is directed to issue are those applicable to "the sentence modification provisions set forth in [§]3582(c) of title 18." 28 U.S.C. §994(a)(2)(C). Such policy statements might, for example, encourage judges to consider the defendant's conduct after his original sentencing, or to consider reducing the term of supervised release if the term of imprisonment recommended by the amended guideline range is less than the defendant's remaining time to be served. As shown in Part III, these policy statements are by definition nonbinding, and were intended by Congress to be nonbinding.

Section 3582(c)'s directive to the courts to act "consistent[ly]" with applicable policy statements does not authorize the Commission to issue policy statements at all, much less to pronounce any of its policy statements binding. The Commission, however, has decided that it can issue a policy statement that dictates the court's resentencing decision by making the minimum of the amended guideline range the mandatory sentencing floor. It first assumes that the "consistent with" clause of §3582(c)(2) gives it the power to issue policy statements pursuant to 28 U.S.C. §994(a)(2)(C) with the binding force of law. It next assumes that, since it can (by hypothesis) issue binding policy statements, 28 U.S.C. §994(u), which supplements the Commission's power to amend guidelines pursuant to 28 U.S.C. §994(o), gives it the power to issue a binding policy statement to control the court's resentencing decision. Parts II and III demonstrate the error in each of these assumptions.

II. Section 994(u) Supplements the Commission's Power to Amend Guidelines Under §994(o), Not Its Power to Issue Policy Statements Under §994(a)(2)(C), and Does Not Authorize the Revised §1B1.10(b).

"In addition to the duty to review and revise the Guidelines [pursuant to §994(o)], Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect [pursuant to] 28 U.S.C. §994(u)." *Braxton v. United States*, 500 U.S. 344, 348 (1991) (emphasis in original). As *Braxton* describes it, §994(u) supplements the Commission's duty under §994(o) to review and revise its guidelines. Section 994(u), therefore, empowers the Commission to issue a specification as to the retroactivity of each amendment made under §994(o) that reduces offense guideline ranges. The Commission can state, on an amendment-by-amendment basis, whether the amendment is available for retroactive application under §3582(c)(2), and by what amount the amendment retroactively reduces the pertinent guideline range.

Section 994(u) is not itself mentioned in 18 U.S.C. §3582(c)(2). One reasonably asks why the courts would be required to consider a specification made under §994(u) at all. The answer, given in *Braxton*, is that it supplements the Commission's duty under §994(o) to review and revise the guidelines. Section 994(o) *is* mentioned in §3582(c)(2), in the first clause, which triggers the court's power to act. Viewed

as a supplement to §994(o), section 994(u) finds an attenuated basis in the text of §3582(c)(2). Because that basis is found only in the first clause, any specification the Commission makes under §994(u) affects only the court's determination of whether it has the power to act, and not the extent or scope of the court's resentencing decision.

The Commission's 2008 amendment to §1B1.10(b) is based on a misunderstanding of its power. As its authority for issuing a "policy statement" purporting to control the court's resentencing decision, the Commission cites 18 U.S.C. §3582(c)(2), as well as 28 U.S.C. §994(a) and §994(u).[14] But nothing in §3582(c)(2) authorizes any action by the Commission, just as nothing in §994(u) is directed at the action of the court. The scope and limits of the courts' sentencing powers are all and only contained in Chapter 227 of Title 18, while directions to the Commission are in Chapter 58 of Title 28. Whatever special authority §994(u) may confer on the Commission, its impact on a judge acting under §3582(c)(2) is indirect at best; it does not allow the Commission to control the extent or scope of the court's resentencing decision.

1. The Commission's assumption that §994(u) authorizes the "policy statements" referenced in the

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[14] *See* 73 Fed.Reg. 217 (Jan. 2, 2008) (citing §994(a), §994(u), §3582(c)(2)); USSG, App. C, Amend. 712 (Mar. 3, 2008) (relying only on §3582(c)(2)).

final clause of §3582(c)(2) is belied by three aspects of the pertinent statutory provisions.

First, §994(a)(2)(C) – not §994(u) – directs that the Commission "shall promulgate" the "policy statements regarding" the "sentence modification provisions set forth in [§]3582(c)." 28 U.S.C. §994(a)(2)(C). These are the "policy statements" referenced in the last clause of §3582(c)(2), which is applicable to the court's resentencing decision. These policy statements exist independent of §994(u).

Second, §994(u) says nothing about "policy statements." Although Congress's other directives to the Commission under §994 state that the Commission is to act through "guidelines" or "policy statements," *see* 28 U.S.C. §994(a), (c)-(n), (t), (v), (y), section 994(u) does not. It states in full:

> If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

28 U.S.C. §994(u). The most apt comparison is with the sentence reduction governed by §3582(c)(2)'s neighbor, §3582(c)(1). There, Congress directs the Commission to act through "policy statements":

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A)

> of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction . . .

28 U.S.C. §994(t). Section 994(t) tells the Commission to act through "policy statements" referenced in §3582(c), whereas §994(u) does not.

The omission of the particular term "policy statements" from §994(u) is significant because "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). Here, the disparate exclusion signifies that, unlike §994(t), section 994(u) does not direct the issuance of policy statements for use under §3582(c).

Third, unlike §994(t), section 994(u) grants the Commission an "unusual explicit *power*."[15] *Braxton*, 500 U.S. at 348 (emphasis in original). Section 994(u) should not be interpreted, against the grain, to address the issuance of mere policy statements.

These aspects of the statute show that §994(u) is not directed at the issuance of the "policy statements" referenced in the final clause of §3582(c)(2) – the

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[15] As explained below in Part III, "a binding policy is an oxymoron." *Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988).

clause that addresses the district court's resentencing decision.

2. Section 994(u) serves a different and important purpose. It supplements the Commission's amendment power under §994(o) with the power to decide what retroactive effect to give each particular amendment. This is clear both from the plain language of §994(u) and §3582(c)(2), and from their complementary purposes.

a. Section 994(u) begins with the very clause that sets the limit on the power it grants: "*If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses*, it shall specify. . . ." 28 U.S.C. §994(u) (emphasis added). In that opening clause, §994(u) establishes that it empowers the Commission to act only in connection with its issuance of a particular amendment under §994(o). The first clause of §994(u) should be understood to set this limit on the Commission's power because "[a] statute should be construed so that effect is given to all its provisions," and because that clause clearly establishes a prerequisite to Commission action under §994(u). *Hibbs*, 542 U.S. at 101.

Because §994(u) empowers the Commission to act only in connection with its issuance of a particular guideline amendment under §994(o), it pertains only to the first clause of §3582(c)(2), and directs action only on an amendment-by-amendment basis. It directs the Commission to specify whether and by what

amount – *i.e.*, by how many offense levels – each particular amendment is to retroactively affect the calculation of a defendant's guideline range.[16] This specification gives the district court the information it needs to decide whether it has the power to entertain a §3582(c)(2) motion. By issuing this specification, the Commission acts as the gatekeeper of §3582(c)(2), ensuring that its amendments trigger the court's power only when appropriate in light of its reasons for "reduc[ing]" the "term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses." 28 U.S.C. §994(u).

b. The meaning of §994(u) is made even clearer by considering its "purpose and context" within the larger purpose of §3582(c)(2). *See Dolan v. Postal Serv.*, 546 U.S. 481, 486 (2006). Congress enacted §3582(c)(2) in order to preserve a desired feature of parole – allowing an earlier release if

[16] In the form the Guidelines have taken, the Commission "reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses," 28 U.S.C. §994(u), simply by reducing offense levels for a particular offense or category of offenses. However, when Congress enacted the SRA, it was not clear precisely what form the Guidelines would take. *See, e.g.*, S. Rep. No. 98-225 at 168 ("guidelines may be . . . in the form of a series of grids, charts, formulas or other appropriate devices"). It may have appeared to Congress that in some circumstances it could be necessary for the Commission, in order to ensure the triggering of §3582(c)(2), to specify not only whether an amendment would have retroactive effect but also "by what amount" it would have retroactive effect.

community attitudes toward a particular crime subsequently changed. S. Rep. No. 98-225 at 55-56, 180 (1983). The Parole Commission had the authority to amend its guidelines. 18 U.S.C. §4203(a)(1) (enacted Mar. 15, 1976 and prospectively repealed with the passage of the SRA). The system allowed for earlier release of a prisoner when applicable parole guidelines were amended, and the release decision was ultimately based on an individualized assessment of factors similar to those set forth in §3553(a).[17] *See* 18 U.S.C. §4206(c); 28 C.F.R. §2.18-.19 (1984).

When drafting the SRA, Congress decided to preserve the flexibility of the parole system "for cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide for a shorter term of imprisonment." S. Rep. No. 98-225 at 55-56. Congress chose to abolish parole, *id.*, and believed that the power to reduce a sentence properly "belong[ed]" in the "judiciary." *Id*. at 121. Consequently, it sought to create a

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[17] *See* 18 U.S.C. §4206(a) (directing the Parole Commission to consider "the nature and circumstances of the offense," "the history and characteristics of the prisoner," and to determine that release would not "depreciate the seriousness of the offense," or "promote disrespect for law," or "jeopardize the public welfare"). In addition, if a prisoner was not yet eligible for parole, the Bureau of Prisons could move the district court to reduce the prisoner's sentence. 18 U.S.C. §4205(g). Before this statutory mechanism was enacted, a district court had authority to modify a prisoner's parole eligibility date, thus allowing an earlier release. *See, e.g.*, *United States v. Lancer*, 508 F.2d 719, 729 n.33 (3d Cir. 1975) (en banc).

judicial replacement to perform some of the Parole Commission's prior function.

To do so, Congress needed to create two mechanisms. First it had to create a statutory vehicle for reducing a final sentence, since 28 U.S.C. §2255 was available only to correct sentences imposed in violation of law. *See United States v. Addonizio*, 442 U.S. 178, 190 (1979). Second, Congress had to create a mechanism to ensure that amendments would be retroactively available when appropriate. Amended guidelines would be clearly available on a retroactive basis only if the Commission was specially empowered to issue them with retroactive force,[18] and if the Commission specifically designated them as retroactive.[19] At the same time, Congress did not want to burden the courts with a flood of unjustified petitions. S. Rep. No. 98-225 at 180.

Congress created the vehicle for relief by enacting §3582(c)(2). Congress satisfied the need for a gatekeeper by explicitly giving the Commission, through §994(u), the authority to "specify in what circumstances and by what amount" its amendments to "the term of imprisonment recommended in the guidelines applicable to a particular offense or

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[18] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Brimstone R. & Canal Co. v. United States*, 276 U.S. 104, 123-24 (1928).

[19] *See* 1 U.S.C. §109; *Warden v. Marrero*, 417 U.S. 653 (1974); *Bowen*, 488 U.S. at 208.

category of offenses" are retroactively available. 28 U.S.C. §994(u). The specifications the Commission makes are used by the court to determine whether a particular amendment triggers its power to consider a motion under §3582(c)(2) by lowering, pursuant to 28 U.S.C. §994(o), a sentencing range upon which the defendant's sentence was based. That is the purpose of these specifications. Their purpose does not extend to the resentencing decision. Congress left the ultimate determination as to when to release an individual offender to the district court, consistent with the nonbinding policy statements issued under §994(a)(2)(C) and the sentencing factors set forth in §3553(a).

3. By radically reshaping §1B1.10(b), the Commission claims for itself much broader power than allowed by §994(u) or than the courts are required to follow by §3582(c)(2). Section 994(u) does not allow the Commission to dictate how the district court balances, in individual cases, the competing and myriad factors set forth in §3553(a) and expressed through §994(a)(2)(C) policy statements. Consequently, it does not give the Commission the power to set hard sentencing floors.

III. The Term "Policy Statement" Used in the Final Clause of §3582(c)(2) Cannot Mean a Binding Rule.

The Commission's revised policy statement purports to bind federal judges in their resentencing

decisions under §3582(c)(2) to the minimum of the amended guideline range. *See* USSG §1B1.10(b)(2)(A) & comment. (n.1(B)), p.s. (2008). The Commission assumes that it has the power to do so because the final clause of §3582(c)(2) requires the court to act in a manner "consistent with applicable policy statements issued by the Sentencing Commission."[20] For the reasons that follow, neither this clause, which is not directed to the Commission at all, nor the directive to the Commission to issue the applicable policy statements, authorizes the Commission to issue a binding policy statement.

A. The term "policy statement," as ordinarily used, means a non-binding statement of policy.

In the absence of a statutory definition,[21] this Court "construe[s] a statutory term in accordance with its ordinary or natural meaning," *FDIC v. Meyer*, 510 U.S. 471, 476 (1994), or its "common usage." *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108-09 (1980).

1. The term "policy statement" has a firmly established meaning under the Administrative Procedure Act (APA). That meaning is best grasped when

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[20] *See* USSG, App. C, Amend. 712 (Reason for Amendment) (Mar. 3, 2008); USSG §1B1.10(a)(1).

[21] The SRA gives no definition of "policy statement." 28 U.S.C. §998 ("Definitions").

"policy statement" is contrasted with two other terms, "legislative rule" and "interpretive rule." 5 U.S.C. §553(b). Legislative rules impose binding legal norms on courts and private parties. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997). An agency cannot issue a legislative rule unless Congress has delegated it the authority to do so, and unless the agency has complied with the APA's notice and comment procedure. *Chrysler Corp.*, 441 U.S. at 302; *Syncor*, 127 F.3d at 95. Those limits on the promulgation of binding substantive rules are important to prevent an agency from exercising power "autocratically." Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 Admin. L. J. Am. U. 1, 3, 15 (1994) (hereinafter, Anthony, *Spurious Rules*).

Interpretive rules merely explain or interpret the agency's own ambiguous legislative rules. *See Christensen v. Harris*, 529 U.S. 576, 587-88 (2000); *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997). Though entitled to deference with respect to the meaning of the legislative rule it interprets, an interpretive rule has no independent "force of law." *Christensen*, 529 U.S. at 587; *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995); *Nat'l Latino Media Coalition v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987). Interpretive rules are thus exempt from notice and comment requirements. 5 U.S.C. §553(b).

A policy statement, also exempt from notice and comment, is "merely the announcement to the public

of the policy which the agency" favors presently; it is an "informational device." *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 38-39 (D.C. Cir. 1974).[22] Policy statements lack the force of law. *Nat'l Park Hosp. Ass'n v. Dept. of the Interior*, 538 U.S. 803, 809 (2003). Even in the agency's own "administrative proceedings," a policy statement does not serve as a "binding norm." *PG&E*, 506 F.2d at 38-39. "A binding policy is an oxymoron." *Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988).

2. The Guidelines Manual echoes the APA's taxonomy in "text of three varieties." *Stinson v. United States*, 508 U.S. 36, 41, 44-45 (1993). First, as created by Congress, "the guidelines are the equivalent of legislative rules adopted by federal agencies." *Id*. at 45. The "guidelines," unlike commentary or policy statements, are subject to the APA's notice and comment procedure and congressional approval. *See* 28 U.S.C. §994(p), (x); *Mistretta v. United States*, 488 U.S. 361, 394 (1989) (§994(x) subjects the Commission's "rulemaking . . . to the notice and comment requirements of the Administrative Procedure Act").

Second, "official commentary," which assists in the interpretation or application of particular guidelines, "is akin to an agency's interpretation of its own

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[22] *PG&E* provides a "classic" statement distinguishing legislative rules from policy statements. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993).

legislative rules." *Stinson*, 508 U.S. at 45. Likewise, a "policy statement[ ] regarding application of [a] guideline[ ]," 28 U.S.C. §994(a)(2), "is an authoritative guide to the meaning of the applicable Guideline." *Williams v. United States*, 503 U.S. 193, 201 (1992).

In *Williams* and *Stinson*, this Court twice dealt with the second type of "text," *i.e.*, provisions "akin to an agency's interpretation of its own legislative rules." *Stinson*, 508 U.S. at 45. In *Williams*, the Court held that an error in interpreting a "policy statement" that interpreted a particular guideline was an "incorrect application of the sentencing guidelines" within the meaning of 18 U.S.C. §3742(f)(1). *Id*. at 200-01. The policy statement was a "'general policy statement[ ] regarding application of the guidelines,'" *id*. at 200 (quoting 28 U.S.C. §994(a)(2)), and was thus "an authoritative guide to the meaning of the applicable Guideline," *viz*., the criminal history guidelines. *Id*. at 196, 200. *Williams* did not give the policy statement the independent binding force that a legislative rule (*i.e.*, a guideline) would have had at the time. It simply established that, if a policy statement functions like an interpretive rule, it is an authoritative guide to the meaning of the guideline it interprets. *Id*. at 200. In *Stinson*, the Court reiterated this approach. While *Williams* involved a "policy statement" that functioned as an interpretive rule, *Stinson* involved "commentary" that likewise had the "functional purpose" of an interpretive rule, in that it explained the career offender guideline. *Stinson*, 508

U.S. at 38, 45. *Stinson* merely established that commentary that serves the "functional purpose" of an interpretive rule has the derivative authority of an interpretive rule. *Id.* at 42, 45; 1 Richard J. Pierce, *Administrative Law Treatise* §6.11 at 400 (4th ed. 2002) ("*Stinson* could be interpreted merely as a reaffirmation of long-standing principles [of administrative law]."). [23]

Third, the Commission is authorized to issue "general policy statements regarding . . . aspect[s] of sentencing" other than application of the guidelines, *see* 28 U.S.C. §994(a)(2), including use of "the sentence modification provisions set forth in [§] 3582(c) of title 18." *Id*. §994(a)(2)(C). These "general policy statements" are equivalent to the APA's "general statements of policy." 5 U.S.C. §553(b). Since "a binding policy is an oxymoron," *Vietnam Veterans*, 843 F.2d at 537, when Congress authorized the Commission to issue "policy statements" regarding the "sentence modification provisions set forth in [§] 3582(c)," 28 U.S.C. §994(a)(2)(C), it plainly referred to nonbinding

[23] To the extent this Court's decisions in *Williams* and *Stinson* contain language suggesting that policy statements (or Guidelines or commentary) have the independent binding force of law, this Court's subsequent decisions have abrogated any such suggestion. The *Stinson* Court, for example, stated that "[t]he principle that the Guidelines Manual is binding on federal courts applies as well to policy statements." 508 U.S. at 42 (citing *Williams*, 503 U.S. at 201). The *Williams* Court indicated that policy statements were binding by virtue of 18 U.S.C. §3553(b). *See* 503 U.S. at 196, 198, 200.

statements of policy. Likewise, when §3582(c)(2) directs judges to act consistently with those "policy statements," it refers to nonbinding statements of policy.

3. USSG §1B1.10(b)(2)(A) is not "commentary," nor does it in fact interpret or explain any guideline. Unlike the policy statement at issue in *Williams*, which was a "general policy statement[ ] regarding application of the guidelines," 28 U.S.C. §994(a)(2), *see* 503 U.S. at 200, section 1B1.10 is a "general policy statement[ ] regarding . . . any other aspect of sentencing," specifically, "the sentence modification provisions set forth in [§] 3582(c)." 28 U.S.C. §994(a)(2)(C). Although nominally a "policy statement," §1B1.10(b)(2)(A) purports to bind courts to substantive sentencing floors with the force of law. It purports to bind courts more firmly than even a guideline would have before *Booker* because it denies the courts any discretion to depart.[24] The ordinary

[24] Section 1B1.10(b)(2)(B)'s allowance of a comparable reduction for previous recipients of downward "departures" is not available to most defendants. "Departures" are even more rare today than before *Booker*. *Compare* U.S. Sent'g Comm'n, Preliminary Quarterly Data Report, Fourth Quarter Release, tbl. 1 (2009) (3% departures), http://www.ussc.gov/sc_cases/USSC_2009_Quarter_Report_4th.pdf, *with* U.S. Sent'g Comm'n, Federal Sentencing Statistics by State, District and Circuit, tbl. 8 (2003) (7.5% departures), http://www.ussc.gov/JUDPACK/2003/1c03.pdf.

meaning of "policy statement" does not encompass a rule with such binding force.[25]

The Court should adhere to the term's ordinary meaning, and reject §1B1.10(b)(2)(A). The alternative interpretation would permit the Commission to dictate the scope of the courts' authority under a federal statute, situated in Title 18 and directed to the courts, simply because that statute includes the phrase "consistent with applicable policy statements." That alternative violates the plain meaning of the relevant statutes, and, as discussed in Part IV, would allow the Commission to exercise power "autocratically." Anthony, *Spurious Rules*, *supra*, at 3, 15.[26]

B. The legislative history confirms that "policy statements" are not binding.

The legislative history of the SRA supports the ordinary understanding of the term "policy statement." Congress intended that, unlike a sentence that is "inconsistent with the sentencing

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[25] Nor does the ordinary meaning of "interpretive rule" encompass such a rule.

[26] This Court has declined to accord the Commission any special deference in interpreting statutory directives to the Commission. *United States v. LaBonte*, 520 U.S. 751 (1997). Here, the Commission relies on its interpretation of 18 U.S.C. §3582(c)(2), a statute directed to judges, to curtail the power of judges under that statute, and bootstraps from that a novel interpretation of statutes meant to define its duties, *i.e.*, 28 U.S.C. §994(a)(2)(C) and (u). Under these circumstances, even a typical agency would receive no deference.

guidelines," a sentence that is "inconsistent with the policy statements" would not be subject to appeal. S. Rep. No. 98-225 at 167. By "policy statement," Congress meant an ordinary policy statement that a judge would "consult[ ]"when making a discretionary decision "in a particular case." *Id*. at 167-68.

The discussion of the particular policy statements applicable to §3582(c)(2) proceedings explains that such policy statements would merely guide the courts' considered and discretionary judgment:

> The bill, as reported, provides . . . in 18 U.S.C. §3583(c) [sic] for *court determination*, subject to *consideration* of Sentencing Commission *standards*, of the question *whether there is justification* for reducing a term of imprisonment in situations such as those described.

S. Rep. No. 98-225 at 55-56 (emphasis added).

These passages confirm that when Congress said that the court must act "consistent[ly] with applicable policy statements," §3582(c)(2), it did not intend for those "policy statements" to dictate the court's resentencing decision. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (emphasizing that while Congress mandated that the agency promulgate "*standards*" regarding a right of action under the statute, it did not thereby "empower the [agency] to regulate the scope of judicial power vested by the statute") (emphasis in original).

C. The ordinary meaning of "policy statement" should be used to ensure consistency within the Guidelines Manual.

Section 994(a)(2) is the primary provision authorizing the Commission to issue policy statements. It directs the Commission to issue "general policy statements regarding [1] application of the guidelines or [2] any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2)." 28 U.S.C. §994(a)(2). It specifically directs the Commission to issue general "policy statements" regarding the "appropriate use of" thirteen "other aspect[s] of sentencing or sentence implementation," including sentence modification under §3582(c)(2). *See* 28 U.S.C. §994(a)(2)(A)-(F).[27] Although the Commission has not issued policy statements for all thirteen situations, no policy statement it has issued pursuant to this direction, *other than* §1B1.10, purports to be binding.[28] Until its revision in 2008,

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[27] These are 18 U.S.C. §§3554 (criminal forfeiture), 3555 (notice to victims), 3556 (restitution), 3563(b) (discretionary conditions of probation) and 3583(d) (conditions of supervised release), 3563(c) (modification of conditions of probation), 3564 (modification of term of probation), 3573 (modification of a fine), 3582(c) (modification of term of imprisonment), 3572 (imposition of a fine); 3622 (temporary release of a prisoner), 3624(c) (prerelease custody), and plea agreements under Rule 11 of the Federal Criminal Rules of Procedure.

[28] *See* USSG §1B1.13, p.s. (in no way limiting the extent to which §3553(a) applies in considering motion for reduction in

(Continued on following page)

§1B1.10 likewise did not purport to be binding. *See* USSG §1B1.10(b) & comment. (n.3), p.s. (2007).

Similarly, while Congress authorized the Commission to promulgate either guidelines *or* policy statements regarding the provisions for revocation of probation or supervised release, *id.* §994(a)(3), the Commission elected to issue "policy statements only" that do not purport to be binding, *see* Ch. 7, Part A(1), and expressly recognized that policy statements are advisory only. *See id.* Part A(3)(a) ("At the outset, the Commission faced a choice between promulgating guidelines or issuing *advisory* policy statements for the revocation of probation and supervised release." (emphasis added)); *see also id.* Part B, p.s. Indeed, when the guidelines themselves were mandatory, every court of appeals held that the policy statements

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term of imprisonment under §3582(c)(1)); *id.* §5B1.3(c)-(e), p.s. ("recommend[ing]" conditions of probation and suggesting some that otherwise "may be appropriate on a case-by-case basis"); *id.* §5D1.2(b), p.s. ("recommend[ing]" statutory maximum term of supervised release for sex offenses); *id.* §5D1.3(c)-(e), p.s. ("recommend[ing]" conditions of supervised release and suggesting some that otherwise "may be appropriate on a case-by-case basis"); *id.* §6B1.1-6B1.4, p.s. ("These policy statements make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge."). Although the provisions relating to plea agreements contain some binding clauses, those clauses merely reiterate binding provisions of Rule 11. The Commission otherwise designated as "guidelines" those provisions that reiterate statutory provisions or are meant to bind. *See id.* §§5B1.3(a)-(b), 5D1.3(a)-(b), 5E1.1, 5E1.2, 5E1.4, 5F1.1, 5F1.2, 5F1.4, 5F1.8.

in Part B of Chapter 7 are advisory only,[29] because they do not interpret a guideline, but rather tell a judge "what to do after he has determined" the guideline range. *See United States v. Hill*, 48 F.3d 228, 231 (7th Cir. 1995). That is, the Chapter 7 policy statements "tell the district judge how to exercise his discretion in the area left open by the guidelines and the interpretive commentary on the guidelines," and "do not replace that discretion with a rule." *Id.*

Nothing in the language of §3582(c)(2) indicates that Congress expected the Commission, in exercising its duty under §994, to promulgate a "policy statement" to replace the court's discretion with a binding rule. Section 3582(c)(2) calls for a resentencing decision "consistent with applicable policy statements issued by the Sentencing Commission." Three of the other "aspect[s] of sentencing" particularly identified by §994(a)(2) likewise call for action "consistent with" the Commission's "policy statements," but, as mentioned, no policy statement purports to bind in those situations. *See* 18 U.S.C. §§3582(c)(1), 3582(c)(2), 3583(d), 3622;[30] *see* 28 U.S.C. §§994(a)(2)(B), (C), (F).

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[29] *See, e.g.*, *United States v. Waters*, 84 F.3d 86, 89-90 & n.4 (2d Cir. 1996) (collecting cases); *United States v. George*, 184 F.3d 1119, 1121-22 (9th Cir. 1999).

[30] The Commission did not promulgate a policy statement for §3582(c)(1) until 2006, yet many prisoners were released early under that provision. *See* Written Testimony of Margaret Colgate-Love Before the U.S. Sentencing Comm'n on Behalf of the American Bar Association, at 14 n.7 (Mar. 15, 2006). It has never promulgated a policy statement for §3622.

Two of these three "consistent with" provisions are particularly pertinent. First, §3583(d), governing conditions of supervised release, provides a useful comparison. Like §3582(c)(2), it directs judges to take into account certain §3553(a) factors and to act "consistent[ly] with" the Commission's policy statements. Section 3583(d) directs that any condition of supervised release must be "reasonably related to" and "involve[ ] no greater deprivation of liberty than is reasonably necessary for" enumerated purposes and factors under §3553(a),[31] as well as "consistent with any pertinent policy statements issued by the Sentencing Commission." In exercising its duty under §994(a)(2)(B), the Commission has promulgated three policy statements regarding conditions of supervised release, and none purports to bind judges or to control the extent to which the enumerated factors apply in a given case. *See* USSG §5D1.3(c), (d), (e), p.s. Courts of appeals routinely affirm conditions of supervised release that stray from the express terms of a policy statement directly addressing the issue where the condition was nevertheless reasonably related to the enumerated factors and purposes set forth in §3553(a).[32] In short, the requirement that a condition be "consistent with" the policy statement does not

[31] 18 U.S.C. §3583(d)(1)-(2).

[32] *See, e.g.*, *United States v. McKissic*, 428 F.3d 719, 723 (7th Cir. 2005) (upholding total ban on alcohol as reasonably related to the §3553(a) factors, though policy statement recommends only "no excessive use").

negate the sentencing court's equal duty to reasonably conform the condition to §3553(a) factors.

Second, perhaps the most apt comparison is between §3582(c)(2) and its neighbor, §3582(c)(1), which allows a district court to reduce a prisoner's sentence due to age or "extraordinary and compelling reasons." Both provisions give the district courts and the Commission a job that, before the Guidelines, the courts and Parole Commission performed. S. Rep. No. 98-225 at 55-56 (1983). Both provisions give the correctional system necessary flexibility through a type of "safety valve" allowing for post-sentencing review and reduction of a term of imprisonment. *Id*. at 121. And both use the very same phrasing – "after considering the factors set forth in §3553(a) to the extent that they are applicable" and that such reduction be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. §3582(c)(1), (2). With respect to §3582(c)(1), the Commission has issued a policy statement that neither purports to be binding nor attempts to control the extent to which §3553(a) factors apply. USSG §1B1.13, p.s.

Finally, another kind of policy statement, regarding neither application of particular guidelines nor other aspects of sentencing specifically listed in §994(a)(2), does not bind the courts. Although the policy statements in Chapter 5, Parts H and K still prohibit "departure" except in "specific, limited cases," *Booker*, 543 U.S. at 234, judges may conclude that these provisions "do not generally treat certain

defendant characteristics in the proper way" or reflect "an unsound judgment." *Rita v. United States,* 551 U.S. 338, 357 (2007); *see Gall v. United States*, 552 U.S. 38, 41-44, 57-58 (upholding below guideline sentence based on factors the Commission's "policy statements" deem never or not ordinarily relevant).

In sum, the Commission wrongly assumed that the final clause of §3582(c)(2) invited it to issue a "policy statement" with the binding force of law. This assumption is inconsistent with the plain meaning of "policy statement," the legislative history, and the other policy statements in the Guidelines Manual. Allowing the Commission the power to issue binding "policy statements" for use in §3582(c)(2) proceedings would be a complete anomaly. If the Court, by eschewing the ordinary meaning of "policy statement," were to permit that extraordinary power, the Commission would hereafter issue nonbinding legislative rules (*i.e.*, guidelines) through the notice and comment procedure, while issuing binding policy statements exempt from notice and comment.

IV. Revised §1B1.10(b)(2)(A) Is Invalid Because It Was Issued Without Proper Notice and Comment.

Revised §1B1.10(b)(2)(A) would be invalid even if the Court were to find that the Commission had the authority to issue a binding rule equivalent in substance to it, and that §3582(c)(2) required judges to follow it. That is so because, when the Commission

issues binding rules, it must satisfy "the notice and comment requirements of [section 553 of] the Administrative Procedure Act." *Mistretta*, 488 U.S. at 394; *see* 28 U.S.C. §994(x). Section 1B1.10(b)(2)(A) purports to bind courts with the force of law, but the Commission failed to give notice or seek comment before issuing it.[33]

Section 553 of the APA requires an agency to include in its notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b)(3). Notice fails this requirement if it consists of "ambiguous comments and weak signals" as to the proposed rule's substance. *Int'l Union v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1261 (D.C. Cir. 2005) (internal quotation marks omitted). Unless, due to the agency's notice, "interested parties should have anticipated" that the final rule was under consideration, the notice is inadequate and the rule invalid. *Id.* (internal quotation marks

[33] The Commission's view that it has the power to issue policy statements that are binding, yet exempt from the notice and comment requirement, *see* U.S. Sent'g Comm'n, Rules of Practice and Procedure 4.3 (2007), is indefensible. Other agencies are denied such power, *see Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993) (collecting examples); the SRA has expressly denied the Commission that power in promulgating Guidelines, 28 U.S.C. §994(x); and the Commission's survival of a separation of powers challenge was due in part to the notice and comment requirement. *See Mistretta*, 488 U.S. at 394; *see generally United States v. Handy*, 570 F. Supp. 2d 437, 467-68 (E.D.N.Y. 2008).

omitted). When notice is inadequate, the agency cannot "bootstrap" notice from subsequent public comment because "notice necessarily must come – if at all – from the Agency." *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (internal quotation marks omitted).

The Commission's notice did not state "either the terms or substance" of a proposed amendment to §1B1.10.[34] 5 U.S.C. §553(b)(3). Nor did it provide an adequate "description" of the "subjects and issues involved." *Id*. It led interested parties to anticipate only an amendment that may offer "guidance" as to the "procedure" for applying an amendment retroactively, and, specifically, the procedure to be used if the crack amendment was given retroactive effect. 72 Fed.Reg. 41,794, 41,795 (July 31, 2007). The amendment to §1B1.10(b) went far beyond the scope of that notice. It fundamentally changed §1B1.10(b) from advisory guidance to a binding rule. It did not address "procedure," but created new substantive sentencing floors. Though the notice gave no hint of any such intention, the Commission amended §1B1.10(b) to dictate an answer to the question that is now before this Court.[35] That a professor appeared

[34] The only portion of the amended rule that was properly published for comment was the addition of the crack amendments to subsection (c) of §1B1.10.

[35] "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). The Commission is "not a court and does not exercise judicial power." *Mistretta*, 488 U.S. at 384-85.

at the public hearing and proposed an "absolute" yet possibly advisory sentencing floor does not compensate for the failure of the Commission to give notice of its overhaul of §1B1.10(b). *Horsehead Res. Dev. Co.*, 16 F.3d at 1268. Because of that failure, the new rule is invalid.

CONCLUSION

This Court should reverse the judgment of the court of appeals and remand for resentencing absent the sentencing floor that §1B1.10(b)(2)(A) purports to set.

Respectfully submitted,

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